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THE LAWYERS REPORTS ANNOTATED


BOOK LXV.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P.
FARNHAM, EDITORS.

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SUPPLEMENTAL TABLE

OF ALL

CASES REPORTED IN LAWYERS REPORTS, ANNOTATED,

BOOK 65.

NOT OFFICIALLY RECORDED WHEN THIS BOOK WENT TO PRESS.

(To be "tipped in" in front of regular table, used as a book mark or as data for marking each case. Like tables will be furnished for subsequent volumes as fast as possible.)

| | | | |
|---|-----|--|-----|
| Abbott v. Thorne (34 Wash. 692) | 826 | Headrick v. McDowell (102 Va. 124) | 578 |
| Arentsen v. Moreland (122 Wis. 167) | 973 | Hinchman v. Pere Marquette R. R. Co. (136 Mich. 341) | 553 |
| Aycock v. Hampton (84 Miss. 204) | 689 | Hinton v. Mutual Reserve Fund Life Asso. (135 N. C. 314) | 161 |
| Bailey v. Bailey (76 Vt. 264) | 332 | Hoover v. King (43 Or. 281) | 790 |
| Barnes v. Western Union Teleg. Co. (27 Nev. 438) | 666 | Houston v. Zahn (44 Or. 610) | 790 |
| Barry v. Truax (N. D.) | 762 | Howard v. Union R. Co. (25 R. I. 652) | 231 |
| Bland v. People (32 Colo. 319) | 424 | Hunt v. State (72 Ark. 241) | 71 |
| Block v. Schwartz (27 Utah, 387) | 308 | Interstate Nat. Bank v. Claxton (97 Tex. 569) | 820 |
| Boyer, Re (27 Nev. 299) | 47 | Johnson v. White (26 R. I. 207) | 250 |
| Bunch v. Weil (72 Ark. 343) | 80 | Kenney v. State (Tex. Crim. Rep.) | 316 |
| Canton v. Canton Cotton Warehouse Co. (84 Miss. 268) | 561 | Kirkland v. State (72 Ark. 171) | 76 |
| Central Coal & Iron Co. v. Grider (115 Ky. 745) | 455 | Knoxville Traction Co. v. McMillan (111 Tenn. 521) | 296 |
| Clapp v. Hong (12 N. D. 600) | 757 | Krause v. Crothersville School Trustees (162 Ind. 278) | 111 |
| Cochran v. Boleman (162 Ind. 659) | 516 | Lahiff v. St. Joseph's T. A. & B. Soc. (76 Conn. 648) | 92 |
| Commercial Bank v. J. K. Armsby Co. (120 Ga. 74) | 443 | Livesley v. Johnston (45 Or. 30) | 783 |
| Copland v. Seattle (33 Wash. 415) | 333 | Longtin v. Persell (30 Mont. 306) | 655 |
| Cowan v. Roberts (134 N. C. 415) | 729 | Louisville & N. R. Co. v. Lowe (118 Ky. 260) | 122 |
| Danielson v. Roberts (44 Or. 108) | 526 | McConnell v. McKillip (Neb.) | 610 |
| Dight v. Chapman (44 Or. 265) | 793 | McGuire v. District of Columbia (24 App. D. C. 22) | 430 |
| Di Nola v. Allison (143 Cal. 106) | 419 | Manning v. Devils Lake (N. D.) | 187 |
| Dorr v. Camden (55 W. Va. 226) | 348 | Marsh v. Stonebraker (Neb.) | 607 |
| Duval v. Atlantic Coast Line R. R. Co. (134 N. C. 331) | 722 | Matthews v. Seaboard Air Line R. Co. (67 S. C. 499) | 286 |
| Dyson v. Rhode Island Co. (25 R. I. 600) | 236 | Miller v. Delaware Ins. Co. (14 Okla. 81) | 173 |
| Ft. Worth & Rio Grande R. Co. v. Glenn (97 Tex. 586) | 818 | Nashville, C. & St. L. R. Co. v. Heikens (112 Tenn. 378) | 298 |
| Fox v. Clarke (25 R. I. 515) | 234 | Nathan v. Spokane County (35 Wash. 26) | 336 |
| German Gymnastic Asso. v. Louisville (117 Ky. 958) | 120 | Northwestern Teleph. Exchange Co. v. Anderson (12 N. D. 585) | 771 |
| Gladding v. Saint Matthews Church (25 R. I. 628) | 225 | | |
| Greenwall Theatrical Circuit Co. v. Markowitz (97 Tex. 479) | 302 | | |
| Hard v. Boise City Irrig. & Land Co. (9 Idaho, 589) | 407 | | |

SUPPLEMENTAL TABLE OF CASES.

| | | | |
|--|-----|---|-----|
| Painter v. Kaiser (27 Nev. 421) | 672 | Stone v. Marshall Oil Co. (208 Pa. 85) | 218 |
| Patton v. Cruce (72 Ark. 421) | 937 | | |
| Rodman v. Robinson (134 N. C. 503) | 682 | Wagener v. Latham (26 R. I. 27) | 810 |
| Schubach v. McDonald (179 Mo. 163) | 136 | Western Union Teleg. Co. v. Uvalde Nat. Bank (97 Tex. 219) .. | 805 |
| Slaughter v. Thacker Coal & Coke Co. (55 W. Va. 642) | 342 | Whitworth v. Shreveport Belt R. Co. (112 La. 363) | 129 |
| Star Publishing Co. v. Donahoe (Del.) | 980 | Wilson v. Mitchell (17 S. D. 515) | 158 |
| State v. Hall (16 S. D. 6) | 151 | Winston v. Beeson (135 N. C. 271) .. | 167 |
| State v. Missouri Tie & Timber Co. (181 Mo. 536) | 588 | Woods v. Cottrell (55 W. Va. 476) .. | 616 |
| State ex rel. Mial v. Ellington (134 N. C. 131) | 697 | Young v. Central of Ga. R. Co. (120 Ga. 25) | 436 |

— 221 —

TABLE

OF

CASES REPORTED

IN

LAWYERS' REPORTS ANNOTATED, BOOK LXV.

| | | | |
|--|-----|---|-----|
| A. | | Boleman, Cochran v. (Ind.)..... | 516 |
| Abbott v. Thorne (Wash.)..... | 826 | Boyce, Re (Nev.)..... | 47 |
| Allison, Di Nola v. (Cal.)..... | 419 | Boyd, Feeley v. (Cal.)..... | 943 |
| Allred v. Smith (N. C.)..... | 924 | Brenton, McClurg v. (Iowa)..... | 519 |
| American Natural Gas Co., Hicks v. (Pa.)..... | 209 | Bunch v. Weil (Ark.)..... | 80 |
| Anderson, Northwestern Teleph. Exchange Co. v. (N. D.)..... | 771 | C. | |
| Arbuckle v. Blackburn (C. C. A. 6th C.)..... | 864 | Camden, Dorr v. (W. Va.)..... | 348 |
| Arentsen v. Moreland (Wis.)..... | 973 | Canton v. Canton Cotton Warehouse Co. (Miss.)..... | 561 |
| Atlantic Coast Line R. Co., Duval v. (N. C.)..... | 722 | Canton Cotton Warehouse Co., Canton v. (Miss.)..... | 561 |
| Austin, Wright v. (Cal.)..... | 949 | Cary v. Morrison (C. C. A. 8th C.)..... | 659 |
| Aycock v. Hampton (Miss.)..... | 689 | Central Coal & I. Co. v. Grider (Ky.).. | 455 |
| B. | | Central of Ga. R. Co., Young v. (Ga.).. | 436 |
| Bailey v. Bailey (Vt.)..... | 332 | Chapman, Dight v. (Or.)..... | 793 |
| Bank, Commercial, v. J. K. Armsby Co. (Ga.)..... | 443 | Clapp v. Houg (N. D.)..... | 757 |
| Interstate Nat., v. Claxton (Tex.)..... | 820 | Clarke, Fox v. (R. I.)..... | 234 |
| of Yolo v. Sperry Flour Co. (Cal.)..... | 90 | Claxton, Interstate Nat. Bank v. (Tex.) | 820 |
| Uvalde Nat., Western U. Teleg. Co. v. (Tex.)..... | 805 | Clegg v. Southern R. Co. (N. C.)..... | 717 |
| Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. S. M. R. Co. (C. C. A. 8th C.)..... | 397 | Cochran v. Boleman (Ind.)..... | 516 |
| Barnes v. Western U. Teleg. Co. (Nev.) | 666 | Commercial Bank v. J. K. Armsby Co. (Ga.)..... | 443 |
| Barry v. Truax (N. D.)..... | 762 | Com. ex rel. Wadsworth v. Shortall (Pa.)..... | 193 |
| Beeson, Winston v. (N. C.)..... | 167 | Computing Scales Co. v. Long (S. C.) | 294 |
| Berger, Fuller v. (C. C. A. 7th C.).... | 381 | Copland v. Seattle (Wash.)..... | 333 |
| Bernard, People v. (Mich.)..... | 559 | Cottrell, Woods v. (W. Va.)..... | 616 |
| Bigelow v. Whitcomb (N. H.)..... | 676 | Cowan v. Roberts (N. C.)..... | 729 |
| Bishop, Weltmer v. (Mo.)..... | 584 | Crescent Canal Co. v. Montgomery (Cal.)..... | 940 |
| Blackburn, Arbuckle v. (C. C. A. 6th C.)..... | 864 | Crothersville School Trustees, Krause v. (Ind.)..... | 111 |
| Bland v. People (Colo.)..... | 424 | Cruce, Patton v. (Ark.)..... | 937 |
| Block v. Schwartz (Utah)..... | 308 | D. | |
| Boisé City Irrig. & Land Co., Hard v. (Idaho)..... | 407 | Danielson v. Roberts (Or.)..... | 526 |
| 65 L. R. A. | | Debnam v. Southern Bell Teleph. & Teleg. Co. (N. C.)..... | 915 |
| | | Delaware Ins. Co., Miller v. (Okla.).. | 173 |
| | | v. S. S. White Dental Mfg. Co. (C. C. A. 3d C.)..... | 387 |
| | | | 3 |

| | |
|---|-----|
| De Pascale, Mahoning Valley R. Co. v. (Ohio) | 860 |
| Devils Lake, Manning v. (N. D.) | 187 |
| Dight v. Chapman (Or.) | 793 |
| Di Nola v. Allison (Cal.) | 419 |
| District of Columbia, McGuire v. (D. C. App.) | 430 |
| Donahoe, Star Pub. Co. v. (Del.) | 980 |
| Dorr v. Camden (W. Va.) | 348 |
| Drum v. Miller (N. C.) | 890 |
| Duval v. Atlantic Coast Line R. Co. (N. C.) | 722 |
| D. W. Chandler & Co., Smead v. (Ark.) | 353 |
| Dyson v. Rhode Island Co. (R. I.) | 236 |

E.

| | |
|--|-----|
| Ellington, State ex rel. Mial v. (N. C.) | 697 |
|--|-----|

F.

| | |
|--|-----|
| Feeley v. Boyd (Cal.) | 943 |
| Florida C. & P. R. Co., McIver v. (Ga.) | 437 |
| Ford, Irving v. (Mass.) | 177 |
| Ft. Worth & R. G. R. Co. v. Glenn (Tex.) | 818 |
| Fox v. Clarke (R. I.) | 234 |
| v. Philadelphia (Pa.) | 214 |
| Freedley, Giddings v. (C. C. A. 2d C.) | 327 |
| Fuller v. Berger (C. C. A. 7th C.) | 381 |
| Fuller & H. Co., Jacobs v. (Ohio) | 833 |
| Fullerton, Roberts v. (Wis.) | 953 |

G.

| | |
|--|-----|
| German Gymnastic Asso. v. Louisville (Ky.) | 120 |
| Giddings v. Freedley (C. C. A. 2d C.) | 327 |
| Gladding v. Saint Matthew's Church (R. I.) | 225 |
| Glenn, Ft. Worth & R. G. R. Co. v. (Tex.) | 818 |
| G. P. Putnam's Sons, Kipling v. (C. C. A. 2d C.) | 873 |
| Greenwall Theatrical Circuit Co. v. Markowitz (Tex.) | 302 |
| Grider, Central Coal & I. Co. v. (Ky.) | 455 |

H.

| | |
|---|-----|
| Hall, State v. (S. D.) | 151 |
| Hamburger, Lancaster v. (Ohio) | 856 |
| Hampton, Aycock v. (Miss.) | 689 |
| Hard v. Boisé City Irrig. & Land Co. (Idaho) | 407 |
| Harrington, Thomas v. (N. H.) | 742 |
| Hawn v. Stoler (Pa.) | 813 |
| Headrick v. McDowell (Va.) | 578 |
| Heikens, Nashville, C. & St. L. R. Co. v. (Tenn.) | 298 |

65 L. R. A.

| | |
|--|-----|
| Heller & M. Co., Shaver v. (C. C. A. 8th C.) | 878 |
| Hicks v. American Natural Gas Co. (Pa.) | 209 |
| Hinchman v. Pere Marquette R. Co. (Mich.) | 553 |
| Hinton v. Mutual Reserve Fund Life Asso. (N. C.) | 161 |
| Hoadley, Leicester v. (Kan.) | 523 |
| Hoover v. King (Or.) | 790 |
| Hopkins, Re (N. Y.) | 95 |
| Houg, Clapp v. (N. D.) | 757 |
| Houston v. Zahm (Or.) | 790 |
| Howard v. Union R. Co. (R. I.) | 231 |
| Humphreys v. State (Ohio) | 776 |
| Hunt v. State (Ark.) | 71 |

I.

| | |
|---|-----|
| Insurance Co., Delaware, Miller v. (Okla.) | 173 |
| Delaware, v. S. S. White Dental Mfg. Co. (C. C. A. 3d C.) | 387 |
| International Text-Book Co. v. Weissinger (Ind.) | 599 |
| Interstate Nat. Bank v. Claxton (Tex.) | 820 |
| Irving v. Ford (Mass.) | 177 |

J.

| | |
|--|-----|
| Jacobs v. Fuller & H. Co. (Ohio) | 833 |
| J. K. Armsby Co., Commercial Bank v. (Ga.) | 443 |
| Johnson v. White (R. I.) | 250 |
| Johnston, Livesley v. (Or.) | 783 |

K.

| | |
|---|-----|
| Kaiser, Painter v. (Nev.) | 672 |
| Kenney v. State (Tex. Crim. App.) | 316 |
| Kimball S. S. Co., Weisshaar v. (C. C. A. 9th C.) | 84 |
| King, Hoover v. (Or.) | 790 |
| King Bridge Co., Salliotte v. (C. C. A. 6th C.) | 620 |
| Kipling v. G. P. Putnam's Sons (C. C. A. 2d C.) | 873 |
| Kirkland v. State (Ark.) | 76 |
| Knoxville Traction Co. v. McMillan (Tenn.) | 296 |
| Krause v. Crothersville School Trustees (Ind.) | 111 |

L.

| | |
|--|-----|
| Lahiff v. Saint Joseph's Total Abstinence & Benev. Soc. (Conn.) | 92 |
| Lancaster v. Hamburger (Ohio) | 856 |
| La Republique Francaise v. Saratoga Vichy Springs Co. (C. C. A. 2d C.) | 836 |

| | |
|---|-----|
| Latham, Wagener v. (R. I.)..... | 816 |
| Lehndorff, Rahmel v. (Cal.)..... | 88 |
| Leicester v. Hoadley (Kan.)..... | 523 |
| Lemon, Re (Cal.)..... | 946 |
| Livesley v. Johnston (Or.)..... | 783 |
| Long, Computing Scales Co. v. (S. C.) | 294 |
| Longtin v. Persell (Mont.)..... | 655 |
| Louisville, German Gymnastic Asso. v. | |
| (Ky.) | 120 |
| Louisville & N. R. Co. v. Lowe (Ky.).. | 122 |
| Lowe, Louisville & N. R. Co. v. (Ky.).. | 122 |

M.

| | |
|--|-----|
| McClurg v. Brenton (Iowa)..... | 519 |
| McConnell v. McKillip (Neb.)..... | 610 |
| McDonald, Schubach v. (Mo.)..... | 136 |
| v. Tefft-Weller Co. (C. C. A. 5th | |
| C.) | 106 |
| McDowell, Headrick v. (Va.)..... | 578 |
| McGuire v. District of Columbia (D. | |
| C. App.)..... | 430 |
| McIver v. Florida C. & P. R. Co. (Ga.) | 437 |
| McKillip, McConnell v. (Neb.)..... | 610 |
| McMillan, Knoxville Traction Co. v. | |
| (Tenn.) | 296 |
| Mahoning Valley R. Co. v. De Pascale | |
| (Ohio) | 860 |
| Mallin v. Wenham (Ill.)..... | 602 |
| Manning v. Devils Lake (N. D.)..... | 187 |
| Markowitz, Greenwall Theatrical Cir- | |
| cuit Co. v. (Tex.)..... | 302 |
| Marsh v. Stonebraker (Neb.)..... | 607 |
| Marshall Oil Co., Stone v. (Pa.).... | 218 |
| Massachusetts Homœopathic Hospital, | |
| Powers v. (C. C. A. 1st C.) | 372 |
| Matthews v. Seaboard Air Line R. Co. | |
| (S. C.)..... | 286 |
| Menkhausen, Supreme Lodge K. & L. | |
| of H. v. (Ill.)..... | 508 |
| Mial, State ex rel., v. Ellington (N. | |
| C.) | 697 |
| Miller v. Delaware Ins. Co. (Okla.).. | 173 |
| Drum v. (N. C.)..... | 890 |
| Minneapolis, St. P. & S. S. M. R. Co., | |
| Bankers' Mut. Casualty Co. | |
| v. (C. C. A. 8th C.)..... | 397 |
| Missouri Tie & Timber Co., State v. | |
| (Mo.) | 588 |
| Mitchell, Wilson v. (S. D.)..... | 158 |
| Molineux, Re (N. Y.)..... | 104 |
| Montgomery, Crescent Canal Co. v. | |
| (Cal.)..... | 940 |
| Moreland, Arentsen v. (Wis.)..... | 973 |
| Morrison, Cary v. (C. C. A. 8th C.).. | 659 |
| Mutual Reserve Fund Life Asso., Hin- | |
| ton v. (N. C.)..... | 161 |

N.

| | |
|--|-----|
| Nashville, C. & St. L. R. Co. v. Heikens | |
| (Tenn.) | 298 |
| 65 L. R. A. | |

| | |
|--------------------------------------|-----|
| Nathan v. Spokane County (Wash.).. | 336 |
| Northwestern Teleph. Exchange Co. v. | |
| Anderson (N. D.)..... | 771 |

O.

| | |
|--------------------------------------|----|
| Orange County Road Constr. Co., Peo- | |
| ple v. (N. Y.)..... | 33 |

P.

| | |
|---------------------------------------|-----|
| Painter v. Kaiser (Nev.)..... | 672 |
| Patton v. Cruce (Ark.)..... | 937 |
| Paul v. Washington (N. C.)..... | 902 |
| People v. Bernard (Mich.)..... | 559 |
| Bland v. (Colo.)..... | 424 |
| v. Orange County Road Constr. | |
| Co. (N. Y.)..... | 33 |
| Pere Marquette R. Co., Hinchman v. | |
| (Mich.) | 553 |
| Persell, Longtin v. (Mont.)..... | 655 |
| Philadelphia, Fox v. (Pa.)..... | 214 |
| Porter, Voorhees, M. & Co. v. (N. C.) | 736 |
| Powers v. Massachusetts Homœopathic | |
| Hospital (C. C. A. 1st C.) | 372 |

R.

| | |
|--|-----|
| Rahmel v. Lehndorff (Cal.)..... | 88 |
| Railroad Co., Atlantic Coast Line, Du- | |
| val v. (N. C.)..... | 722 |
| Florida C. & P., McIver v. (Ga.) | 437 |
| Louisville & N., v. Lowe (Ky.) | 122 |
| Pere Marquette, Hinchman v. | |
| (Mich.) | 553 |
| Union, Howard v. (R. I.)..... | 231 |
| Railway Co., Central of Ga., Young v. | |
| (Ga.) | 436 |
| Ft. Worth & R. G., v. Glenn | |
| (Tex.) | 818 |
| Mahoning Valley, v. De Pascale | |
| (Ohio) | 800 |
| Minneapolis, St. P. & S. S. M., | |
| Bankers' Mut. Casualty Co. | |
| v. (C. C. A. 8th C.)..... | 397 |
| Nashville, C. & St. L., v. Heikens | |
| (Tenn.) | 298 |
| Seaboard Air Line, Matthews v. | |
| (S. C.) | 286 |
| Shreveport Belt, Whitworth v. | |
| (La.) | 129 |
| Southern, Clegg v. (N. C.)..... | 717 |
| Re Boyce (Nev.)..... | 47 |
| Hopkins (N. Y.)..... | 95 |
| Lemon (Cal.)..... | 946 |
| Molineux (N. Y.)..... | 104 |
| Reyburn v. Sawyer (N. C.)..... | 930 |
| Rhode Island Co., Dyson v. (R. I.).... | 236 |
| Richmond v. Sitterding (Va.)..... | 445 |
| Roberts, Cowan v. (N. C.)..... | 729 |
| Roberts, Danielson v. (Or.)..... | 526 |
| v. Fullerton (Wis.)..... | 953 |

| | |
|-----------------------------|-----|
| Robinson, Rodman v. (N. C.) | 682 |
| Rodman v. Robinson (N. C.) | 682 |

S.

| | |
|---|-----|
| Saint Joseph's Total Abstinence & Benev. Soc., Lahiff v. (Conn.) | 92 |
| Saint Matthew's Church, Gladding v. (R. I.) | 225 |
| Salliotte v. King Bridge Co. (C. C. A. 6th C.) | 620 |
| Saratoga Vichy Springs Co., La Republique Francaise v. (C. C. A. 2d C.) | 830 |
| Sawyer, Reyburn v. (N. C.) | 930 |
| Schubach v. McDonald (Mo.) | 136 |
| Schwartz, Block v. (Utah) | 308 |
| Seaboard Air Line R. Co., Matthews v. (S. C.) | 286 |
| Seattle, Copland v. (Wash.) | 333 |
| Shaver v. Heller & M. Co. (C. C. A. 8th C.) | 878 |
| Shortall, Com. ex rel. Wadsworth v. (Pa.) | 193 |
| Shreveport Belt R. Co., Whitworth v. (La.) | 129 |
| Sittinger, Richmond v. (Va.) | 445 |
| Slaughter v. Thacker Coal & Coke Co. (W. Va.) | 342 |
| Smead v. D. W. Chandler & Co. (Ark.) | 353 |
| Smith, Allred v. (N. C.) | 924 |
| Southern Bell Teleph. & Teleg. Co., Debnam v. (N. C.) | 915 |
| Southern R. Co., Clegg v. (N. C.) | 717 |
| Sperry Flour Co., Bank of Yolo v. (Cal.) | 90 |
| Spokane County, Nathan v. (Wash.) | 336 |
| S. S. White Dental Mfg. Co., Delaware Ins. Co. v. (C. C. A. 3d C.) | 387 |
| Star Pub. Co. v. Donahoe (Del.) | 980 |
| State v. Hall (S. D.) | 151 |
| Humphreys v. (Ohio) | 776 |
| Hunt v. (Ark.) | 71 |
| Kenney v. (Tex. Crim. App.) | 316 |
| Kirkland v. (Ark.) | 76 |
| v. Missouri Tie & Timber Co. (Mo.) | 588 |
| State ex rel. Mial v. Ellington (N. C.) | 697 |
| Stoler, Hawn v. (Pa.) | 813 |
| Stone v. Marshall Oil Co. (Pa.) | 218 |
| Stonebraker, Marsh v. (Neb.) | 607 |
| Supreme Lodge K. & L. of H. v. Menkhousen (Ill.) | 508 |
| 65-L. R. A. | |

T.

| | |
|--|-----|
| Tefft-Weller Co., MacDonald v. (C. C. A. 5th C.) | 106 |
| Thacker Coal & Coke Co., Slaughter v. (W. Va.) | 342 |
| Thomas v. Harrington (N. H.) | 742 |
| Thorne, Abbott v. (Wash.) | 826 |
| Truax, Barry v. (N. D.) | 762 |

U.

| | |
|---|-----|
| Union R. Co., Howard v. (R. I.) | 231 |
| Uvalde Nat. Bank, Western U. Teleg. Co. v. (Tex.) | 805 |

V.

| | |
|--------------------------------------|-----|
| Van Tassell, Wakefield v. (Ill.) | 511 |
| Voorhees, M. & Co. v. Porter (N. C.) | 736 |

W.

| | |
|---|-----|
| Wadsworth, Com. ex rel., v. Shortall (Pa.) | 193 |
| Wagener v. Latham (R. I.) | 816 |
| Wakefield v. Van Tassell (Ill.) | 511 |
| Wanamaker v. Weaver (N. Y.) | 529 |
| Washington, Paul v. (N. C.) | 902 |
| Weaver, Wanamaker v. (N. Y.) | 529 |
| Weil, Bunch v. (Ark.) | 80 |
| Weisshaar v. Kimball S. S. Co. (C. C. A. 9th C.) | 84 |
| Weissinger, International Text-Book Co. v. (Ind.) | 599 |
| Weltmer v. Bishop (Mo.) | 584 |
| Wenham, Mallin v. (Ill.) | 602 |
| Western U. Teleg. Co., Barnes v. (Nev.) | 666 |
| v. Uvalde Nat. Bank (Tex.) | 805 |
| Whitcomb, Bigelow v. (N. H.) | 676 |
| White, Johnson v. (R. I.) | 250 |
| Whitworth v. Shreveport Belt R. Co. (La.) | 129 |
| Wilson v. Mitchell (S. D.) | 158 |
| Winston v. Beeson (N. C.) | 167 |
| Woods v. Cottrell (W. Va.) | 616 |
| Wright v. Austin (Cal.) | 949 |

Y.

| | |
|--------------------------------------|-----|
| Young v. Central of Ga. R. Co. (Ga.) | 436 |
|--------------------------------------|-----|

Z.

| | |
|------------------------|-----|
| Zahm, Houston v. (Or.) | 799 |
|------------------------|-----|

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

A.

| | |
|--|-----|
| Abbot of Strata Mercella, Case of, 9 Coke, 32a | 246 |
| Abbott v. Butler, 59 N. H. 317 | 572 |
| v. National Bank of Commerce, 20 Wash. 552, 58 Pac. 376 | 829 |
| Adams v. Emerson, 6 Pick. 57 | 680 |
| v. Jones, 12 Pet. 213, 9 L. ed. 1060 | 735 |
| v. State, 34 F'a. 186, 15 So. 905 | 822 |
| Adler-Goldman Commission Co. v. Phillips, 63 Ark. 40, 37 S. W. 297 | 371 |
| Ainsworth v. Ritt, 38 Cal. 89 | 299 |
| Alabama & V. R. Co. v. Davis, 69 Miss. 444, 13 So. 693 | 728 |
| Alabama Midland R. Co. v. Martin, 100 Ala. 511, 14 So. 401 | 630 |
| Albany v. Cunniff, 2 N. Y. 165 | 632 |
| Albert v. Mutual L. Ins. Co. 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327 | 163 |
| Alcorn v. Philadelphia, 44 Pa. 348 | 215 |
| Aldrich v. Press Printing Co. 9 Minn. 133, 86 Am. Dec. 84, Gil. 123 | 989 |
| Alexander v. Dorsey, 12 Ga. 12, 56 Am. Dec. 443 | 299 |
| v. McKenzie, 2 S. C. N. S. 81 | 703 |
| v. Parker, 144 Ill. 355, 19 L. R. A. 187, 33 N. E. 133 | 511 |
| Allan v. State S. S. Co. 132 N. Y. 91, 15 L. R. A. 166, 28 Am. St. Rep. 556, 30 N. E. 482 | 376 |
| Allegeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427 | 62 |
| Allen v. Boston, 159 Mass. 335, 38 Am. St. Rep. 423, 54 N. E. 519 | 573 |
| v. Flood [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 238 | 859 |
| v. Gardner, 7 R. L. 23 | 688 |
| v. Jay, 60 Me. 127, 11 Am. Rep. 185 | 189 |
| v. Pike, 3 Cush. 242 | 733 |
| v. Sallinger, 103 N. C. 14, 8 S. E. 913 | 928 |
| v. South Boston R. Co. 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917 | 799 |
| v. Walsh, 25 Minn. 643 | 796 |
| Almy v. Coggeshall, 19 R. I. 549, 36 Atl. 1124 | 256 |
| v. Jones, 17 R. I. 205, 12 L. R. A. 414, 21 Atl. 616 | 231 |
| Amador County v. Kennedy, 70 Cal. 458, 11 Pac. 757 | 948 |
| American Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112 | 94 |
| American Brewing Co. v. St. Louis Brewing Co. 47 Mo. App. 14 | 884 |
| American Nat. Bank v. Georgia R. Co. 96 Ga. 605, 51 Am. St. Rep. 155, 23 S. E. 898 | 444 |
| American Print Works v. Lawrence, 21 N. J. L. 248, 23 N. J. L. 590, 57 Am. Dec. 420 | 613 |
| American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33 | 587 |
| American Teleph. & Teleg. Co. v. Pearce, 71 Md. 541, 7 L. R. A. 200, 18 Atl. 910 | 567 |
| American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85, 43 L. R. A. 826, 73 Am. St. Rep. 263, 53 N. E. 141 | 886 |
| Amis v. Kyle, 2 Yerg. 31, 24 Am. Dec. 463 | 688 |
| Amory v. Amory, 95 U. S. 186, 24 L. ed. 428 | 918 |
| v. Amory, 26 Wis. 152 | 792 |
| Amoskeag Mfg. Co. v. Spear, 2 Sandf. 599 | 885 |
| v. Trainer, 101 U. S. 51, 25 L. ed. 993 | 885 |
| Anderson v. Caraway, 27 W. Va. 385 | 349 |
| v. How, 116 N. Y. 336, 22 N. E. 695 | 524 |
| 65 L. R. A. | |

| | |
|---|----------|
| Anglo-Egyptian Nav. Co. v. Rennie, L. R. 10 C. P. 271, 44 L. J. C. P. N. S. 130, 32 L. T. N. S. 467, 23 Week Rep. 626 | 117-119 |
| Anonymous Case, 1 Gall. 23, Fed. Cas. No. 444 | 80 |
| Anthony v. Adams, 1 Met. 284 | 190 |
| Appleby v. Myers, L. R. 2 C. P. 651, 36 L. J. C. P. N. S. 331, 16 L. T. N. S. 669 | 118-120 |
| Armendaiz v. Stillman, 67 Tex. 458, 3 S. W. 678 | 634 |
| Armfield v. Moore, 44 N. C. (Busbee, L.) 157 | 926, 929 |
| Armory v. Delamirie, 1 Strange, 505 | 527 |
| v. Delamirie, 1 Smith, Lead. Cas. pt. 1, *475 | 528 |
| Arrington v. Arrington, 127 N. C. 190, 52 L. R. A. 201, 80 Am. St. Rep. 791, 37 S. E. 212 | 817 |
| Ashby v. Erie, 85 Pa. 286 | 217 |
| Asher v. Hutchinson Water, Light, & P. Co. 61 L. R. A. 76 | 570 |
| Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609 | 602 |
| v. Potter, 64 Kan. 13, 56 L. R. A. 575, 67 Pac. 534 | 292 |
| Atkin v. Kansas, 191 U. S. 223, 48 L. ed. 158, 24 Sup. Ct. Rep. 124 | 426 |
| Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185 | 229 |
| Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556 | 515 |
| Attersol v. Stevens, 1 Taunt. 202 | 300, 301 |
| Atty. Gen. v. Cleaver, 18 Ves. Jr. 211 | 870 |
| v. Delaware & B. B. R. Co. 27 N. J. Eq. 631 | 961 |
| v. Old South Soc. 13 Allen, 474 | 377 |
| v. Power, 1 Ball & B. 145 | 230 |
| Atty. Gen. ex rel. Rich v. Jochin, 90 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606, 58 N. W. 611 | 704 |
| Audenreid v. Betteley, 8 Allen, 302 | 824 |
| Austin v. Hilliers (1666) Hardr. 244 | 408 |
| v. Hudson River R. Co. 25 N. Y. 334 | 300 |
| v. Munro, 47 N. Y. 360 | 675 |
| v. Murray, 16 Pick. 121 | 315 |
| v. Tennessee, 179 U. S. 369, 45 L. ed. 224, 21 Sup. Ct. Rep. 134 | 62, 65 |
| Avery v. Bowden, 5 El. & Bl. 714 | 306 |
| v. Maxwell, 4 N. H. 36 | 680 |
| v. Ryan, 74 Wis. 591, 43 N. W. 317 | 789 |
| Aycock v. Raleigh & A. Air Line R. Co. 89 N. C. 321 | 933 |
| Ayers, Re, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 179 | 871 |

B.

| | |
|--|---------------|
| Babcock v. Trice, 18 Ill. 420, 68 Am. Dec. 560 | 82 |
| Bailey v. Caldwell, 68 N. C. 472 | 712 |
| v. De Crespigny, L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494 | 116 |
| v. Gray, 53 S. C. 514, 31 S. E. 354 | 291 |
| v. Raleigh, 130 N. C. 209, 58 L. R. A. 178, 41 S. E. 281 | 908, 914 |
| v. Sweeney, 64 N. H. 296, 9 Atl. 543 | 678, 680 |
| Bain v. Fothergill, L. R. 7 H. L. 159, 43 L. J. Exch. N. S. 243, 31 L. T. N. S. 387, 23 Week. Rep. 261 | 976 |
| Baker v. Shephard, 24 N. H. 208 | 678, 679, 680 |
| v. Tibbetts, 162 Mass. 468, 39 N. E. 350 | 378 |
| Baldwin v. Bexley, 185 Ill. 180, 56 N. E. 1065 | 511 |

- Baldwin v. Munn, 2 Wend. 399, 20 Am. Dec. 627 721
- Ballels, Re, 144 N. Y. 182, 38 N. E. 1007 781
- Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572 766
- Baltimore & O. R. Co. v. Barger, 80 Md. 23, 26 L. R. A. 220, 45 Am. St. Rep. 319, 30 Atl. 580 863
- v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 716
- v. Brydon, 65 Md. 198, 57 Am. Rep. 318, 3 Atl. 306, 65 Md. 226, 9 Atl. 126 787
- v. Fulton, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 285 440, 442
- v. Harris, 12 Wall. 65, 20 L. ed. 354 922
- v. State, 70 Md. 335, 47 Am. St. Rep. 415, 20 Atl. 518 728
- Bandel v. Isaac, 13 Md. 202 766
- Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274 919
- Bank of California v. Western U. Tele. Co., 52 Cal. 280 810
- Bank of Columbia v. Okely, 4 Wheat. 235, 4 L. ed. 559 595
- Bank of United States v. Huth, 4 B. Mon. 423 372
- Banks v. White, 1 Sneed, 613 300
- Banner Pub. Co. v. State, 16 Lea, 176, 57 Am. Rep. 210 988
- Barber v. Barber, 21 How. 582, 16 L. ed. 226 817
- v. Cincinnati, N. O. & T. P. R. Co., 14 Ky. L. Rep. 869, 21 S. W. 340 126
- Barbier v. Connolly, 118 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357 613, 246
- Barker v. Dixie, 2 Strange, 1051 119
- v. Hodgson, 3 Maule & S. 267, 15 Revised Rep. 485 80
- Barnacoat v. Six Quarter Casks of Gunpowder, 1 Met. 230 979
- Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595 789
- Barnes v. Barnes, 65 N. C. 261 936
- v. Hathorn, 54 Me. 127 709
- v. Trenton Gaslight Co., 27 N. J. Eq. 33 989
- Barr v. Moore, 87 Pa. 385, 30 Am. Rep. 367 792
- Barrell v. Title Guarantee Co., 27 Or. 77, 39 Pac. 092 687
- Barrett v. Applington, Fed. Cas. No. 1,045 306
- Barrick v. Buba, 2 C. B. N. S. 563, 26 L. J. C. P. N. S. 280, 5 Week. Rep. 665 920
- Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 7 Sup. Ct. Rep. 931 901
- Barrows v. Bell, 7 Gray, 301, 66 Am. Dec. 479 292
- Barry v. New York C. & H. R. R. Co., 92 N. Y. 289, 44 Am. Rep. 377 820
- Bartlett v. Christhill, 69 Md. 219, 14 Atl. 518 810
- v. Tucker, 104 Mass. 336, 6 Am. Rep. 240 375
- Barwick v. English Joint Stock Bank, L. R. 2 Exch. 250, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877 721
- Bass v. Glover, 63 Ga. 745 94
- Bassett v. Atwater, 65 Conn. 355, 32 L. R. A. 575, 32 Atl. 937 045
- Bassinger v. Spangler, 9 Colo. 189, 10 Pac. 809 887
- Bateman v. Fargason, 2 Filipp. 660, 4 Fed. 32 150
- v. Johnson, 10 Wis. 1 688
- Bates v. Kimball, 2 D. Chp. (Vt.) 77 989
- Batsford v. Every, 44 Barb. 618 557
- Bays v. Hunt, 60 Iowa, 251, 14 N. W. 785 245
- Beall v. Athens Twp., 81 Mich. 536, 45 N. W. 1014 75
- Beardmore v. Carrington (1764) 2 Wils. 244 183
- Beasley v. State, 138 Ind. 552, 46 Am. St. Rep. 418, 38 N. E. 35 688
- Becker v. Louisville & N. R. Co., 110 Ky. 474, 53 L. R. A. 287, 96 Am. St. Rep. 459, 61 S. W. 997 336
- Behan v. Ghlo, 75 Tex. 87, 12 S. W. 996 984
- Beidling v. Black Hills & Ft. P. R. Co., 3 S. D. 369, 53 N. W. 750 66 L. R. A.
- Belknap v. Ball, 83 Mich. 583, 11 L. R. A. 72, 21 Am. St. Rep. 622, 47 N. W. 674 184 U. S.
- Bell's Gap R. Co. v. Pennsylvania, 184 U. S. 239, 33 L. ed. 895, 10 Sup. Ct. Rep. 533 297
- Benard v. Woonsocket Bobbin Co., 23 R. I. 581, 51 Atl. 209 255
- Benett v. Wyndham, 4 De G. F. & J. 259 378
- Benner v. Atlantic Dredging Co., 134 N. Y. 156, 17 L. R. A. 220, 30 Am. St. Rep. 649, 31 N. E. 328 656, 657
- Bennett v. Hethington, 16 Serg. & R. 193 927
- v. Louisville & N. R. Co., 102 U. S. 577, 26 L. ed. 235 202
- v. Western U. Tele. Co., 128 N. C. 103, 38 S. E. 204 670
- Benson v. Keller, 37 Or. 120, 60 Pac. 918 789
- Benton v. City Hospital, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836 375, 377
- Bernina, The, L. R. 13 App. Cas. 1, 57 L. J. Prob. N. S. 65, 58 L. T. N. S. 423, 38 Week. Rep. 870, 6 Asp. Mar. L. Cas. 257, 52 J. P. 212 725, 728
- The L. R. 12 Prob. Div. 58 728
- Berry v. State, 44 Tex. Crim. Rep. 395, 72 S. W. 170 321
- Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323 315
- Best v. Flint, 58 Vt. 543, 56 Am. Rep. 570, 5 Atl. 192 82
- Bethune v. McDonald, 35 S. C. 93, 14 S. E. 674 295
- Bickerstaff v. Dellinger, 5 N. C. (1 Murph.) 272 421
- Bills v. Belknap, 36 Iowa, 583 682
- Birks v. French, 21 Kan. 238 688
- Birmingham Vinegar Brewery Co. v. Powell (1897) A. C. 710, 66 L. J. Ch. N. S. 763, 76 L. T. N. S. 792 880, 884, 886
- Bishop v. Bedford Charity, 1 El. & El. 697, 29 L. J. Q. B. N. S. 53, 6 Jur. N. S. 220, 1 L. T. N. S. 214, 8 Week. Rep. 115 378
- v. Brainerd, 28 Conn. 289 229
- v. Tripp, 15 R. I. 466, 8 Atl. 692 248
- v. Tripp, 16 R. I. 198, 14 Atl. 79 237
- v. Williamson, 11 Me. 405 403
- Blitner v. Brough, 11 Pa. 127 979
- Bittenhaus v. Johnston, 92 Wis. 588, 32 L. R. A. 380, 66 N. W. 805 613
- Black v. Christchurch Finance Co., [1894] A. C. 48, 63 L. J. C. P. N. S. 32, 6 Reports, 394, 70 L. T. N. S. 77, 58 J. P. 332 751
- v. Vermont Marble Co., 137 Cal. 683, 70 Pac. 776 423
- Blackwell v. Lynchburg & D. R. Co., 111 N. C. 151, 17 L. R. A. 729, 32 Am. St. Rep. 786, 16 S. E. 12 663
- Blaechinska v. Howard Mission, 56 Hun, 322, 9 N. Y. Supp. 670 378
- Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304 631
- v. Rich, 34 N. H. 282 678
- v. United States, 103 U. S. 227, 26 L. ed. 462 710
- Blanc v. Klumpke, 29 Cal. 156 936
- Blazier v. Miller, 10 Hun, 435 613
- Bliss v. American Bible Society, 2 Allen, 334 230
- v. Ball, 99 Mass. 597 682
- Block v. Standard Distilling & Distributing Co., 95 Fed. 978 885, 886
- Blocker v. State, 72 Miss. 723, 18 So. 388 576
- Bloom v. Richards, 2 Ohio St. 387 688
- Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532 385
- Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 386 682
- Bloomington v. Brinckerhoff, 2 Misc. 49, 20 N. Y. Supp. 858 536
- Blumenthal v. State, 21 Ind. App. 665, 51 N. E. 496 289
- Blumer v. Pollak, 18 Fla. 707 109
- Blunt v. Alkin, 15 Wend. 522, 30 Am. Dec. 72 632
- Blythe, Re, 99 Cal. 472, 34 Pac. 108 422
- v. Ayres, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915 184
- Bodley v. Archibald, 33 W. Va. 229, 10 S. E. 392 618
- Boggero v. Southern R. Co., 64 S. C. 104, 41 S. E. 819 290
- Bond v. Bunting, 78 Pa. 210 815

| | | | |
|--|----------|---|---------------|
| Boone County v. Mutchler, 137 Ind. 140, 86 N. E. 534 | 728 | Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625 | 882, 885, 890 |
| Booth v. Kehoe, 71 N. Y. 341 | 872 | Brown Saddle Co. v. Troxel, 98 Fed. 620 | 385 |
| v. Rome, W. & O. Terminal R. Co. 140 N. Y. 287, 24 L. R. A. 105, 37 Am. St. Rep. 552, 35 N. E. 592 | 656, 657 | Bruce v. Rawlins (1770) 3 Wils. 61 | 245 |
| Boston v. Richardson, 13 Allen, 146 | 682 | Brumby v. Smith, 3 Ala. 123 | 117, 120 |
| v. Worthington, 10 Gray, 496, 71 Am. Dec. 678 | 452 | Bryan v. Malloy, 90 N. C. 508 | 928 |
| Boston & M. R. Co. v. Fogg (not yet reported) | 144 | v. Western U. Teleg. Co. 135 N. C. 603, 45 S. E. 938 | 670 |
| Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989 | 428 | Bryant v. Hambrick, 9 Ga. 133 | 978 |
| Boswell v. Otis, 9 How. 326, 13 L. ed. 164 | 760 | Bryden v. Hinds (Cal.) 55 Alb. L. J. 327 | 519 |
| Bottoms v. Seaboard & R. R. Co. 114 N. C. 609, 25 L. R. A. 784, 41 Am. St. Rep. 799, 19 S. E. 730 | 729 | Bryson v. Peak, 43 N. C. (8 Ired. Eq.) 310 | 688 |
| Bowden v. Lewis, 13 R. I. 191, 43 Am. Rep. 21 | 234 | Bucher v. Chesbire R. Co. 125 U. S. 553, 1 L. ed. 795, 8 Sup. Ct. Rep. 974 | 439 |
| Bowen v. Detroit City R. Co. 54 Mich. 406, 52 Am. Rep. 822, 20 N. W. 559 | 234 | Buck v. Ellenbolt, 84 Iowa, 394, 15 L. R. A. 187, 51 N. W. 22 | 962 |
| v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172 | 528 | v. Eureka, 109 Cal. 504, 30 L. R. A. 409, 42 Pac. 243 | 948 |
| Bower v. Peete, L. R. 1 Q. B. Div. 321 | 748 | v. Miller, 62 Am. St. Rep. 448 | 340 |
| Rox v. Goodbar, 54 Ark. 6, 14 S. W. 925 | 371 | Bullard v. Shibley, 153 Mass. 559, 12 L. R. A. 110, 27 N. E. 708 | 230 |
| Boyd v. United States, 116 U. S. 616, 20 L. ed. 746, 6 Sup. Ct. Rep. 524 | 618 | Bullock v. Bullock, 52 N. J. Eq. 581, 27 L. R. A. 213, 46 Am. St. Rep. 528, 30 Atl. 676 | 817 |
| Boynton v. Page, 13 Wend. 425 | 688 | v. Bullock, 67 N. J. L. 508, 31 Atl. 1024 | 817 |
| Brackett v. Blake, 7 Met. 335, 41 Am. Dec. 442 | 605 | Bunting v. Hogsett, 139 Pa. 363, 12 L. R. A. 268, 23 Am. St. Rep. 192, 21 Atl. 35 | 728 |
| Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co. 60 Ohio St. 560, 45 L. R. A. 658, 71 Am. St. Rep. 740, 54 N. E. 528 | 658 | Burbage v. Windley, 108 N. C. 357, 12 L. R. A. 409, 12 S. E. 830 | 185 |
| Bradley v. Heath, 12 Pick. 164, 22 Am. Dec. 418 | 985 | Burch v. Cavanaugh, 12 Abb. Pr. N. S. 410 | 918 |
| v. Ohio River & C. R. Co. 110 N. C. 744, 26 S. E. 169, 78 Fed. 387 | 918 | Burdeitt v. Allen, 35 Va. 347, 14 L. R. A. 337, 13 S. E. 1012 | 761 |
| Brampton's Case (1616) 1 Rolle Rep. 272 | 245 | Burlington v. Whipple, Sept. term 1709 (Newport County) | 246 |
| Brauer v. State, 25 Wis. 413 | 321 | Burnett v. Cralk, 30 Ala. 138, 68 Am. Dec. 115 | 912 |
| Braun, Ex parte, 141 Cal. 204, 74 Pac. 780 | 947 | Burnside v. Twitchell, 43 N. H. 394 | 330 |
| Brazier's Case. See KING v. BRAZIER. | | Burris v. People's Ditch Co. 104 Cal. 248, 37 Pac. 922 | 951 |
| Breden v. McLaurin, 98 N. C. 307, 4 S. E. 136 | 928 | Burt v. Advertiser Newspaper Co. 154 Mass. 238, 13 L. R. A. 97, 28 N. E. 1 | 988, 989 |
| Brett v. Warnick (Or.) 75 Pac. 1061 | 789 | v. Grand Lodge, F. & A. M. 66 Mich. 85, 33 N. W. 13 | 94 |
| Brewer v. Chase, 121 Mich. 528, 46 L. R. A. 397, 80 Am. St. Rep. 527, 80 N. W. 575 | 940 | v. Lathrop, 52 Mich. 106, 17 N. W. 716 | 519 |
| v. Weakley, 2 Overt. 99, 5 Am. Dec. 656 | 988, 989 | Burton v. Baynes (1733). Barnes's Notes, 153 | 244 |
| Brice v. Wilson, 8 Ad. & El. 349 | 675 | v. Western & A. R. Co. 98 Ga. 783, 25 S. E. 736 | 292 |
| Bridger v. Asheville & S. R. Co. 25 S. C. 24 | 293 | Burwell's Case, 1 Vent. 48 | 691 |
| Bridges v. Hawkesworth, 21 L. J. Q. B. N. S. 75, 15 Jur. 1070 | 528 | Busbee v. Lewis, 85 N. C. 332 | 913 |
| Briggs v. Garrett, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513 | 900 | v. Macy, 85 N. C. 329 | 913 |
| Bright v. Barnett & R. Co. 88 Wis. 290, 26 L. R. A. 524, 60 N. W. 418 | 460 | Rush v. Stanley, 122 Ill. 406, 13 N. E. 249 | 606 |
| Brisbane v. Dobson, 50 Mo. App. 170 | 817 | Business Men's League v. Waddill, 143 Mo. 495, 40 L. R. A. 501, 45 S. W. 262 | 142 |
| Brittain v. Daniels, 94 N. C. 781 | 928 | Butcher's Union S. H. & L. S. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 757, 28 L. ed. 585, 4 Sup. Ct. Rep. 860 | 70, 313 |
| Bromage v. Prosser, 4 Barn. & C. 247, 6 Dowl. & R. 298, 1 Car. & P. 475, 3 L. J. K. B. 203, 28 Revised Rep. 241 | 524, 985 | Butler v. Pennsylvania, 10 How. 402, 13 L. ed. 472 | 701, 710 |
| Bronson v. Bruce, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 671 | 988, 990 | Butterfield v. Byron, 153 Mass. 517, 12 L. R. A. 571, 23 Am. St. Rep. 634, 27 N. E. 667 | 117, 119 |
| v. Coffin, 108 Mass. 175, 11 Am. Rep. 335 | 804 | Byrne v. New York C. & H. R. R. Co. 104 N. Y. 362, 58 Am. Rep. 512, 10 N. E. 539 | 292 |
| v. Wilmington N. C. L. Ins. Co. 85 N. C. 411 | 930 | | |
| Brooklyn, W. & N. R. Co., Re. 19 Hun. 314 | 930 | | |
| Brooks v. Belfast, 90 Me. 318, 38 Atl. 222 | 231 | | |
| v. Cooper, 50 N. J. Eq. 761, 21 L. R. A. 617, 35 Am. St. Rep. 793, 26 Atl. 978 | 514 | | |
| Broomhead, Re. 16 L. J. Q. B. N. S. 355, 5 Dowl. & L. 52 | 607 | | |
| Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356 | 670 | | |
| v. Foster, 113 Mass. 136, 18 Am. Rep. 463 | 787 | | |
| v. Merchants' & F. Bank, 79 N. C. 244 | 740 | | |
| v. Perkins, 12 Gray, 89 | 614 | | |
| v. Providence, W. & B. R. Co. 5 Gray, 35 | 663 | | |
| v. Van Braam, 3 Dail. 344, 1 L. ed. 629 | 249 | | |
| Brown Chemical Co. v. Frederick Stearns & Co. 37 Fed. 361 | 885 | | |
| 65 L. R. A. | | | |

C.

| | |
|---|----------|
| Cady v. Rhode Island Children's Hospital & Nursery, 17 R. I. 207, 21 Atl. 303 | 231 |
| v. Schultz, 19 R. I. 193, 29 L. R. A. 524, 61 Am. St. Rep. 763, 32 Atl. 915 | 884, 886 |
| Cahill v. Cincinnati, N. O. & T. P. R. Co. 92 Ky. 345, 18 S. W. 2 | 127, 728 |
| Cairo & F. R. Co. v. Trout, 32 Ark. 17 | 79 |
| Calcasieu Lumber Co. v. Harris, 48 Am. & Eng. R. Cas. 576 | 573 |
| Caldicott v. Griffiths, 22 Eng. L. & Eq. 529 | 519 |
| Caldwell v. Central Park, N. & E. River R. Co. 7 Misc. 67, 27 N. Y. Supp. 397 | 670 |
| v. Neely, 51 N. C. 114 | 928 |
| California Dry Dock Co. v. Armstrong, 8 Sawy. 523, 17 Fed. 216 | 300 |
| Callender v. Marsh, 1 Pick. 418 | 257 |
| Calye's Case, 8 Coke, *33 | 90 |

| | | | |
|--|----------|--|----------|
| Colcough v. Nashville & N. W. R. Co. 2 Head, 171 | 801 | Cook v. State, 22 Tex. App. 511, 3 S. W. 749 | 321 |
| Coldwell v. Holme, 2 Smaile & G. 31, 23 L. J. Ch. N. S. 594, 18 Jur. 396 .. | 229 | Cooke v. Cooke, 41 Md. 362 | 768 |
| Cole v. Drew, 44 Vt. 49, 8 Am. Rep. 363 .. | 681 | Coppock v. Bower, 4 Mees. & W. 361, 8 L. J. Exch. N. S. 9 | 514 |
| Coleman v. Com. 25 Gratt. 865, 18 Am. Rep. 711 | 157 | Corbin v. Philadelphia, 195 Pa. 461, 49 L. R. A. 715, 78 Am. St. Rep. 825, 45 Atl. 1070 | 135 |
| v. First Nat. Bank, 94 Tex. 607, 86 Am. St. Rep. 871, 63 S. W. 867 .. | 825 | Corner v. Shew, 3 Mees. & W. 350 .. | 675 |
| v. Mawby (1730) 2 Strange, 854 | 245 | Cotten v. Ellis, 52 N. C. (7 Jones, L.) 548 710, | 712 |
| v. New Orleans Ins. Co. 49 Ohio St. 310, 16 L. R. A. 174, 84 Am. St. Rep. 565, 31 N. E. 279 | 176 | Cotting v. Kansas City Stock Yards Co. 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30 | 40 |
| Collins, The, 82 Fed. 665 | 88 | Courtier v. Barret (1505) Cro. Eliz. pt. 1, p. 412 | 248 |
| Collett v. Vanderburgh County, 119 Ind. 27, 4 L. R. A. 321, 21 N. E. 329 .. | 290 | Covington v. Threadgill, 88 N. C. 189 .. | 685 |
| Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302 | 615 | Covington & C. Bridge Co. v. Steinbrock, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618 | 750, 838 |
| Colt v. Towle (1859) Eng. Ch. App. | 515 | Covington Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558 | 728 |
| Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395 | 658, 663 | Cowan v. Roberts (N. C.) 46 S. E. 979 .. | 740 |
| Columbia College v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615 | 804 | Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547 | 515 |
| Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 161 | 882, 885 | Cox v. East Tennessee, V. & G. R. Co. 68 Ga. 446 | 442 |
| Colwell v. Tinker, 169 N. Y. 531, 58 L. R. A. 765, 98 Am. St. Rep. 587, 62 N. E. 668 | 525 | Cox Case. See Cox v. East Tennessee, V. & G. R. Co. | 442 |
| Commercial & Agri. Bank v. Jones, 18 Tex. 811 | 823 | Craig v. State, 30 Tex. App. 619, 18 S. W. 237 | 319 |
| Commercial Bank v. Chicago, St. P. & K. C. R. Co. 160 Ill. 401, 43 N. E. 756 | 721 | v. Werthmueller, 78 Iowa, 598, 43 N. W. 606 | 620 |
| Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582 | 175 | Crampton v. Ivie Bros. 126 N. C. 894, 36 S. E. 351 | 723 |
| Com. v. Alger, 7 Cush. 53 | 58, 315 | Crawford v. Feder, 34 Fla. 397, 16 So. 287 v. Gamble, 22 Fla. 487 | 109, 109 |
| v. Anderson, 1 Ashm. (Pa.) 55 | 601 | Crawford County v. Louisville, N. A. & St. L. Air Line R. Co. 39 Ind. 192 .. | 110 |
| v. Balph, 111 Pa. 365, 3 Atl. 220 .. | 768 | Crenshaw v. United States, 134 U. S. 99, 33 L. ed. 825, 10 Sup. Ct. Rep. 431 701, | 710 |
| v. Bonnell, 8 Phila. 534 | 59 | Creswick v. Saunders (1682) 2 Show, 200 Creve Coeur Lake Ice Co. v. Tamm, 188 Mo. 385, 39 S. W. 791 | 766 |
| v. Clap, 4 Mass. 163, 3 Am. Dec. 212 | 989, 991 | Crocker v. Collins, 37 S. C. 333, 34 Am. St. Rep. 752, 15 S. E. 951 | 201 |
| v. Conyngham, 66 Pa. 99 | 59 | Croft v. Day, 7 Beav. 84 | 884, 885 |
| v. Davidson, 91 Ky. 162, 15 S. W. 53 .. | 769 | Cromwell v. Benjamin, 41 Barb. 558 .. | 535 |
| v. Delamater, 145 Pa. 210, 22 Atl. 1098 | 768 | Crook v. Cowan, 64 N. C. 743 | 733 |
| v. Emerson, 165 Mass. 146, 42 N. E. 559 | 173 | Croomes v. State, 40 Tex. Crim. Rep. 672, 51 S. W. 924, 53 S. W. 882 310, 322, | 326 |
| v. Erie & N. E. R. Co. 27 Pa. 339, 67 Am. Dec. 475 | 566 | Croomes Case. See CROOMES V. STATE. | |
| v. Hamilton Mfg. Co. 120 Mass. 383 | 57 | Cross v. Fumbey, 54 Ark. 179, 15 S. W. 461 Crow v. Reed, 38 Ark. 462 | 371, 79 |
| v. Nefus, 135 Mass. 533 | 157 | Crowell v. New Orleans & N. E. R. Co. 61 Miss. 631 | 300 |
| v. Perry, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126 | 594, 597 | Crowley v. Christensen, 127 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13 .. | 58, 914 |
| v. Sisson, 178 Mass. 578, 60 N. E. 385 | 173 | v. Louisville & N. R. Co. 21 Ky. L. Rep. 1435, 55 S. W. 434 | 127 |
| v. Snelling, 15 Pick. 340 | 986 | Curtin v. Somerset, 140 Pa. 70, 12 L. R. A. 322, 23 Am. St. Rep. 220, 21 Atl. 244 | 632 |
| v. Wardwell, 136 Mass. 164 | 980 | Curtis v. Bank of Somerset, 7 Harr. & J. 25 | 675 |
| Com. ex rel. Hepburn v. Mann, 5 Watts & S. 418 | 707 | v. Curtis, 40 Me. 24, 63 Am. Dec. 651 580, | 581 |
| Burt v. Union League, 135 Pa. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030 | 94 | v. Mussey, 6 Gray, 261 | 989 |
| Conley v. Cincinnati, N. O. & T. P. R. Co. 89 Ky. 402, 12 S. W. 764 | 126 | Curtis & Co. Mfg. Co. v. Williams, 48 Ark. 330, 3 S. W. 517 | 83 |
| Conley Case. See CONLEY V. CINCINNATI, N. O. & T. P. R. Co. | | | |
| Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251, 165, Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397 | 166, 885 | | |
| Conner v. New York, 2 Sandf. 370 | 669, 703 | | |
| Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431 | 40 | | |
| Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803 | 385 | | |
| Constitution Pub. Co. v. De Laughter, 95 Ga. 17, 21 S. E. 1000 | 439 | | |
| Consumers' Gas Co. v. American Electric Constr. Co. 1 C. C. A. 663, 3 U. S. App. 111, 50 Fed. 778 | 295 | | |
| Continental Ins. Co. v. Continental Fire Asso. 96 Fed. 846 | 882, 885 | | |
| v. Ward, 50 Kan. 346, 31 Pac. 1079 Converse, Re, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191 | 175, 619 | | |
| Conwell v. Voorhees, 18 Ohio, 523, 42 Am. Dec. 206 | 405 | | |
| Cook v. Beal, 1 Ld. Raym. 176 | 245 | | |
| v. McCabe, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507 | 117 | | |
| 65 L. R. A. | | | |
| | | D. | |
| | | Dahl v. Tibbals, 5 Wash. 259, 31 Pac. 868 Dames v. Rock (1625) Bendloes, 158 | 335, 244 |
| | | Dana v. Valentine, 5 Met. 8 | 936 |
| | | Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264 | 557 |
| | | v. Hilgard, 77 Ill. 640 | 58 |
| | | Danube & B. Sea Co. v. Xenos, 13 C. B. N. S. 825, 31 L. J. C. P. N. S. 284, 8 Jur. N. S. 439, 10 Week. Rep. 320 | 306 |
| | | Danville, H. & W. R. Co. v. Com. 73 Pa. 38 Dartmouth College v. Woodward, 4 Wheat. 579, 4 L. ed. 644, | 568, 774 |
| | | Dartmouth College Case. See DARTMOUTH COLLEGE V. WOODWARD. | |
| | | Dater v. Troy Turnp. & R. Co. 2 Hill, 629 Daves v. Haywood, 22 N. C. (2 Dev. & B. Eq.) 313 | 423, 600 |

- Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 618 58
 v. Southern P. Co. 44 Fed. 476 670
 Davies v. Davies, L. R. 36 Ch. Div. 364, 56 L. J. Ch. N. S. 962, 58 L. T. N. S. 209, 36 Week. Rep. 86 514
 Davis v. American Soc. for Prevention of Cruelty to Animals, 75 N. Y. 362 871
 v. Central Cong. Soc. 129 Mass. 367, 37 Am. Rep. 308 378
 v. Chicago & N. W. R. Co. 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 406 292
 v. Foliot (Banc. Sup.) Style, 310 244
 v. French, 20 Me. 21, 37 Am. Dec. 36 675
 v. Guarneri, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350 841
 v. Reyner, 2 Lev. 3 675
 v. Shepatone, L. R. 11 App. Cas. 187, 55 L. J. P. C. N. S. 51, 55 L. T. N. S. 1, 34 Week. Rep. 984, 50 J. P. 709 988
 Davison v. Duncan, 7 El. & Bl. 231, 26 L. J. Q. B. N. S. 106, 3 Jur. N. S. 613, 5 Week. Rep. 253 901
 v. Hough, 105 Mo. 561, 65 S. W. 731 143
 Dawley v. Brown, 79 N. Y. 390 793
 Day v. Green, 4 Cush. 433 775
 v. Howard, 73 N. C. 1 928
 v. Singleton [1899] 2 Ch. 320, 68 L. J. Ch. N. S. 593, 81 L. T. N. S. 806, 48 Week. Rep. 18 976
 Day's Case, 124 N. C. 369, 46 L. R. A. 295, 32 S. E. 750 707, 710, 711
 Dean v. Pennsylvania R. Co. 129 Pa. 514, 6 L. R. A. 143, 15 Am. St. Rep. 733, 18 Atl. 720 728
 Deane v. Willamette Bridge Co. 22 Or. 167, 15 L. R. A. 614, 29 Pac. 440 249
 Deaton v. Polk County, 9 Iowa, 594 679
 Debenham v. Mellon, 20 Am. L. Reg. N. S. 324 541
 v. Mellon, L. R. 5 Q. B. Div. 394, 49 L. J. Q. B. N. S. 407 536
 Deltrichs v. Lincoln & N. W. R. Co. 13 Neb. 361, 13 N. W. 624 577
 De Kay v. Hackensack Water Co. 38 N. J. Eq. 158 799
 Delamater v. Russell, 4 How. Fr. 234 525
 Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581 831, 882, 885
 Delaware Bridge Co. v. Trenton City Bridge Co. 13 N. J. Eq. 46 961
 Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569 663
 v. Frank, 110 Fed. 689 144
 De Mahy v. Morgan's L. & T. R. & S. S. Co. 45 La. Ann. 1329, 14 No. 61 134
 Deming v. Terminal R. Co. 169 N. Y. 1, 88 Am. St. Rep. 521, 61 N. E. 983 750
 Demott v. Field, 7 Cow. 58 675
 Den ex dem. Flynn v. Williams, 23 N. C. (1 Ired. L.) 509 707
 Denniston v. Clark, 125 Mass. 216 678, 680
 Denny v. Faulkner, 22 Kan. 89 368, 371, 372
 Denson v. Autrey, 21 Ala. 205 582
 Denver v. Hohart, 10 Nev. 28 703
 Dering v. Winchelsea, 1 Cox, Ch. Cas. 319, 2 Bos. & P. 270 887
 Detroit v. Osborne, 185 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012 375
 Devoe v. New York, O. & W. R. Co. 63 N. J. L. 276, 43 Atl. 899 292
 Devron v. First Municipality, 4 La. Ann. 11 871, 913
 Dewing v. Hutton, 40 W. Va. 521, 21 S. E. 780 340
 v. Hutton, 48 W. Va. 576, 37 S. E. 670 349
 Diamond Match Co. v. Roeder, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419 346
 Dickson v. Kewanee Electric Light Motor Co. 53 Ill. App. 379 775
 v. Reuter's Tele. Co. L. R. 2 C. P. Div. 62, L. R. 3 C. P. Div. 1, 47 L. J. C. P. N. S. 1, 37 L. T. N. S. 370, 26 Week. Rep. 23 809
 Diehl v. Adams County Mut. Ins. Co. 58 Pa. 452, 98 Am. Dec. 302 720
 Dillaway v. Butler, 135 Mass. 479 799
 65 L. R. A.
 Distilled Spirits, The, 11 Wall. 356, 20 L. ed. 167 799
 District of Columbia v. Baltimore & P. R. Co. 114 U. S. 461, 29 L. ed. 220, 5 Sup. Ct. Rep. 1100 577
 Doan v. American Book Co. 45 C. C. A. 42, 105 Fed. 772 876
 Dodge v. Essex County, 3 Met. 380 663
 Doe ex dem. Myers v. Craig, 44 N. C. (Busee, L.) 169 707
 Hoyle v. Stowe, 13 N. C. (2 Dev. L.) 318 927
 Dollner v. Snow, 16 Fla. 86 109
 Donahue v. Star Pub. Co. 3 Penn. (Del.) 545, 53 Atl. 1028 982
 v. Will County, 100 Ill. 94 704
 Donaldson v. General Public Hospital, 30 N. B. 279 381
 Donnelly v. Boston Catholic Cemetery Assn. 146 Mass. 163, 15 N. E. 505 877
 v. Harris, 41 Ill. 128 863
 Donovan v. Allart, 11 N. D. 289, 58 L. R. A. 775, 91 N. W. 441 773
 Dorn v. Georgia C. & N. R. Co. 58 S. C. 364, 36 S. E. 654 294
 Dorough v. Equitable Mortg. Co. 118 Ga. 178, 45 S. E. 22 687
 Dorr v. Dewing, 30 W. Va. 466, 15 S. E. 93 349
 Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199 58
 Douville v. Sun Mut. Ins. Co. 12 La. Ann. 259 394
 Dow v. Blake, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761 817
 Dowdy v. White, 128 N. C. 17, 38 S. E. 129 688
 Downes v. Harper Hospital, 101 Mich. 555, 25 L. R. A. 602, 45 Am. St. Rep. 427, 60 N. W. 42 377
 Downing v. Mt. Washington Road Co. 40 N. H. 230 575
 Downs v. High Point, 115 N. C. 182, 20 S. E. 385 935
 Drake v. Baker, 34 N. J. L. 358 979
 v. Howell, 133 N. C. 168, 45 S. E. 539 721
 Draper v. State (Tex. Crim. App.) 57 S. W. 655 326
 Draughan v. Bunting, 31 N. C. (9 Ired. L.) 13 742
 Drew v. Hagerty, 81 Me. 231, 3 L. R. A. 290, 10 Am. St. Rep. 255, 17 Atl. 63 815
 Drury v. Defontaine, 1 Taunt. 131 685
 Duane v. McDonald, 41 Conn. 517 94
 Dubols v. Spinks, 114 Cal. 289, 46 Pac. 95 945
 Ducat v. Chicago, 48 Ill. 172, 95 Am. Dec. 529 782
 v. Chicago, 10 Wall. 410, 19 L. ed. 972 782
 Duckett v. National Mechanics Bank, 86 Md. 400, 39 L. R. A. 84, 63 Am. St. Rep. 513, 38 Atl. 983 826
 Dueber v. Northern P. R. Co. 100 Fed. 424 336
 Duff v. Fisher, 15 Cal. 376 788
 Dugan v. State, 125 Ind. 130, 9 L. R. A. 321, 25 N. E. 171 971
 Dulton v. Shelton, 3 Cal. 207 92
 Duncan v. Findlater, 6 Clark & F. 894, 1 Rob. 911 375, 376, 379, 381
 v. Jaudon, 15 Wall. 165, 21 L. ed. 142 826
 Dunlith & D. Bridge Co. v. Dubuque County, 55 Iowa, 558, 8 N. W. 443, 962 965
 Dunlop v. Monroe, 7 Cranch, 242, 3 L. ed. 329 405
 Dunne v. Deery, 40 Iowa, 251 675
 Dunnington v. Elston, 101 Ind. 373 423
 Durant v. Lexington Coal Min. Co. 97 Mo. 62, 10 S. W. 484 59
 Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528 528
 Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696 82
 Dustan v. McAndrew, 44 N. Y. 72 788
 Dustin v. Newcomer, 8 Ohio, 49 977
 Dwyer v. Gulf, C. & S. F. R. Co. 69 Tex. 707, 7 S. W. 504 721
 Dyer v. Erie R. Co. 71 N. Y. 228 726

E.

- Earp v. Lee, 71 Ill. 195 234
 Eastland v. Burchell, 18 Am. L. Reg. N. S. 412 541
 Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147 679
 v. Lyon, 3 Ves. Jr. 690 119
 E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747 385
 Eberle v. Mehrbach, 55 N. Y. 682 688
 E. Carver Co. v. Manufacturers' Ins. Co. 6 Gray, 214 394, 395
 Eck v. Hoffman, 55 Cal. 501 92
 Eckert v. Long Island R. Co. 48 N. Y. 602, 3 Am. Rep. 721 135
 Edsall v. Brooks, 17 Abb. Pr. 221 989
 Edwards v. Atlantic Coast Line R. Co. 129 N. C. 78, 39 S. E. 730, 132 N. C. 101, 43 S. E. 585 902
 v. Peterson, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936 606
 v. San Jose Printing & Pub. Soc. 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128 988
 Edwards Case. See EDWARDS v. PETERSON.
 Eldenmuller v. Eldenmuller, 37 Cal. 364 338
 Eldman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515 781
 Elghmy v. Union P. R. Co. 93 Iowa, 538, 27 L. R. A. 296, 61 N. W. 1056 376
 Eight-Hour Law, Re, 21 Colo. 29, 39 Pac. 328 64
 Ellenbecker v. District Court, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424 79
 Eldridge v. Hill, 2 Johns. Ch. 281 913
 Electron, The, 21 C. C. A. 12, 45 U. S. App. 16, 74 Fed. 689 295
 Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 865, 45 L. ed. 865, 21 Sup. Ct. Rep. 270 831, 885
 886 890
 Ellis v. Kansas City, St. J. & C. B. R. Co. 63 Mo. 131, 21 Am. Rep. 430 819
 Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140 810
 Ely v. Davis, 111 N. C. 24, 15 S. E. 878 829
 Elyton Land Co. v. South & North Ala. R. Co. 95 Ala. 647, 10 So. 274 571
 Emery v. Boston Marine Ins. Co. (1885) 138 Mass. 398 394
 v. Lawrence, 8 Cush. 151 605
 Emmerson v. Fay, 94 Va. 60, 26 S. E. 386, 452, 453 454
 Engel v. Fitch, L. R. 3 Q. B. 314, Affirmed in L. R. 4 Q. B. 659, 10 Beat & S. 738, 33 L. J. Q. B. N. S. 304, 17 Week. Rep. 894 976
 Englewood Connecting R. Co. v. Chicago & E. I. R. Co. 117 Ill. 611, 6 N. E. 684 577
 English v. Spokane Commission Co. 6 C. C. A. 416, 15 U. S. App. 218, 57 Fed. 454 82
 Eppright v. Kaufman, 90 Mo. 25, 1 S. W. 736 930
 Equitable L. Ins. Co. v. Hazlewood, 75 Tex. 338, 7 L. R. A. 217, 16 Am. St. Rep. 893, 12 S. W. 621 166
 Eureka City v. Wilson, 15 Utah, 53, 48 Pac. 41, 15 Utah, 67, 62 Am. St. Rep. 904, 48 Pac. 150 774
 Evans v. Foster, 80 Wis. 509, 14 L. R. A. 117, 50 N. W. 410 675
 Evanston v. Gunn, 99 U. S. 660, 25 L. ed. 306 158
 Evansville & T. H. R. Co. v. Griffin 100 Ind. 221, 50 Am. Rep. 783 292
 Everett v. Council Bluffs, 46 Iowa, 66 682
 Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760 988
 Exline v. Sargent, 23 Ohio C. C. 180 525
- Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co. 117 N. C. 579, 29 L. R. A. 700, 53 Am. St. Rep. 606, 23 S. E. 43 935
 Farnsworth v. Storrs, 5 Cush. 412 991
 Farthing v. Rochelle, 131 N. C. 563, 43 S. E. 1 684, 688
 Faust v. Passenger R. Co. 3 Phila. 166 568
 Fecheimer v. Robertson, 53 Ark. 101, 13 S. W. 423 371
 Felch v. Gilman, 22 Vt. 38 679
 Felton v. Aubrey, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350 292
 Ferguson v. Josey, 70 Ark. 94, 66 S. W. 345 79
 v. Wright, 113 N. C. 537, 18 S. E. 691 928
 Ferrin v. Myrick, 41 N. Y. 315 675
 Field v. New York, 6 N. Y. 187, 57 Am. Dec. 435 605
 v. Western Springs, 181 Ill. 186, 54 N. E. 929 913
 Fife, Re, 109 Fed. 880 796
 Fildew v. Bealey, 42 Mich. 100, 36 Am. Rep. 433, 3 N. W. 278 120
 Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 514 175
 First Nat. Bank v. Alexander, 85 N. C. 352, 39 Am. Rep. 702 740
 v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629 297
 v. Hirschowitz (Fla.) 35 So. 22 109
 v. Kentucky, 9 Wall. 353, 19 L. ed. 701 297
 First Presby. Congregation v. Smith, 163 Pa. 581, 26 L. R. A. 504, 43 Am. St. Rep. 808, 30 Atl. 279 632
 Fishburne v. Engledove, 91 Va. 548, 22 S. E. 354 451
 Fisher v. Board of Trade, 80 Ill. 85 94
 v. McGirr, 1 Gray, 1, 61 Am. Dec. 381 614
 Flak v. Atty. Gen. L. R. 4 Eq. 521 230
 Fitch v. Cornell, 1 Sawy. 156, Fed. Cas. No. 4,834 793
 Fitchburg R. Co. v. Boston & M. R. Co. 3 Cush. 58 635
 Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269 871
 Fitzgerald v. Andrews, 15 Neb. 52, 17 N. W. 370 688
 FitzSimons & C. Co. v. Braun, 109 Ill. 390, 59 L. R. A. 421, 65 N. E. 249 658
 Flavell's Case, 8 Watts & S. 197 766
 Fleming v. Graham, 110 N. C. 374, 14 S. E. 922 684
 Fletcher v. New Orleans & N. E. R. Co. 19 Fed. 731 788
 Flureau v. Thornhill, 2 Wm. Bl. 1078 976
 977 978
 Flynn v. Louisville R. Co. 110 Ky. 662, 62 S. W. 15 127
 Fogel v. Brubaker, 122 Pa. 7, 15 Atl. 692 82
 Follman v. Mankato, 35 Minn. 522, 59 Am. Rep. 340, 29 N. W. 317 728
 Forbes v. Boston & L. R. Co. 133 Mass. 157 722
 Ford v. Delta & P. Land Co. 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230 575
 v. French, 72 Mo. 250 799
 v. Surget, 97 U. S. 594, 24 L. ed. 1018 205
 Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87 675
 Fortesque v. Crawford, 105 N. C. 29, 10 S. E. 910 688
 Ft. Smith v. Dodson, 51 Ark. 447, 4 L. R. A. 252, 14 Am. St. Rep. 62, 11 S. W. 687 761
 Fortune v. Watkins, 94 N. C. 304 684
 Foster v. Hackett, 112 N. C. 546, 17 S. E. 426 928
 v. Jackson (1016) Hobart, 52a 243
 v. Jones, 79 Va. 642, 52 Am. Rep. 637 704
 v. Metts, 55 Miss. 77, 80 Am. Rep. 504 405
 v. Wooten, 67 Miss. 540, 7 So. 501 688
 Francis v. Flinn, 118 U. S. 385, 30 L. ed. 165, 6 Sup. Ct. Rep. 1148 873
 v. Weaver, 76 Md. 457, 25 Atl. 413 80
 Frank v. Hicks, 4 Wyo. 502, 35 Pac. 483 416
- Falkner v. Guflid, 10 Wis. 564 976
 Falls v. Gamble, 66 N. C. 455 926
 Farmers' & M. Nat. Bank v. Hazeltine, 78 N. Y. 104, 34 Am. Rep. 518 721
 Farmers' Bank v. Hunt, 124 N. C. 171, 32 S. E. 546 734
 65 L. R. A.

F.

| | | | |
|---|----------|---|---------------|
| Fraternal Mystic Circle v. State, 61 Ohio St. 628, 76 Am. St. Rep. 446, 48 N. E. 940 | 94 | Gibson v. Megrew, 154 Ind. 273, 48 L. R. A. 362, 56 N. E. 674 | 519 |
| Frazier v. Brown, 12 Ohio St. 294 | 860 | v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578 | 635, 636 |
| Freche, Re, 109 Fed. 620 | 525 | Gilbert v. Moline Water Power & Mfg. Co. 19 Iowa, 319 | 962, 963, 967 |
| Freeman v. State, 40 Tex. Crim. Rep. 545, 46 S. W. 641, 51 S. W. 230 | 319 | v. Moose, 104 Pa. 74, 49 Am. Rep. 570 | 166 |
| Frenkel v. Hudson, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758 | 799 | v. Trinity House, L. R. 17 Q. B. Div. 795, 56 L. J. Q. B. N. S. 85, 35 Week. Rep. 30 | 378 |
| Fresno Street R. Co. v. Southern P. R. Co. 135 Cal. 202, 67 Pac. 773 | 943 | Gilchrist v. Middleton, 107 N. C. 663, 12 S. E. 85 | 928 |
| Frorer v. People, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395 | 594, 605 | Gillam v. Life Ins. Co. 121 N. C. 369, 28 S. E. 470 | 739 |
| Frost v. Knight, L. R. 7 Exch. 112, 41 L. J. Exch. N. S. 78, 26 L. T. N. S. 77, 20 Week. Rep. 471 | 306 | Gilleland v. Louisville & N. R. Co. 119 Ga. 789, 47 S. E. 336 | 436 |
| Frue v. Houghton, 6 Colo. 318 | 788, 789 | Gillett v. Warren (N. M.), 62 Pac. 975 | 789 |
| Fulcher's Case, 28 Tex. App. 465, 13 S. W. 750 | 319 | Gilliam v. Perkinson, 4 Rand. (Va.) 325 | 103 |
| Fulgum v. Nashville, 8 Lea, 635 | 948 | Gillott v. Easterbrook, 48 N. Y. 374, 8 Am. Rep. 553 | 887 |
| Fuller v. Huff, 51 L. R. A. 832, 48 C. C. A. 453, 104 Fed. 141 | 886 | Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721 | 58 |
| Fuller's Case, 114 N. C. 885, 10 S. E. 797 | 716 | Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675 | 380, 381 |
| Funk v. Haldeman, 53 Pa. 229 | 213 | Glendon Iron Co. v. Uhler, 75 Pa. 467, 15 Am. Rep. 599 | 882, 885 |
| G. | | Glover v. Cheatham, 19 Mo. App. 656 | 687 |
| Gaddis v. Howell, 31 N. J. L. 313 | 945 | Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354 | 594 |
| Gagnier v. Fargo, 11 N. D. 73, 88 N. W. 1030 | 236 | Goddard, Re, 16 Pick. 504, 28 Am. Dec. 259 | 435 |
| Gaines v. Waters, 64 Ark. 609, 44 S. W. 353 | 80 | Goldsmitth v. Joy, 61 Vt. 488, 4 L. R. A. 500, 15 Am. St. Rep. 923, 17 Atl. 1010 | 863 |
| Gale v. Dean, 20 Ill. 320 | 978 | Golinsky v. Allison, 114 Cal. 458, 46 Pac. 295 | 421 |
| Gallagher v. Waring, 9 Wend. 20 | 82 | Gooch v. Association for Relief of Aged Indigent Females, 109 Mass. 558 | 377 |
| Galveston v. Barbour, 62 Tex. 175, 50 Am. Rep. 519 | 321 | Goodwin v. Welsh (1610) Yelv. 152 | 244 |
| Gangwere, Re, 14 Pa. 417, 53 Am. Dec. 554 | 688 | Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166 | 885, 890 |
| Gardiner v. Gray, 4 Campb. 144, 16 Revised Rep. 764 | 82 | Gordon v. Longest, 16 Pet. 97, 10 L. ed. 900 | 441 |
| Gardner, Re, L. R. 20 Q. B. Div. 249, 57 L. J. Q. B. N. S. 149, 58 L. T. N. S. 119, 36 Week. Rep. 142, 5 Morrell, 1 | 110 | Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 234 | 750 |
| Garland, Ex parte, 4 Wall. 333, 18 L. ed. 366 | 709, 712 | Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554 | 789 |
| Garner's Case, 3 Gratt. 655 | 971 | Gorrell v. Greensboro Water Supply Co. 124 N. C. 328, 46 L. R. A. 513, 70 Am. St. Rep. 598, 32 S. E. 720 | 723, 741 |
| Garrett v. T. H. Garrett & Co. 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472 | 885, 886 | Gorton v. Brown, 27 Ill. 489, 81 Am. Dec. 245 | 829 |
| Garrison v. Rudd, 19 Ill. 558 | 804 | Goshen v. Myers, 119 Ind. 196, 21 N. E. 657 | 190 |
| Garvin v. Watkins, 29 Fla. 151, 10 So. 818 | 109 | Gosline v. Place, 32 Pa. 520 | 209 |
| Gastonia v. McEntee-Peterson Engineering Co. 131 N. C. 363, 42 S. E. 858 | 741 | Gott v. Powell, 41 Mo. 418 | 423 |
| Gates v. Chicago, B. & Q. R. Co. 42 Neb. 379, 60 N. W. 583 | 721 | Gottschalk v. Lincoln & N. W. R. Co. 14 Neb. 389, 15 N. W. 695 | 577 |
| v. Latta, 117 N. C. 189, 53 Am. St. Rep. 584, 23 S. E. 173 | 663 | Gould v. Wise, 18 Nev. 254, 3 Pac. 30 | 56 |
| Gatewood v. Tomlinson, 113 N. C. 312, 18 S. E. 318 | 684, 685 | Govan v. Jackson, 32 Ark. 553 | 79, 80 |
| Gault v. Wallis, 53 Ga. 675 | 871 | Graetz v. McKenzie, 3 Wash. 194, 28 Pac. 331 | 335, 336 |
| Gay v. Boston & A. R. Co. 141 Mass. 407, 6 N. E. 236 | 289 | v. McKenzie, 9 Wash. 696, 35 Pac. 377 | 663 |
| Geer v. Putnam, 10 Mass. 312 | 687 | Graham v. Boston, H. & E. R. Co. 118 U. S. 161, 39 L. ed. 196, 6 Sup. Ct. Rep. 1009 | 922 |
| Genesee Salt Co. v. Burnap, 20 C. C. A. 27, 43 U. S. App. 243, 73 Fed. 818 | 886 | v. Western U. Teleg. Co. 109 La. 1071, 34 So. 92 | 670 |
| George v. Surrey, Moody & M. 516 | 103 | Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679 | 87, 127, 663 |
| Georgia R. & Bkg. Co. v. Clarke, 97 Ga. 708, 25 S. E. 368 | 437 | Granger v. Singleton, 32 La. Ann. 898 | 792 |
| Gerard v. McCormick, 130 N. Y. 266, 14 L. R. A. 234, 29 N. E. 115 | 826 | Grant v. Secretary of State, 8 English Ruling Cases, 266 | 705 |
| Germania Bank v. Michaeland, 62 Minn. 459, 30 L. R. A. 286, 54 Am. St. Rep. 653, 65 N. W. 70 | 675 | Graves v. Berdan, 26 N. Y. 498 | 299 |
| German Ins. Co. v. Fairbank, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711 | 176 | v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536 | 678, 775 |
| v. York, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586 | 175 | Gray v. Bennett, 3 Met. 522 | 110 |
| Gerst v. Jones, 32 Gratt. 518, 34 Am. Rep. 773 | 82 | v. Blanchard, 8 Pick. 284 | 515 |
| Getz v. Philadelphia & R. R. Co. 103 Pa. 547 | 300 | v. Chicago, M. & St. P. R. Co. 189 Ill. 400, 59 N. E. 950 | 516 |
| Gibbs & S. Mfg. Co. v. Brucker, 111 U. S. 597, 28 L. ed. 534, 4 Sup. Ct. Rep. 572 | 688 | v. Johnston, L. R. 3 H. L. 1, 16 Week. Rep. 842 | 825 |
| Gibney v. Lewis, 68 Conn. 392, 36 Atl. 799 | 94 | v. Puller, 5 Best & S. 970, 34 L. J. Q. B. N. S. 265, 11 L. T. N. S. 569, 13 Week. Rep. 257 | 749 |
| v. State, 137 N. Y. 1, 19 L. R. A. 365, 33 Am. St. Rep. 690, 33 N. E. 142 | 132, 133 | v. Trafton, 12 Mart. (La.) 702 | 600 |
| Gibson v. Cranage, 39 Mich. 49, 33 Am. Rep. 351 | 787 | v. Williams, 21 L. R. A. 597 | 257 |
| 65 L. R. A. | | | |

| | | | |
|--|---------------|--|----------|
| Green v. Van Buskirk, 7 Wall. 139, 19 L. ed. 109 | 368 | Hargrove v. Adcock, 111 N. C. 166, 16 S. E. 16 | 688 |
| Greer v. Louisville & N. R. Co. 94 Ky. 169, 42 Am. St. Rep. 345, 21 S. W. 649 | 128 | Harkrader v. Wadley, 172 U. S. 148, 48 L. ed. 399, 19 Sup. Ct. Rep. 119 | 871 |
| Gregg v. Sanford, 24 Ill. 17, 78 Am. Dec. 719 | 606 | Harper v. Carroll, 66 Minn. 487, 69 N. W. 610 | 796 |
| Gregory v. Bullock, 120 N. C. 260, 26 S. E. 820 | 735 | Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451 | 292 |
| Grey v. Willoughby (1595) F. Moore, 465, pl. 657 | 243 | Harrington v. Los Angeles R. Co. 140 Cal. 514, 63 L. R. A. 238, 98 Am. St. Rep. 85, 74 Pac. 15 | 87 |
| Gridley v. Bloomington, 88 Ill. 554, 30 Am. Rep. 566 | 435 | v. Watson, 11 Ore. 143, 50 Am. Rep. 465, 3 Pac. 173 | 299 |
| Griffin v. Richardson, 33 N. C. (11 Ired. L.) 439 | 926 | Harris v. Haynes, 34 Vt. 220 | 330 |
| Griswold v. Boston & M. R. Co. 183 Mass. 434, 67 N. E. 354 | 292 | Harrison v. Bush, 5 Bl. & Bl. 345, 25 L. J. Q. B. N. S. 25, 1 Jur. N. S. 846, 3 Week. Rep. 474 | 985 |
| Gross v. Heckert (Wis.) 97 N. W. 952 | 978 | v. Harrison, 20 Ala. 629, 56 Am. Dec. 227 | 817 |
| Gudger v. Richmond & D. R. Co. 43 Am. & Eng. R. Cas. p. 606, and note, 106 N. C. 481, 11 S. E. 515 | 570, 572 | v. Maynard, M. & Co. 10 C. C. A. 17, 26 U. S. App. 99, 61 Fed. 689 | 876, 877 |
| Guiteau v. Wisely, 47 Ill. 433 | 422 | Hart v. Roney, 93 Md. 432, 49 Atl. 661 | 315 |
| Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255 | 40 | Hartford v. Hartford Street R. Co. 74 Conn. 194, 50 Atl. 393 | 94 |
| v. Morris, 67 Tex. 700, 4 S. W. 156 | 575 | Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 64 Am. St. Rep. 38, 50 N. E. 178 | 218 |
| Gulick v. Ward, 10 N. J. L. 87, 18 Am. Dec. 389 | 514 | Hartford F. Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115 | 175 |
| Gunn v. Felton, 108 Ky. 565, 57 S. W. 15 | 127 | Hartford Sorghum Mfg. Co. v. Brush, 43 Vt. 528 | 787 |
| Gut v. Minnesota, 9 Wall. 35, 19 L. ed. 573 | 768 | Hartshorn v. Chaddock, 135 N. Y. 116, 17 L. R. A. 426, 31 N. E. 997 | 634 |
| H. | | v. Shoe & Leather Dealers' Ins. Co. 15 Gray, 240 | 394 |
| Haas v. Missionary Soc. 6 Misc. 281, 26 N. Y. Supp. 868 | 377 | Hartzell v. Crumb, 90 Mo. 629, 3 S. W. 59 | 976 |
| Hadley v. Baxendale, 9 Exch. 341, 23 L. J. Exch. N. S. 179, 2 C. L. Rep. 517, 18 Jur. 358, 2 Week. Rep. 302 | 671 | Harvey v. Johnson, 138 N. C. 352, 45 S. E. 644 | 716 |
| Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663 | 340, 341 | Haskell, Ex parte, 112 Cal. 412, 32 L. R. A. 527, 44 Pac. 725 | 948 |
| Hagerty v. State, 55 Ohio St. 613, 45 N. E. 1046 | 782 | Hatch v. Leonard, 165 N. Y. 435, 59 N. E. 270 | 535 |
| Haldeman v. Davis, 28 W. Va. 324 | 617 | Haugen v. Chicago, M. & St. P. R. Co. 3 S. D. 394, 53 N. W. 769 | 156 |
| Hale v. Haddon, 37 C. C. A. 240, 95 Fed. 747 | 795, 796, 797 | Hawver v. Whalen, 49 Ohio St. 69, 14 L. R. A. 828, 29 N. E. 1049 | 750 |
| Hall v. Delaphine, 5 Wis. 206, 68 Am. Dec. 57 | 978 | Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279 | 657, 663 |
| v. School District No. 10, 24 Mo. App. 213 | 117 | Hayes v. Bickerstaff, Vaughan, 118 v. Stearns, 130 Mich. 292, 89 N. W. 947 | 557 |
| v. Smith, 2 Bing. 156, 9 J. B. Moore, 226, 2 L. J. C. P. 113 | 375, 376 | Haynes v. Second Baptist Church, 88 Mo. 285, 57 Am. Rep. 413 | 117 |
| v. Stone (1722) 1 Strange, 515 | 245 | Hazard v. Day, 14 Allen, 487, 92 Am. Dec. 790 | 687 |
| Halle v. Einstein, 34 Fla. 589, 16 So. 554 | 109 | Hazlehurst v. Freeman, 52 Ga. 245 | 566 |
| Haltiwanger v. Columbia N. & L. R. Co. 64 S. C. 7, 41 S. E. 810 | 290 | Health Department v. Trinity Church, 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579, 39 N. E. 833 | 60 |
| Hamaker v. Blanchard, 90 Pa. 377, 35 Am. Rep. 664 | 528 | Hearns v. Waterbury Hospital, 66 Conn. 98, 31 L. R. A. 224, 33 Atl. 595 | 379 |
| Hamilton v. Barricklow, 96 Ind. 398 | 742 | Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. 35 L. R. A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 294 | 385 |
| v. Eno, 81 N. Y. 126 | 988, 989 | Hedrick v. Hedrick, 128 Ind. 522, 26 N. E. 768 | 333 |
| v. St. Louis County Ct. 15 Mo. 5 | 766 | v. Ilwaco R. & Nav. Co. 4 Wash. 400, 80 Pac. 714 | 335, 336 |
| Hamline v. Southern R. Co. 76 Miss. 417, 25 So. 295 | 566 | Hellman v. Union Canal Co. 37 Pa. 100 | 789 |
| Hammerstein v. Parsons, 38 Mo. App. 332 | 519 | Hellams v. Abercrombie, 15 S. C. 110, 40 Am. Rep. 684 | 686 |
| Hammett v. Blount, 1 Swan, 385 | 927 | Heller & M. Co. v. Shaver, 102 Fed. 882 | 880 |
| Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490 | 977 | Heim, Ex parte, 143 Cal. 553, 77 Pac. 453 | 947 |
| Hancock v. Franklin Ins. Co. 114 Mass. 156 | 607 | Hemsley v. Myers, 45 Fed. 288 | 872 |
| v. Yaden, 121 Ind. 366, 6 L. R. A. 576, 16 Am. St. Rep. 396, 23 N. E. 253 | 602 | Hendershot v. Western U. Teleg. Co. 106 Iowa, 529, 68 Am. St. Rep. 313, 76 N. W. 828 | 671 |
| Hankinson v. Charlotte, C. & A. R. Co. 41 S. C. 1, 19 S. E. 206 | 290 | Henderson v. Kentucky C. R. Co. 86 Ky. 389, 5 S. W. 875 | 336 |
| Hanley v. Sutherland (1882) 74 Me. 212 | 249 | Hendricks v. Western U. Teleg. Co. 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543 | 670 |
| Hannah v. Carrington, 18 Ark. 105 | 372 | Hennen, Ex parte, 13 Pet. 230, 10 L. ed. 138 | 701 |
| Hannibal & St. J. R. Co. v. Huse, 95 U. S. 465, 24 L. ed. 527 | 62 | Re, 13 Pet. 230, 10 L. ed. 138 | 714 |
| Hansen v. Southern P. Co. 105 Cal. 379, 38 Pac. 957 | 292 | Hennessey v. Woolworth, 128 U. S. 438, 32 L. ed. 500, 9 Sup. Ct. Rep. 109 | 683 |
| Hanson v. Davison, 73 Minn. 454, 76 N. W. 254 | 795, 796, 798 | | |
| v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215 | 189 | | |
| Harblson v. Knoxville Iron Co. 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682, 53 S. W. 955 | 595 | | |
| Hardaker v. Idle District [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196 | 749 | | |
| 65 L. R. A. | | | |

| | | | |
|---|--|--|---------------|
| Henschel, Re, 51 C. C. A. 277, 113 Fed. 443 | 797 | Horacek v. Keebler, 5 Neb. 355 | 688 |
| Herbert v. Waters, 1 Salk. 205, 1 Ld. v. Raym. 59, 12 Mod. 85 | 244 | Hornbeck v. State, 35 Ohio, St. 277, 35 Am. Rep. 608 | 822 |
| Hertlot's Hospital v. Ross, 12 Clark & F. 507 | 378 | Horner v. Graves, 7 Bing. 735, 5 Moore & P. 788, 9 L. J. C. P. 192 | 346, 347, 422 |
| Hervey v. Rhode Island Locomotive Works, 93 U. S. 684, 23 L. ed. 1003 | 368 | v. Zimmerman, 45 Ill. 14 | |
| Hewitt v. Mantell (1768) 2 Wils. 372 | 245 | Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403 | 781, 782 |
| Heydon's Case (1813) 11 Coke 5 | 245 | Hosea v. Jacobs, 98 Mass. 65 | 229 |
| Hey Sing Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 115 | 614 | Hottinger v. New Orleans, 42 La. Ann. 629, 8 So. 575 | 913 |
| Hibbard v. Newman, 2 Baxt. 285 | 300 | Houfe v. Fulton, 34 Wis. 608, 17 Am. Rep. 463 | 190 |
| Hickey v. Cochina, 133 Cal. 81, 65 Pac. 313 | 945 | Hougan v. Milwaukee & St. P. R. Co. 35 Iowa, 558, 14 Am. Rep. 502 | 567 |
| Hicks v. Parham, 3 Hayw. 226, 9 Am. Dec. 745 | 300 | House Bill No. 107, Re, 21 Colo. 32, 39 Pac. 431 | 64 |
| Higgins v. Scott, 2 Barn. & Ad. 413, 0 L. J. K. B. 262 | 607 | Houston & T. C. R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 119 | 721 |
| v. Southern R. Co. 98 Ga. 751, 25 S. E. 837 | 441 | Howard v. Southern R. Co. 122 N. C. 944, 29 S. E. 778 | 918 |
| High Bridge Lumber Co. v. United States, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 320 | 635 | v. Union Traction Co. 195 Pa. 391, 45 Atl. 1076 | 294 |
| Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332 | 375 | Hoyt v. Jeffers, 30 Mich. 181 | 557 |
| v. Wentworth, 28 Vt. 428 | 330 | Hudson v. Granger, 5 Barn. & Ald. 27, 24 Revised Rep. 268 | 824 |
| v. Winsor, 118 Mass. 251 | 901 | Hughes v. Auburn, 161 N. Y. 96, 46 L. R. A. 636, 55 N. E. 389 | 819 |
| Hillard v. Richardson, 3 Gray, 349, 63 Am. Dec. 743 | 453, 454 | v. Hodges, 102 N. C. 236, 9 S. E. 437 | 684, 685, 793 |
| Hinckley v. Franklin, 69 N. H. 614, 45 Atl. 643 | 680 | v. Walker, 14 Or. 481, 13 Pac. 450 | |
| Hinkle v. Hinkle, 55 Ark. 583, 18 S. W. 1049 | 79 | v. Wheeler, 76 Cal. 230, 18 Pac. 386 | 793 |
| Hochster v. De La Tour, 2 El. & Bl. 678, 22 L. J. Q. B. N. S. 456, 17 Jur. 972, 1 Week. Rep. 409 | 306 | Hunt v. Boonville, 65 Mo. 620, 27 Am. Rep. 299 | 160 |
| Hodges v. Western U. Teleg. Co. 72 Miss. 912, 29 L. R. A. 770, 18 So. 84 | 566, 568, 583 | v. Loucks, 38 Cal. 382, 99 Am. Dec. 404 | 422 |
| Hoe v. Knap, 27 Fed. 204 | | v. Lowell Gaslight Co. 8 Allen, 169, 85 Am. Dec. 697 | 820 |
| Hoke v. Henderson, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677 | 699, 700, 701, 702, 703, 706, 707, 709, 710, 711, 712, 713, 714, 715, 716, 717 | v. Pownall, 9 Vt. 411 | 566 |
| Holden v. Hardy, 189 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383 | 39, 65, 69 | Huntress, The, 2 Ware, 89, Fed. Cas. No. 6,914 | 766 |
| Holderbaugh v. Turpin, 75 Ind. 84, 39 Am. Rep. 124 | 675 | Hurd v. Curtis, 19 Pick. 459 | 804 |
| Holdfast v. Shepard, 28 N. C. (6 Ired. L.) 361 | 927 | Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248 | 405 |
| Holland v. Bartch, 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83 | 236 | v. Planters' Nat. Bank, 130 N. C. 285, 41 S. E. 487 | 740 |
| v. Duluth Iron Min. & Development Co. 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50 | 795 | Hutchinson v. Ulrich, 145 Ill. 342, 21 L. R. A. 391, 34 N. E. 556 | 515 |
| Holliday v. National Teleph. Co. [1899] 2 Q. B. 392, 68 L. J. Q. B. N. S. 1016, 81 L. T. N. S. 252, 47 Week. Rep. 658 | 749 | Hutton v. Dewing, 42 W. Va. 691, 26 S. E. 197 | 349 |
| v. St. Leonard, 11 C. B. N. S. 192, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. Rep. 694 | 380 | | |
| Hollingsworth v. Barbour, 4 Pet. 475, 7 L. ed. 926 | 760 | I. | |
| Holly v. Boston Gaslight Co. 8 Gray, 123, 69 Am. Dec. 233 | 820 | Illinois C. R. Co. v. Arnola, 78 Miss. 787, 84 Am. St. Rep. 645, 29 So. 768 | 292 |
| v. Southern R. Co. 119 Ga. 767, 47 S. E. 188 | 436 | v. Dick, 91 Ky. 434, 15 S. W. 665 | 127 |
| Holmes v. Holmes, 29 N. J. Eq. 9 | 333 | v. Hilliard, 99 Ky. 684, 37 S. W. 75 | 128 |
| Holst v. State, 23 Tex. App. 1, 59 Am. Rep. 770, 3 S. W. 757 | 321, 322 | v. Mahan, 17 Ky. L. Rep. 1200, 34 S. W. 16 | 126 |
| Holtzman v. United States, 14 App. D. C. 454, 27 Wash. L. Rep. 385 | 432 | Illinois Watch Case Co. v. Elgin Nat. Watch Co. 35 C. C. A. 237, 94 Fed. 667 | 885, 890 |
| Holyoke Bank v. Goodman Paper Mfg. Co. 9 Cush. 576 | 795 | Independence v. Slack, 134 Mo. 66, 34 S. W. 1004 | 750 |
| Home F. Ins. Co. v. Bertstein, 55 Neb. 260, 75 N. W. 839 | 176 | Indiana Nat. Bank v. Colgate, 4 Daly, 41 | 721 |
| Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365 | 920 | Indianapolis & St. L. R. Co. v. Vance, 96 U. S. 450, 24 L. ed. 752 | 922 |
| Homer v. Brown, 16 How. 354, 14 L. ed. 370 | 439 | Ingram v. State (Tex. Crim. App.) 43 S. W. 518 | 319 |
| Hood v. Fahnestock, 8 Watts, 489, 34 Am. Dec. 489 | 799 | Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653 | 127 |
| Hooper v. Pope (1626) 1 Arch. 223 | 244 | Inman v. Tripp, 11 R. I. 520, 23 Am. Rep. 520 | 253-256 |
| Hoover v. Haynes, 65 Neb. 557, 91 N. W. 392, 93 N. W. 732 | 670 | Inman Case. See INMAN v. TRIPP. | |
| Hopkins v. Grazebrook, 6 Barn. & C. 31, 9 Dowl. & R. 22, 5 L. J. K. B. 65 | 976 | Iowa v. Illinois, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239 | 962 |
| v. Ladd (1864) 35 Ill. 178 | 249 | Ireland's Case (1594) Cro. Ellz. pt. 10, p. 339 | 243 |
| 65 L. R. A. | | Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 4 L. R. A. 622, 11 S. W. 705 | 636 |
| | | Irving v. Ford, 179 Mass. 216, 60 N. E. 491 | 181 |
| | | Irwin v. Askew, 74 Ga. 581 | 978 |
| | | J. | |
| | | Jackson v. Jackson, 39 N. Y. 153 | 108 |

| | | | |
|--|-----|--|---------|
| Jackson v. Phillips, 14 Allen, 539 | 377 | Kellogg v. Larkin, 3 Pinney (Wis.) 123, 3 Chand. (Wis.) 133, 56 Am. Dec. 164 | 515 |
| Jackson ex dem. Yates v. Hathaway, 15 Johns. 447, 8 Am. Dec. 283.. | 678 | Kellogg Bridge Co. v. Hamilton, 110 U. S. 103, 28 L. ed. 86, 3 Sup. Ct. Rep. 537 | 82 |
| Van Dusen v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330 | 103 | Kelly v. Sherlock, L. R. 1 Q. B. 686, 6 Best & S. 480, 35 L. J. Q. B. N. S. 209, 12 Jur. N. S. 937 | 940 |
| Jacksonport v. Watson, 33 Ark. 704 | 192 | Kemmler, Re, 136 U. S. 448, 34 L. ed. 519, 10 Sup. Ct. Rep. 930 | 613 |
| Jacobs, Re, 98 N. Y. 110, 50 Am. Rep. 636 60, 67, 313, 314, 594 | 30 | Kendall v. Canton, 53 Miss. 526 | 703 |
| Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494 | 372 | v. Hathaway, 67 Vt. 122, 30 Atl. 859 | 329 |
| Jaffrey v. Mathews, 120 Mo. 317, 25 S. W. 187 | 870 | Kendrick v. State, Cooke (Tenn.) 474 | 708 |
| Jaques v. Weeks, 7 Watts, 261 | 212 | Kenney v. Tucker, 8 Mass. 143 | 581 |
| Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76 | 117 | Kerlin v. West, 4 N. J. Eq. 449 | 937 |
| Jarrell v. Charleston & W. C. R. Co. 58 S. C. 491, 36 S. E. 910 | 293 | Kern v. Huldekoper, 103 U. S. 485, 26 L. ed. 354 | 442 |
| Jefts v. York, 10 Cush. 392 | 810 | v. Zeigler, 13 W. Va. 707 | 345 |
| Jenkins v. Wilkinson, 107 N. C. 707, 22 Am. St. Rep. 911, 12 S. E. 630 ..732, | 740 | Kerr v. Merchants' Exch. Co. 3 Edw. Ch. 316 | 209 |
| Jerry v. Townshend, 2 Md. 274 | 768 | v. Preston, L. R. 6 Ch. Div. 463, 46 L. J. Ch. N. S. 409, 25 Week. Rep. 264 | 870 |
| Johansen v. Ilome F. Ins. Co. 54 Neb. 548, 74 N. W. 866 | 176 | Kershaw v. Kershaw, 102 Ill. 307 | 581 |
| Johnson v. Atlantic & St. L. R. Co. 35 N. H. 560, 69 Am. Dec. 560 | 681 | Kessler v. Brooklyn Heights R. Co. 3 App. Div. 426, 38 N. Y. Supp. 799 .. | 728 |
| v. Boston, 118 Mass. 114 | 463 | Keystone Mut. Ben. Asso. v. Norris, 115 Pa. 446, 2 Am. St. Rep. 572, 8 Atl. 638 | 166 |
| v. Brown, 13 Kan. 529 | 688 | Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6 | 345 |
| v. Fischer, 30 Minn. 173, 14 N. W. 799 | 705 | Kies v. Young, 64 Ark. 381, 62 Am. St. Rep. 108, 42 S. W. 660 | 74 |
| v. McKee, 27 Mich. 471 | 803 | Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1108 | 787 |
| v. Simonton, 43 Cal. 242 | 587 | King v. Brasler, 1 Leach C. L. 109, 1 East P. C. 443 | 323 |
| v. State, 76 Ga. 76 | 323 | v. Davies (1794) 5 T. R. 626, 5 Eng. Ruling Cases, 543, 2 Revised Rep. 683 | 769 |
| Johnston v. Whatcom County, 27 Wash. 95, 67 Pac. 569 | 340 | v. Dewansap, 16 East, 196 | 936 |
| Johnstone v. Milling, L. R. 16 Q. B. Div. 467, 53 L. J. Q. B. N. S. 162, 54 L. T. N. S. 629, 34 Week. Rep. 238, 50 J. P. 694 | 307 | v. Eaton (1787) 2 T. R. 81, 1 Revised Rep. 436 | 769 |
| Jolly v. Brady, 127 N. C. 142, 37 S. E. 153 .. | 936 | v. Flitch (1636) Cro. Car. 414 | 239 |
| Jones, Ex parte, L. R. 12 Ch. Div. 484, 48 L. J. Bankr. N. S. 109, 40 L. T. N. S. 790, 28 Week. Rep. 287, 44 J. P. 55 | 110 | v. Holden, 5 Barn. & Ad. 347, 2 Nev. & M. 167 | 769 |
| v. Ashford, 70 N. C. 172 | 740 | v. Hunter, 65 N. C. 603, 6 Am. Rep. 754 | 712 |
| v. Charleston & W. C. R. Co. 61 S. C. 500, 39 S. E. 758 | 292 | v. Nottingham, 4 East, 208, 1 Smith, 31 | 767 |
| v. Hough, 77 Ala. 437 | 103 | v. Russell, 4 Barn. & Ad. 576, note .. | 769 |
| v. Shaw, 15 Tex. 577 | 704 | v. Thom, 1 T. R. 489 | 675 |
| v. Singer Mfg. Co. 38 W. Va. 147, 18 S. E. 478 | 345 | v. Thomas, 4 Maule & S. 442 | 769 |
| v. Townsend, 21 Fla. 431, 58 Am. Rep. 676 | 990 | v. Townshend, 65 Hun, 567, 20 N. Y. Supp. 602, 141 N. Y. 358, 36 N. E. 513 | 793 |
| Jordan v. Benwood, 42 W. Va. 312, 36 L. R. A. 513, 57 Am. St. Rep. 859, 26 S. E. 266 | 301 | v. Wight, 155 Mass. 444, 29 N. E. 644 | 804 |
| Joyner v. Sugg, 132 N. C. 589, 44 S. E. 122 .. | 684 | Kling ex rel. Daubuz v. Penprase, 4 Barn. & Ad. 573, 1 Nev. & M. 312 .. | 769 |
| J. S. Keator Lumber Co. v. St. Croix Boom Corp. 72 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529 ..960, 961, | 965 | Kinkead, Re, 3 Blas. 405, Fed. Cas. No. 7,824 | 110 |
| 966, 968, 972 | 972 | Kinner v. Lake Shore & M. S. R. Co. 23 Ohio C. C. 204 | 144 |
| Judefind v. State, 22 L. R. A. 721, and notes, 78 Md. 510, 28 Atl. 405 .. | 687 | Kip v. New York & H. R. Co. 67 N. Y. 227 .. | 577 |
| K. | | | |
| Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548 | 307 | Kirby v. Citizens' R. Co. 48 Md. 168, 30 Am. Rep. 435 | 571 |
| Kaiser v. Waggoner, 59 Iowa, 40, 12 N. W. 754 | 742 | Kirk v. State, 1 Coldw. 344 | 768 |
| Kane v. Clough, 36 Mich. 436, 24 Am. Rep. 599 | 605 | Kirkland v. Brune, 31 Gratt. 126 | 372 |
| Kansas C. R. Co. v. Allen, 22 Kan. 285, 31 Am. Rep. 190 | 606 | Kirksey v. Fike, 27 Ala. 383, 62 Am. Dec. 768 | 789 |
| Kansas Farmer's F. Ins. Co. v. Saindon, 53 Kan. 623, 36 Pac. 983 | 578 | Klauder v. McGrath, 35 Pa. 128, 78 Am. Dec. 329 | 294 |
| Kaufman v. Hamm, 30 Mo. 388 | 176 | Kleppner v. Lemon, 197 Pa. 480, 47 Atl. 353 | 225 |
| Kavanagh v. Barber, 59 Hun, 60, 12 N. Y. Supp. 603, 131 N. Y. 211, 15 L. R. A. 689, 30 N. E. 235 | 687 | Knapp v. Knapp, 59 Fed. 641 | 817 |
| Keane v. Roberts, 4 Madd. 357, 20 Revised Rep. 306 | 819 | Knee, Ex parte, 1 Bos. & P. N. R. 148, 8 Revised Rep. 772 | 601 |
| Keator Case. See J. S. KEATOR LUMBER Co. v. ST. CROIX BOOM CORP. | 825 | Knight v. Houghtalling, 85 N. C. 17 ..738, | 739 |
| Keeler v. Keeler, 31 N. J. Eq. 190 | 330 | Knott v. Morgan, 2 Keen. 213 | 884 |
| Keeler v. Phillips, 39 N. Y. 351 | 534 | Knowlton v. Hilt, 67 N. H. 155, 30 Atl. 346 | 748 |
| Kelley v. Ohio Oil Co. 57 Ohio St. 327, 30 L. R. A. 765, 63 Am. St. Rep. 721, 49 N. E. 399 | 860 | Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 77 Fed. 501 | 774 |
| v. Rhoads, 7 Wyo. 237, 39 L. R. A. 594, 75 Am. St. Rep. 904, 51 Pac. 593 | 840 | Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1 | 62, 65, |
| 65 L. R. A. | 2 | Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558 | 828 |
| | | Kowing v. Manly, 49 N. Y. 192, 10 Am. Rep. 346 | 102 |

| | | | |
|--|-----|--|-----|
| Kramer v. Police Department, 21 Jones & S. 492 | 872 | Lewless v. Detroit, G. H. & M. R. Co. 65 Mich. 295, 32 N. W. 790 | 558 |
| Kreitz v. Behrensmeyer, 149 Ill. 496, 24 L. R. A. 59, 36 N. E. 983 | 704 | Lichenstein v. Goldsmith, 37 Fed. 359 | 880 |
| Kribben v. Haycraft, 26 Mo. 396 | 514 | Lillie v. Dunbar, 62 Wis. 198, 22 N. W. 467 | 975 |
| L. | | | |
| Lacy v. Webb, 130 N. C. 545, 41 S. E. 549 .. | 741 | Lindsey v. State, 35 Tex. Crim. Rep. 164, 32 S. W. 768 | 319 |
| Lafond v. Deems, 81 N. Y. 507 | 519 | Lingen v. Lingen, 45 Ala. 410 | 184 |
| Laing v. Colder, 8 Pa. 479, 49 Am. Dec. 533 | 217 | Lingenfeiter v. Baltimore & O. S. W. R. Co. 154 Ind. 49, 58 N. E. 1021 | 292 |
| Lake Erie & W. R. Co. v. Close, 5 Ind. App. 444, 32 N. E. 583 | 671 | Linnehan v. Sampson, 126 Mass. 506, 30 Am. Rep. 392 | 132 |
| Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357 | 633 | Linnertz v. Dorway, 175 Ill. 508, 67 Am. St. Rep. 232, 51 N. E. 809 | 516 |
| Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71 | 315 | Ll Prottil, Ex parte, 68 Cal. 635, 10 Pac. 113 | 948 |
| Lamphere v. Grand Lodge, A. O. U. W. 47 Mich. 429, 11 N. W. 268 | 94 | Listowel's Fishery, Re, Ir. Rep. 9 C. L. 46. | 760 |
| Lancaster v. Richardson, 4 Lans. 136 | 679 | Litchfield Coal Co. v. Taylor, 81 Ill. 500 .. | 59 |
| Laue v. Cotton, 1 Ld. Raym. 646 | 405 | Little v. Hackett, 116 U. S. 566, 29 L. ed. 652, 6 Sup. Ct. Rep. 391 .. | 728 |
| Langhorne v. Richmond R. Co. 91 Va. 369, 22 S. E. 159 | 294 | Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641 | 79 |
| Lansburgh v. District of Columbia, 11 App. D. C. 512 | 173 | Liverman v. Roanoke & T. River R. Co. 114 N. C. 692, 19 S. E. 64 | 721 |
| Lansing v. Russell, 3 Barb. Ch. 325 | 102 | Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 458, 32 L. ed. 798, 9 Sup. Ct. Rep. 478 | 367 |
| La Republique Francaise v. Schultz, 42 C. A. 233, 102 Fed. 154 | 831 | Live Stock D. & B. Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 390, Fed. Cas. No. 8,408 | 70 |
| Larkin v. Saginaw County, 11 Mich. 88, 82 Am. Dec. 63 | 636 | Livingston, Ex parte, 20 Nev. 289, 21 Pac. 322 | 63 |
| Latta v. Williams, 87 N. C. 126 | 170 | Lockett v. Ft. Worth & R. G. R. Co. 78 Tex. 211, 14 S. W. 564 | 819 |
| Laubheim v. De Koningslyke Nederlandsche S. B. Maatschappij, 107 N. Y. 228, 1 Am. St. Rep. 815, 13 N. E. 781 | 376 | Lockhart v. Litchenthaler, 46 Pa. 151 .. | 728 |
| Laugher v. Pointer, 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L. J. K. B. 309 | 631 | Locklear v. Bullard, 133 N. C. 260, 45 S. E. 580 | 928 |
| Lavalle v. Société St. Jean Baptiste, 17 R. I. 980, 16 L. R. A. 392, 24 Atl. 467 | 94 | Loehner v. Home Mut. Ins. Co. 17 Mo. 247. | 176 |
| Lavin v. Emigrant Industrial Sav. Bank, 18 Blatchf. 224, 1 Fed. Rep. 641 | 760 | Lohman v. State, 81 Ind. 17 | 171 |
| Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396 | 886 | Long v. Linn, 71 Ill. 152 | 157 |
| Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813, 23 N. E. 878 | 615 | v. Little, 119 Ill. 600, 8 N. E. 194 .. | 173 |
| v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, 500, 501 | 619 | v. State, 74 Md. 585, 12 L. R. A. 425, 28 Am. St. Rep. 268, 22 Atl. 4 .. | 323 |
| Leavenworth v. Haich, 57 Kan. 57, 57 Am. St. Rep. 309, 45 Pac. 65 | 728 | v. State, 10 Tex. App. 186 | 321 |
| Lee v. Haley, L. R. 5 Ch. 155, 39 L. J. Ch. N. S. 284, 22 L. T. N. S. 251, 18 Week. Rep. 242 .. | 883 | Loomis v. Rockford Ins. Co. 77 Wis. 87, 8 L. R. A. 834, 20 Am. St. Rep. 96, 45 N. W. 813 | 176 |
| v. Sturges, 46 Ohio St. 153, 2 L. R. A. 556, 19 N. E. 560 | 782 | Loomis Case. See STATE v. LOOMIS. | |
| v. Union R. Co. 12 R. I. 383, 34 Am. Rep. 668 | 233 | Lopez v. State, 30 Tex. App. 487, 28 Am. St. Rep. 935, 17 S. W. 1058 .. | 323 |
| Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75 | 595 | Lord v. Goodall, N. & P. S. Co. 4 Sawy. 292, Fed. Cas. No. 8,506 | 88 |
| Lehman v. Clark, 174 Ill. 294, 43 L. R. A. 648, 51 N. E. 222 | 519 | v. Wheeler, 1 Gray, 282 | 117 |
| Lennon v. Rawltzer, 57 Conn. 583, 19 Atl. 334 | 246 | Lorillard v. Clyde, 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489 | 117 |
| Lenoir v. Valley River Min. Co. 113 N. C. 513, 18 S. E. 73 | 928 | Loring v. Thorndike, 5 Allen, 257 | 184 |
| Lepnick v. Gaddis, 72 Miss. 200, 48 Am. St. Rep. 547, 16 So. 213, and note 26 L. R. A. 688 | 292 | Loscombe v. Wintringham, 13 Beav. 87 .. | 230 |
| Lealle v. Grand Rapids, 120 Mich. 28, 78 N. W. 885 | 236 | Louisiana v. Taylor, 105 U. S. 454, 26 L. ed. 1133 | 710 |
| Lessly v. Bowle, 27 S. C. 200, 3 S. E. 199 .. | 295 | Louisville v. Louisville Water Co. 105 Ky. 754, 49 S. W. 766 | 570 |
| Lester Real Estate Co. v. St. Louis, 169 Mo., loc. cit. 234, 69 S. W. 300 | 142 | Louisville & N. R. Co. v. Ballard, 88 Ky. 159, 2 L. R. A. 694, 10 S. W. 429 | 671 |
| Letts v. Kessler, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765 | 860 | v. Barkhouse, 100 Ala. 543, 13 So. 534 | 721 |
| Levy v. Shreveport, 27 La. Ann. 620 | 871 | v. Bitterman (not yet reported) | 144 |
| Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165 .. | 989 | v. Clark, 105 Ky. 571, 49 S. W. 323 .. | 127 |
| v. Felt, 5 Johns. 1 | | v. Collins, 2 Duv. 114, 87 Am. Dec. 486 | 127 |
| v. Flint & P. M. R. Co. 54 Mich. 55, 62 Am. Rep. 790, 19 N. W. 744 | 558 | v. Davis, 14 Ky. L. Rep. 716 | 128 |
| v. State, 29 Tex. App. 201, 25 Am. St. Rep. 720, 15 S. W. 642 | 318 | v. Earl, 94 Ky. 374, 22 S. W. 607 .. | 127 |
| v. Yale, 4 Fla. 418 | 109 | v. East Tennessee, V. & G. R. Co. 9 C. C. A. 314, 22 U. S. App. 102, 60 Fed. 993 | 87 |
| Lewis's Appeal, 67 Pa. 153 | 887 | v. Hackman, 17 Ky. L. Rep. 81, 30 S. W. 407 | 127 |
| 65 L. R. A. | | v. Kentucky, 161 U. S. 977, 40 L. ed. 849, 16 Sup. Ct. Rep. 714 .. | 428 |
| | | v. Krey, 16 Ky. L. Rep. 797, 29 S. W. 869 | 127 |
| | | v. McCoy, 81 Ky. 411 | 127 |
| | | v. McGuire, 79 Ala. 395 | 719 |
| | | v. Moore, 83 Ky. 675 | 128 |
| | | v. Potts, 92 Ky. 30, 17 S. W. 185 .. | 126 |
| | | v. Robinson, 4 Bush, 507 | 127 |
| | | v. Sanders, 86 Ky. 259, 5 S. W. 563 .. | 336 |
| | | v. Schuster, 10 Ky. L. Rep. 65, 7 S. W. 874 | 127 |
| | | v. Yandell, 17 B. Mon. 598 | 127 |
| | | Louisville, C. & L. R. Co. v. Cavens, 9 Bush, 559 | 128 |
| | | v. Goetz, 79 Ky. 442, 42 Am. Rep. 227 | 127 |

| | | | |
|---|--------------------|---|----------|
| Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817. | 921 | McLane v. Abrams, 2 Nev. 199 | 56 |
| | 922 | v. Elmer, 4 Ind. 239 | 601 |
| Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39 | 189, 192 | McLaughlin v. Platti, 27 Cal. 451 | 789 |
| Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420 | 614 | McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828 | 886 |
| Luby v. Bennett, 111 Wis. 613, 56 L. R. A. 261, 87 Am. St. Rep. 897, 87 N. W. 804 | 829 | McMahan v. Morrison, 16 Ind. 172, 79 Am. Dec. 418 | 229 |
| Lucas v. Larkin, 85 Tenn. 355, 3 S. W. 647 | 688 | McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654 | 300 |
| Ludowski v. Polish Roman Catholic St. S. K. Benev. Soc. 29 Mo. App. 837 | 94 | McNairy v. Hicks, 3 Baxt. 378 | 800 |
| Luscomb v. Ballard, 5 Gray, 403, 66 Am. Dec. 375 | 675 | McNamee v. Minke, 49 Md. 122 | 829 |
| Lusk v. Sawyer, 120 N. C. 225, 27 S. E. 1007 | 713 | McNeal v. Hill, Woolw. 96, Fed. Cas. No. 8,914 | 444 |
| Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555 | 816 | Macon v. Macon & W. R. Co. 7 Ga. 221 | 575 |
| v. Lynde, 41 App. Div. 280, 58 N. Y. Supp. 567, 162 N. Y. 405, 48 L. R. A. 670, 76 Am. St. Rep. 332, 56 N. E. 979 | 817 | Mager v. Grima, 8 How. 490, 12 L. ed. 1168 | 781 |
| Lyne v. Bank of Kentucky, 5 J. J. Marsh. 545 | 799 | Mahler v. Animarium Co. 49 C. C. A. 481, 111 Fed. 530 | 888 |
| v. Western U. Teleg. Co. 123 N. C. 129, 31 S. E. 850 | 670 | Mala v. Eastern State Hospital, 97 Va. 507, 47 L. R. A. 577, 34 S. E. 617 | 377 |
| Lynn v. Baltimore & O. R. Co. 60 Md. 404, 45 Am. Rep. 741 | 787 | Main v. Alexander, 9 Ark. 112, 47 Am. Dec. 732 | 872 |
| v. Southern P. Co. 103 Cal. 7, 24 L. R. A. 710, 36 Pac. 1018 | 87 | v. Johnson, 7 Wash. 321, 35 Pac. 67 | 688 |
| | | Maine C. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836, Affirmed in 128 N. Y. 591, 28 N. E. 251 | 229 |
| | | Maisenbacher v. Society Concordia, 71 Conn. 369, 71 Am. St. Rep. 213, 42 Atl. 67 | 94 |
| | | Makepeace v. Worden, 1 N. H. 16 | 678 |
| | | Mallet v. Ferrer's Case (1588) 1 Leon. 139 | 244 |
| | | Mallory v. Jennings (1731) Fitzg. 162 | 248 |
| | | Maloney v. Newton, 85 Ind. 565, 44 Am. Rep. 46 | 601 |
| | | Manchester v. Warren, 67 N. H. 482, 32 Atl. 763 | 748 |
| | | Manchester F. Ins. Co. v. Felbelman, 118 Ala. 308, 23 So. 759 | 175 |
| | | Mangold v. Offt, 63 Neb. 397, 88 N. W. 507 | 863 |
| | | Manly v. Bitzer, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464 | 605 |
| | | v. State, 7 Md. 135 | 766 |
| | | Manning's Case, 8 Coke, 96 | 421 |
| | | Manthey v. Rauenbuehler, 71 App. Div. 176, 75 N. Y. Supp. 710 | 132 |
| | | Maples, Re, 3 N. B. N. Rep. 539, 105 Fed. 919 | 524 |
| | | Marble v. Worcester, 4 Gray, 395 | 557 |
| | | Markam v. Middleton (1746) 2 Strange, 1259 | 245 |
| | | Markley v. Kessering, 2 Pennyp. 187 | 688 |
| | | Marks v. Cowles, 61 Ala. 299 | 422, 423 |
| | | Marquardt v. Ball Engine Co. 58 C. C. A. 462, 122 Fed. 374 | 632 |
| | | Marquese v. Feisenthal, 58 Ark. 293, 24 S. W. 493 | 371 |
| | | Marr v. Bank of West Tennessee, 4 Lea, 578 | 796 |
| | | Marsh v. Atty. Gen. 2 Johns. & H. 61, 30 I. J. Ch. N. S. 233, 7 Jur. N. S. 184, 3 L. T. N. S. 615, 9 Week. Rep. 179 | 230 |
| | | v. Means, 3 Jur. N. S. 790 | 230 |
| | | v. Woodbury, 1 Met. 436 | 372 |
| | | Martin v. Baltimore & O. R. Co. 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533 | 922 |
| | | v. Clarke, 8 R. I. 403, 5 Am. Rep. 586 | 237 |
| | | v. Hurlburt, 60 Vt. 364, 14 Atl. 649 | 333 |
| | | v. Wright, 21 Ga. 504 | 978 |
| | | Martinez v. Ward, 19 Fla. 175 | 109 |
| | | Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035 | 787 |
| | | Mason v. Patterson, 74 Ill. 191 | 789 |
| | | v. Wilson, 84 N. C. 51, 37 Am. Rep. 612 | 741, 742 |
| | | Masterson v. New York C. & H. R. R. Co. 84 N. Y. 247, 38 Am. Rep. 610 | 728 |
| | | Matheny v. Stewart, 108 Mo. 73, 17 S. W. 1014 | 977 |
| | | v. Wolffs, 2 Duv. 137 | 750 |
| | | Matthew v. Hassel (1590) Cro. Eliz. pt. 1, p. 144 | 238 |
| | | Matthews v. Associated Press, 136 N. Y. 323, 32 Am. St. Rep. 741, 32 N. E. 981 | 846 |
| | | v. Delaware, L. & W. R. Co. 56 N. J. L. 34, 22 L. R. A. 262, 27 Atl. 919 | 294 |
| | | Maxwell v. Bay City Bridge Co. 46 Mich. 278, 289, 9 N. W. 410 | 637 |
| | | May v. Western U. Teleg. Co. 112 Mass. 90 | 810 |
| | | Mayer v. Walter, 64 Pa. 283 | 829 |
| M. | | | |
| McAndrews v. Collierd, 42 N. J. L. 189, 36 Am. Rep. 508 | 657 | | |
| McAusland v. Pundt, 1 Neb. 211, 93 Am. Dec. 358 | 421 | | |
| McBride v. Longworth, 14 Ohio St. 349, 84 Am. Dec. 583 | 422 | | |
| McCall v. McDowell, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,678 | 207 | | |
| McCarren v. McNulty, 7 Gray, 139 | 787 | | |
| McCarthy v. Boston, 135 Mass. 197 | 677 | | |
| McClain v. Henderson, 187 Pa. 283, 40 Atl. 985 | 217 | | |
| McClung v. Kelley, 21 Iowa, 508 | 82 | | |
| McClure Bros. v. Briggs, 58 Vt. 82, 56 Am. Rep. 557, 2 Atl. 583 | 787 | | |
| McCord v. Western U. Teleg. Co. 59 Minn. 181, 1 L. R. A. 143, 12 Am. St. Rep. 636, 39 N. W. 316 | 810 | | |
| McCord-Collins Commerce Co. v. Levi, 21 Tex. Civ. App. 109, 50 S. W. 606 | 829 | | |
| McCormick v. McClure, 6 Blatchf. 467, 39 Am. Dec. 441 | 422 | | |
| v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388 | 709 | | |
| McCormick Harvesting Mach. Co. v. Willan, 63 Neb. 391, 56 L. R. A. 338, 93 Am. St. Rep. 449, 88 N. W. 497 | 828 | | |
| McCoy v. Milwaukee Street R. Co. 88 Wis. 56, 59 N. W. 453 | 670 | | |
| McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L. R. A. 947, 94 Am. St. Rep. 889, 71 Pac. 37 | 316 | | |
| McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529 | 374, 377, 379, 380 | | |
| McDonell v. Rifle Boom Co. 71 Mich. 61, 38 N. W. 681 | 748 | | |
| McDowell v. Oyer, 21 Pa. 417 | 979 | | |
| McFall v. Com. 2 Met. (Ky.) 304 | 969, 971 | | |
| McFarland v. United States Mut. Acci. Asso. 124 Mo. 204, 27 S. W. 436 | 945 | | |
| McGowin v. Remington, 12 Pa. 56, 51 Am. Dec. 584 | 789 | | |
| McIntosh v. Aubrey, 185 U. S. 122, 46 L. ed. 834, 22 Sup. Ct. Rep. 561 | 833 | | |
| McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449 | 421 | | |
| McKeller v. Monitor Twp. 78 Mich. 488, 44 N. W. 412 | 556 | | |
| McKenna, Ex parte, 126 Cal. 429, 58 Pac. 916 | 172 | | |
| McKeon v. See, 51 N. Y. 300, 10 Am. Rep. 659 | 658 | | |
| McKissick v. Pickle, 16 Pa. 140 | 515 | | |
| Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350 | 422 | | |
| 65 L. R. A. | | | |

| | | | |
|--|---------------|--|-------------------|
| Mayho v. Cotton, 69 N. C. 289 | 684 | Monroe v. Hamilton, 60 Ala. 226 | 372 |
| Mayrant v. Richardson, 1 Nott & M'C. 347, 9 Am. Dec. 707 | 989 | Montgomery v. Thompson [1891] A. C. 217 | 883, 885 |
| Meacham v. Dow, 32 Vt. 721 | 514 | Moody v. Rowell, 17 Pick. 490, 28 Am. Dec. 317 | 102 |
| Meadows v. Western U. Teleg. Co. 132 N. C. 40, 43 S. E. 512 | 670 | Moon v. Crowder, 72 Ala. 79 | 156 |
| Meason v. Kaine, 67 Pa. 126 | 979 | Moore v. Illobus, 77 N. C. 65 | 980 |
| Mechanics' Bank v. Seton, 1 Pet. 209, 7 L. ed. 152 | 788 | v. Murdock, 28 Cal. 514 | 688 |
| Meek v. Pennsylvania Co. 38 Ohio St. 632.. | 841 | v. Mutual Reserve Fund Life Asso. 129 N. C. 31, 39 S. E. 637 | 164 |
| Meler v. Pennsylvania R. Co. 64 Pa. 225, 3 Am. Rep. 581 | 217 | v. Reed, 37 N. C. (2 Ired. Eq.) 580.. | 688 |
| Melvin v. Easley, 52 N. C. (7 Jones, L.) 356 | 685 | v. Smith, 11 Rich. L. 569, 73 Am. Dec. 122 | 761 |
| Memphis & C. Packet Co. v. Pikey, 142 Ind. 304, 40 N. E. 527 | 971 | v. Strickling, 46 W. Va. 515, 50 L. R. A. 279, 33 S. E. 274 | 705 |
| Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432 | 921, 922 | Moore v. Moores, 36 Or. 261, 59 Pac. 327.. | 792 |
| v. Womack, 84 Ala. 149, 4 So. 618 | 571 | More v. Clymer, 12 Mo. App. 11 | 687 |
| Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143 | 886 | More's Case (1874) Freeman, 173 | 244 |
| Merchants' & P. Bank v. Clifton Mfg. Co. 56 S. C. 320, 33 S. E. 755, 34 S. E. 411 | 826 | Morehead v. Wriston, 73 N. C. 308 | 738, 741 |
| Merchants' Despatch & Transp. Co. v. Mer- riam, 111 Ind. 5, 11 N. E. 954.. | 721 | Morehouse v. Comstock, 42 Wis. 628 | 82 |
| Merriam v. Field, 24 Wis. 640 | 82 | Morel Bros. v. Westmoreland [1903] 1 K. B. 64, 72 L. J. K. B. N. S. 66, 51 Week. Rep. 290, 87 L. T. N. S. S. 635, 19 Times L. R. 43 | 539 |
| Merrill v. Agricultural Ins. Co. 73 N. Y. 452, 29 Am. Rep. 184 | 176 | Morgan, Re, 26 Colo. 415, 47 L. R. 52, 77 Am. St. Rep. 269, 58 Pac. 1071 | 61, 64-66, 68, 69 |
| v. Hayden, 86 Me. 133, 29 Atl. 949.. | 231 | Morgan Case. See MORGAN, RE. | |
| Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292 | 688 | Moritz v. Garnhart, 7 Watts, 302, 32 Am. Dec. 763 | 690, 691 |
| Mersey Docks & Harbour Board v. Gibbs, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872 | 376, 379 | Morris v. Williams, 30 Ohio St. 554 | 184 |
| Metcalf v. Kincaid, 87 Iowa, 443, 43 Am. St. Rep. 391, 54 N. W. 867 | 605 | Morris & E. R. Co. v. Central R. Co. 31 N. J. L. 205 | 566 |
| Metropolitan Street R. Co. v. Powell, 89 Ga. 601, 16 S. E. 118 | 728 | Morrison v. Lawrence, 98 Mass. 219 | 161 |
| Meyer v. Dr. B. L. Bull Vegetable Medicine Co. 7 C. C. A. 558, 18 U. S. App. 373, 58 Fed. 884 | 886 | Morse v. Union Stock Yards Co. 21 Or. 298, 14 L. R. A. 157, 28 Pac. 2 | 82 |
| Michael v. St. Louis, 112 Mo. 610, 20 S. W. 666 | 146 | Moses v. Mobile, 52 Ala. 198 | 871, 913 |
| Michener v. Dale, 23 Pa. 59 | 815 | Mosher v. St. Louis, 1 M. & S. R. Co. 127 U. S. 300, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324 | 142, 145 |
| Michigan Teleph. Co. v. St. Joseph, 121 Mich. 502, 47 L. R. A. 87, 80 Am. St. Rep. 520, 80 N. W. 383.. | 774 | Mostyn v. Fabrigas, 1 Cowp. 180 | 208 |
| Millard v. Tognoli, 19 Nev. 134, 7 Pac. 279. | 675 | Mott v. Dawson, 46 Iowa, 533 | 989 |
| Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669 | 184 | Mount, Ex parte, 66 Cal. 448, 6 Pac. 78 .. | 948 |
| v. Roessler, 4 E. D. Smith, 234 | 688 | Mt. Hermon Boys' School v. Gill, 145 Mass. 140, 13 N. E. 354 | 121 |
| Milliet v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631 | 313, 594 | Mouse's Case, 12 Coke, 63 | 618 |
| Milligan, Ex parte, 4 Wall. 2, 18 L. ed. 281. | 108 | Muenchow v. Roberts, 77 Wis. 520, 46 N. W. 802 | 978 |
| Mills v. United States, 12 L. R. A. 673, 46 Fed. 738 | 636 | Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.. | 79, 315 |
| v. Williams, 33 N. C. (11 Ired. L.) 558 | 710 | 426, 427, 613, 619 | |
| v. Williams, 16 S. C. 593 | 705, 709, 688 | Mulchey v. Methodist Religious Soc. 125 Mass. 487 | 459, 460, 462 |
| v. Wilmington City R. Co. 1 Marv. (Del.) 260, 40 Atl. 1115 | 663 | Munro v. Pacific Coast Dredging & Recla- mation Co. 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303 | 336 |
| Millville Traction Co. v. Goodwin, 53 N. J. Eq. 448, 32 Atl. 263 | 774 | Murchie v. Cornell, 155 Mass. 60, 14 L. R. A. 492, 31 Am. St. Rep. 526, 19 N. E. 207 | 82 |
| Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331 | 708 | Murray v. Green, 64 Cal. 363, 28 Pac. 118. | 422 |
| Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311. 962, 966, | 967, 968 | Murtaugh v. St. Louis, 44 Mo. 479 | 375 |
| Mississippi River Logging Co. v. Miller, 109 Wis. 77, 85 N. W. 193 | 975 | Myers v. Cole, 12 Johns. 340 | 675 |
| Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 873, 18 Sup. Ct. Rep. 488 | 62 | | |
| Missouri Valley L. Ins. Co. v. McCrum, 36 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517 | 166 | | |
| v. Sturges, 18 Kan. 93, 26 Am. Rep. 761 | 165 | | |
| Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75 | 206 | | |
| v. Mississippi Home Ins. Co. 72 Miss. 53, 48 Am. St. Rep. 535, 18 So. 86 | 170 | | |
| v. Prange, 110 Mich. 78, 34 L. R. A. 182, 64 Am. St. Rep. 329, 67 N. W. 1096 | 663 | | |
| v. Southwestern R. Co. 75 Ga. 398 .. | 820 | | |
| v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673 | 606 | | |
| Moline v. McKinnie, 30 Ill. App. 419 .. | 453, 464 | | |
| 65 L. R. A. | | | |

N.

| | |
|--|----------|
| Nashua & L. R. Corp. v. Boston & L. R. Corp. 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004 | 920 |
| Nashville C. & St. L. R. Co. v. McConnell, 83 Fed. 66 | 144 |
| National Automatic Device Co. v. Lloyd, 5 L. R. A. 784, 40 Fed. 89 | 383 |
| National Folding-Box & Paper Co. v. Rob- ertson, 90 Fed. 985 | 385 |
| National L. Ins. Co. v. Minch, 53 N. Y. 144. | 799 |
| National Security Bank v. Cushman, 121 Mass. 400 | 798 |
| Nations v. Johnson, 24 How. 203, 16 L. ed. 631 | 760 |
| Neas v. Borches, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50 | 315 |
| Neel v. State, 9 Ark. 250, 50 Am. Dec. 209.. | 79 |
| Neely v. State (Tex. Crim. App.) 56 S. W. 625 | 321 |
| Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715 | 988, 990 |
| Nelson v. Smith, 36 N. J. L. 148 | 945 |
| Nelson v. Cheboygan Slack-Water Nav. Co. 44 Mich. 7, 38 Am. Rep. 222, 5 N. W. 998 | 629 |
| Nelson Business College Co. v. Lloyd, 60 Ohio St. 448, 46 L. R. A. 314, 71 Am. St. Rep. 729, 54 N. E. 471 | 864 |

| | | | |
|---|-----|---|-----|
| Nesbitt v. Northern P. R. Co. 22 Wash. 698, 61 Pac. 141 | 335 | Orient Mut. Ins. Co. v. Wright, 23 How. 401, 16 L. ed. 524 | 394 |
| Newark & S. O. Horse Car R. Co. v. Hunt, 50 N. J. L. 308, 12 Atl. 697 | 613 | Osborn v. State, 24 Ark. 629 | 768 |
| Newcomb v. Boston Protective Department, 151 Mass. 215, 6 L. R. A. 778, 24 N. E. 39 | 377 | Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437 | 380 |
| Newhall v. Hatch, 134 Cal. 269, 55 L. R. A. 373, 66 Pac. 266 | 424 | Osgood v. Lewis, 2 Harr. & G. 495, 18 Am. Dec. 323 | 82 |
| v. Kinney, 56 Vt. 591 | 329 | Osler v. Walton, 67 N. J. L. 63, 50 Atl. 590 | 863 |
| New Haven v. Sargent, 38 Conn. 50, 9 Am. Rep. 360 | 680 | Ottawa v. Carey, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361 | 190 |
| Newland v. Osman, 1 Bott. Poor Law Cas. 466 | 691 | Otto v. Journeymen Tailors' Protective & Benev. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217 | 94 |
| Newman v. Alvord, 51 N. Y. 192, 10 Am. Rep. 588 | 885 | Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676 | 728 |
| v. Alvord, 49 Barb. 588 | 884 | Overcash v. Kitchie, 89 N. C. 384 | 928 |
| Newman Lumber Co. v. Purdum, 41 Ohio St. 373 | 120 | Overman v. May, 35 Iowa, 89 | 679 |
| New Orleans v. Great Southern Teleph. & Telegr. Co. 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533 | 774 | Owen County v. Washington Twp. 121 Ind. 379, 23 N. E. 257 | 190 |
| New Orleans, B. R. V. & M. R. Co. v. Brown, 64 Miss. 482, 1 So. 637 | 567 | P. | |
| Newton v. Mahoning County, 100 U. S. 559, 25 L. ed. 710 | 710 | Pacific Bridge Co. v. Kirkham, 54 Cal. 558 | 189 |
| New York & N. J. Telegr. Co. v. Dexheimer, 14 N. J. L. J. 295 | 774 | Pacific Postal Telegr. Cable Co. v. Bank of Palo Alto, 54 L. R. A. 713, 48 C. C. A. 413, 109 Fed. 369 | 810 |
| New York & R. Cement Co. v. Copley Cem- ent Co. 45 Fed. 212 | 885 | Paddock v. Davenport, 107 N. C. 710, 12 S. E. 464 | 685 |
| New York C. & H. R. R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. Supp. 28 | 144 | Page v. Branch, 97 N. C. 97, 2 Am. St. Rep. 281, 1 S. E. 625 | 928 |
| Niblo v. Blasse, 1 Keyes, 476 | 117 | Palge v. Parker, 8 Gray, 211 | 735 |
| Nichols v. MacLean, 101 N. E. 526, 54 Am. Rep. 730, 5 N. E. 347 | 704 | Paisley v. Snipes, 2 Brev. 200 | 103 |
| Nicholson v. Careas, 59 Ind. 39 | 581 | Palmer v. State, 39 Ohio St. 236, 48 Am. Rep. 429 | 873 |
| Nixon v. Potts, 8 N. C. (1 Hawks, N. C.) 469 | 927 | v. Welch, 132 Ill. 141, 23 N. E. 412 | 511 |
| Noble v. Seattle, 19 Wash. 133, 40 L. R. A. 822, 52 Pac. 1013 | 335 | Paradine v. Jane, Aley, 26 | 115 |
| Norcross v. James, 140 Mass. 188, 2 N. E. 946 | 804 | Park v. Chicago & S. W. R. Co. 43 Iowa, 636 | 936 |
| Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co. [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 480 | 514 | Parker v. Anderson, 5 T. B. Mon. 445 | 421 |
| North Cheshire & M. Brewery Co. v. Man- chester Brewery Co. [1899] A. C. 83, 68 L. J. Ch. N. S. 74, 79 L. T. N. S. 645 | 884 | v. Garrison, 61 Ill. 250 | 789 |
| Northcott v. Underhill (1899) 1 Ld. Raym. 388 | 238 | v. Roberts, 63 N. H. 431 | 249 |
| Northern P. R. Co. v. Ellison, 3 Wash. 225, 28 Pac. 333, 29 Pac. 263 | 335 | Parr v. Purbeck (1724) 8 Mod. 196 | 245 |
| v. Spokane, 12 C. C. A. 246, 29 U. S. App. 81, 64 Fed. 506 | 200 | Parrott v. Bridgeport, 44 Conn. 180, 26 Am. Rep. 439 | 94 |
| Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336 | 636 | Passaic Print Works v. Ely & W. Dry- Goods Co. 62 L. R. A. 673, 44 C. C. A. 426, 105 Fed. 163 | 889 |
| North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69 | 951 | Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115 | 873 |
| North Pacific Lumbering & Mfg. Co. v. East Portland, 14 Or. 3, 12 Pac. 4 | 787 | Paul v. Virginia, 8 Wall. 168, 181, 19 L. ed. 357, 360 | 919 |
| Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036 | 69 | Payne v. Snow, 12 Cush. 433, 59 Am. Dec. 203 | 519 |
| Northwestern Teleph. Exch. Co. v. Minne- apolis, 81 Minn. 140, 53 L. R. A. 175, 83 N. W. 527, 86 N. W. 69 | 774 | Peacock v. Williams, 98 N. C. 324, 4 S. E. 550 | 738 |
| Norton v. Palmer, 142 Mass. 433, 8 N. E. 346 | 607 | Pearson v. Boyden, 86 N. C. 585 | 913 |
| Norwalk Gaslight Co. v. Norwalk, 63 Conn. 495, 28 Atl. 32 | 750 | Pease v. Ritchie, 132 Ill. 638, 8 L. R. A. 566, 24 N. E. 433 | 606 |
| Noyes v. Boscawen, 64 N. H. 361, 10 Am. St. Rep. 410, 10 Atl. 690 | 728 | Peck v. Elder, 3 Sandf. 128 | 936 |
| O. | | Peebles v. Pate, 90 N. C. 348 | 926 |
| Ober v. Smith, 78 N. C. 313 | 733 | Pell, Rev. 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789 | 40 |
| Odom v. Riddick, 104 N. C. 515, 7 L. R. A. 118, 17 Am. St. Rep. 686, 10 S. E. 609 | 926 | v. Mercer, 14 R. I. 412 | 230 |
| Ohio & M. R. Co. v. Wheeler, 1 Black. 286 17 L. ed. 130 | 922 | Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737 | 782 |
| Okey v. State Ins. Co. 29 Mo. App. 111 | 721 | Pennington v. Gibson, 16 How. 65, 14 L. ed. 847 | 810 |
| Omaha & R. Valley R. Co. v. Martin, 14 Neb. 295, 15 N. W. 696 | 292 | Pennoyer v. Willis, 26 Or. 1, 46 Am. St. Rep. 594, 36 Pac. 568 | 799 |
| Oney v. Clendenin, 28 W. Va. 34 | 792 | Pennsylvania Co. v. Langendorf, 48 Ohio St. 316, 13 L. R. A. 190, 29 Am. St. Rep. 553, 28 N. E. 172 | 132 |
| Ople v. Pacific Invest. Co. 26 Wash. 505, 56 L. R. A. 778, 67 Pac. 231 | 827 | Pennsylvania R. Co. v. Beekman (D. C.) 30 Wash. L. Rep. 715 | 144 |
| Order of Railway Conductors v. Koster, 55 Mo. App. 186 | 511 | v. Freeport, 138 Pa. 91, 20 Atl. 940 | 291 |
| Orient Ins. Co. v. Daggs, 172 U. S. 563, 564, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, 283 | 65 | Pennsylvania Teleph. Co. v. Varnau, 2 Monaghan (Pa.) 645, 15 Atl. 624 | 775 |
| 65 L. R. A. | | Penny v. Wimbledon Urban [1898] 2 Q. B. 212, 67 L. J. Q. B. N. S. 754, 78 L. T. N. S. 748, 62 J. P. 582 | 749 |
| | | Pensacola Ice Co. v. Perry, 120 U. S. 318, 36 L. ed. 663, 7 Sup. Ct. Rep. 576 | 792 |
| | | Penzel Co. v. Jett, 54 Ark. 428, 16 S. W. 120 | 371 |
| | | People v. Baker, 3 Park Crim. Rep. 181 | 768 |
| | | v. Baker, 3 Abb. Pr. 42 | 767 |
| | | v. Budd, 117 N. Y. 1, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670 | 69 |
| | | v. Central R. Co. 48 Barb. 478 | 972 |

| | | | |
|--|--------------------|--|---------------|
| People v. Courlier, 79 Mich. 366, 44 N. W. 571 | 321 | Phenix Ins. Co. v. Pickel, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 547 | 175 |
| v. Eel River & E. R. Co. 98 Cal. 665, 33 Pac. 728 | 290 | Phifer v. Cox, 21 Ohio St. 248, 8 Am. Rep. 58 | 679 |
| v. Fuhrmann, 103 Mich. 593, 61 N. W. 865 | 769 | Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 149, 59 Am. Rep. 159, 7 Atl. 105 | 728 |
| v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343 | 39, 70, 173 | Philbrook v. Kennebec County, 17 Me. 196 | 189 |
| v. Harding, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555 | 312, 594 | Philfold's Case, 10 Coke, 115 | 237 |
| v. Haynor, 149 N. Y. 204, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 544 | 60 | Phillips v. New York C. & H. R. R. Co. 127 N. Y. 637, 27 N. E. 978 | 556 |
| v. Kerr, 27 N. Y. 188 | 568 | v. Stone Mountain, 61 Ga. 386 | 871 |
| v. Lochner, 73 App. Div. 120, 76 N. Y. Supp. 398, 401 | 59, 62 | Philpps v. Alford, 95 Ga. 215, 22 S. E. 152 | 439 |
| v. McGee, 1 Denio, 19 | 323 | Phoenix Ins. Co. v. Continental Ins. Co. 87 N. Y. 400 | 804 |
| v. McGonegal, 138 N. Y. 62, 32 N. E. 616 | 156 | Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7 | 681 |
| v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29 | 813 | v. Fuller, 8 Mass. 223, 5 Am. Dec. 102 | 515 |
| v. Mollieux, 168 N. Y. 284, 62 L. R. A. 193, 61 N. E. 286 | 102 | Pillsbury-Washburn Flour Mills Co. v. Eagle, 41 L. R. A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608 | 886 |
| v. New York C. & St. L. R. Co. 129 N. Y. 474, 15 L. R. A. 82, 29 N. E. 961 | 229 | Pinkston v. Huie, 9 Ala. 252 | 978 |
| v. Peterson, 93 Mich. 27, 52 N. W. 1039 | 768 | Pioneer Mfg. Co. v. Phenix Assur. Co. 110 N. C. 176, 28 Am. St. Rep. 673, 14 S. E. 731 | 721 |
| v. Powell, 87 Cal. 348, 11 L. R. A. 75, 23 Pac. 481 | 770 | Pittsburgh, C. C. & St. L. R. Co. v. Crown Point, 150 Ind. 536, 50 N. E. 741 | 290 |
| v. Vermilyea (1827) 7 Cow. 137 | 767 | v. Lewis, 18 Ky. L. Rep. 957, 38 S. W. 482 | 127 |
| v. Webb, 1 Hill, 179 | 767 | Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. 71 N. H. 522, 60 L. R. A. 116, 53 Atl. 807 | 748 |
| v. Whipple, 47 Cal. 592 | 947 | Platho v. Merchants' & Mfrs. Ins. Co. 38 Mo. 257 | 394 |
| People ex rel. Seminary of Our Lady of Angels v. Barber, 42 Hun, 27 | 121 | Platt v. Birmingham Axle Co. 41 Conn. 255 | 799 |
| Rice v. Board of Trade, 80 Ill. 134 | 94 | Playford v. United Kingdom Electric Teleg. Co. L. R. 4 Q. B. 706, 10 Best & S. 759, 38 L. J. Q. B. N. S. 249, 21 L. T. N. S. 21, 17 Week. Rep. 968 | 809 |
| Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798 | 515 | Plumb v. Tubbs, 41 N. Y. 444 | 515 |
| Neshamcus v. City Prison, 144 N. Y. 536, 27 L. R. A. 718, 39 N. E. 688 | 60 | Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154 | 872 |
| Devery v. Coler, 173 N. Y. 103, 65 N. E. 956 | 45 | Plummer v. Rigdon, 78 Ill. 222, 20 Am. Rep. 261 | 977 |
| Wood v. Draper, 15 N. Y. 537 | 766 | Polndexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903 | 871 |
| Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111 | 173 | Pollard v. Reardon, 13 C. C. A. 171, 21 U. S. App. 639, 65 Fed. 848 | 444 |
| Dilcher v. German United E. St. S. Church, 53 N. Y. 103 | 94 | v. Shaffer, 1 Dall. 210, 1 L. ed. 104, 1 Am. Dec. 239 | 116, 118, 120 |
| Kennedy v. Gies, 25 Mich. 83 | 766 | Pontiac v. Carter, 32 Mich. 164 | 636, 637, 638 |
| Murphy v. Kelly, 76 N. Y. 475 | 192 | Pope v. Phifer, 3 Helsk. 686 | 766 |
| Lynch v. La Salle County, 100 Ill. 495 | 766 | Popham v. Pickburn, 7 Hurist. & N. 891, 31 L. J. Exch. N. S. 133, 8 Jur. N. S. 179, 5 L. T. N. S. 846, 10 Week. Rep. 321 | 968 |
| Deverell v. Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129 | 94 | Popokey v. Munkwitz, 68 Wis. 322, 60 Am. Rep. 858, 32 N. W. 35 | 978 |
| Atty. Gen. v. New York, 25 Wend. 22 | 766 | Porter v. Tull, 6 Wash. 408, 22 L. R. A. 613, 36 Am. St. Rep. 172, 33 Pac. 955 | 299 |
| Manhattan Sav. Inst. v. Otis, 90 N. Y. 48 | 312 | Post v. Bernheimer, 31 Hun, 247 | 515 |
| Jackson v. Potter, 47 N. Y. 375 | 766 | Post Pub. Co. v. Hallam, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 540 | 985, 987, 990 |
| New York Phonograph Co. v. Rice, 57 Hun. 486, 11 N. Y. Supp. 249 | 229 | v. Moloney, 50 Ohio St. 71, 33 N. E. 921 | 988 |
| Butler v. Saginaw County, 26 Mich. 22 | 189 | Pote's Appeal, 106 Pa. 574, 51 Am. Rep. 540 | 691 |
| Robertson v. Van Gaskin, 5 Mont. 352, 6 Pac. 30 | 703 | Potter v. Thornton, 7 R. I. 252 | 230 |
| Tyroler v. Warden of City Prison, 157 N. Y. 116, 124, 43 L. R. A. 264, 268, 68 Am. St. Rep. 763, 51 N. E. 1006 | 40, 144, 149 | Potts v. Imlay, 4 N. J. L. 337, 7 Am. Dec. 603 | 829 |
| Huck v. Western Seaman's Friend Soc. 87 Ill. 246 | 780 | v. Shreveport Belt R. Co. 110 La. 1, 98 Am. St. Rep. 452, 34 So. 103 | 130, 132 |
| People's Nat. Bank v. Stewart, 19 N. B. 268 | 721 | Powell v. Virginia Constr. Co. 88 Tenn. 697, 17 Am. St. Rep. 925, 13 S. W. 691 | 631 |
| Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683 | 294 | Powers v. Buncratz, 12 Ohio St. 273 | 733 |
| Pepin County v. Prindle, 61 Wis. 301, 21 N. W. 254 | 515 | v. State, 23 Tex. App. 42, 5 S. W. 133 | 321 |
| Perley v. Chandler, 6 Mass. 454, 4 Am. Dec. 159 | 678, 681 | v. Thayer Lumber Co. 92 Mich. 533, 52 N. W. 937 | 536, 557 |
| Perrine v. Chesapeake & D. Canal Co. 9 How. 184, 13 L. ed. 97 | 575 | Pratt v. Brown, 106 Mich. 628, 64 N. W. 583 | 629 |
| Perry v. Cunningham, 40 Ark. 185 | 675 | Predigested Food Co. v. McNeal, 1 Ohio N. P. 266 | 872 |
| v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495 | 377 | Prentiss v. Shaw, 56 Me. 427, 96 Am. Dec. 475 | 863 |
| v. Man, 1 R. I. 263 | 587 | | |
| v. Truett, 6 Beav. 66 | 885 | | |
| v. Washburn, 20 Cal. 350 | 110 | | |
| Person v. Southerland, 120 N. C. 225, 27 S. E. 1007 | 713 | | |
| Peyton v. Texas & P. R. Co. 41 Ia. Ann. 861, 864, 17 Am. St. Rep. 430, 6 So. 690 | 131, 132, 134, 135 | | |
| 65 L. R. A. | | | |

Preston v. Drew, 38 Me. 558, 54 Am. Dec. 639 620
 Preston Nat. Bank v. George T. Smith Mid-
 dlings Purifier Co. 84 Mich. 364,
 47 N. W. 502 372
 Price v. Green, 16 Mees. & W. 346, 16 L. J.
 Exch. N. S. 108, 9 Jur. 880 514
 v. State, 8 Gill, 296 767
 v. Supreme Lodge, K. of H. 68 Tex.
 366, 4 S. W. 638 165
 Prime, Re, 136 N. Y. 847, 18 L. R. A. 713,
 32 N. E. 1091 781
 Prince v. Skillin, 71 Me. 361, 36 Am. Rep.
 325 708
 Pruett v. Western U. Teleg. Co. 6 Tex. Civ.
 App. 533, 25 S. W. 794 671
 Puffer v. Lucas, 101 N. C. 284, 7 S. E. 734
 Pumpelly v. Green Bay & M. Canal Co. 13
 Wall. 166, 181, 20 L. ed. 537,
 561 953
 v. Phelps, 40 N. Y. 59, 100 Am.
 Dec. 463 977
 Putnam v. New York C. & H. R. R. Co. 47
 Hun. 439 556
 Pyle v. Clark, 25 C. C. A. 190, 49 U. S.
 App. 260, 79 Fed. 744 663

Q.

Quarman v. Burnett, 6 Mees. & W. 499, 9
 L. J. Exch. N. S. 308, 4 Jur. 969 631
 Queen v. Fay, Ir. Rep. 6 C. L. 436 789
 v. Palmer, 5 El. & Bl. 1024 770
 v. Phelan, 14 Cox, C. C. 579 769
 Quinlan v. Pew, 5 C. C. A. 438, 5 U. S.
 App. 382, 56 Fed. 111 88
 Quinn v. Kansas City, M. & B. R. Co. 94
 Tenn. 713, 28 L. R. A. 552, 45
 Am. St. Rep. 767, 30 S. W.
 1036 376
 v. Leatham [1901] A. C. 495, 70 L.
 J. P. C. N. S. 76, 85 L. T. N. S.
 289, 50 Week. Rep. 139, 65 J.
 P. 708 859

R.

Raines v. Watson, 2 W. Va. 371 688
 Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41 415
 Ramsey v. Cheek, 109 N. C. 270, 13 S. E.
 775 991
 Randall v. Marble, 69 Me. 310, 31 Am.
 Rep. 281 514
 Rapson v. Cubitt, 9 Mees. & W. 710, Car. &
 M. 64, 11 L. J. Exch. N. S. 271,
 6 Jur. 606 631
 Ray v. Catlett, 12 B. Mon. 532 687
 v. Gardner, 82 N. C. 146 926
 Rayburn v. Davlison, 22 Or. 242, 29 Pac.
 738 798
 Raymond v. Danbury & N. R. Co. (1877) 14
 Blatchf. 133, Fed. Cas. No. 11-
 593 249
 Rearick v. Wilcox, 81 Ill. 77 988
 Rector v. Fitzgerald, 8 C. C. A. 277, 19 U.
 S. App. 423, 59 Fed. 808 422
 Reddaway v. Banham [1896] A. C. 199, 65
 L. J. Q. B. N. S. 381, 74 L. T.
 N. S. 289, 44 Week. Rep. 638
 884, 885 886
 Redfield v. Redfield, 75 Iowa, 435, 39 N. W.
 688 522
 Redigan v. Boston & M. R. Co. 155 Mass.
 44, 14 L. R. A. 276, 31 Am. St.
 Rep. 520, 28 N. E. 1133 292
 Redmond v. Tarboro, 106 N. C. 122, 7 L. R.
 A. 539, 10 S. E. 845 170
 Reese v. Western U. Teleg. Co. 123 Ind.
 294, 7 L. R. A. 583, 24 N. E. 163
 Reg. v. Barrett, Ir. Rep. 4 C. L. 285, 18
 Week. Rep. 671 769
 v. Lines, 1 Car. & K. 393 321
 v. Nicholas, 2 Car. & K. 246, 2 Cox,
 C. C. 136 320, 322
 Reid v. Hoskins, 6 El. & Bl. 953, 26 L. J. Q.
 B. N. S. 5, 3 Jur. N. S. 238, 5
 Week. Rep. 45 306
 Reifsnyder v. Hunter, 19 Pa. 41 514
 Reliance Novelty Co. v. Dworzek, 80 Fed.
 902 363
 Removal Cases, 100 U. S. 457, 25 L. ed. 593
 Renihan v. Wright, 125 Ind. 536, 9 L. R. A.
 514, 21 Am. St. Rep. 250, 25 N.
 E. 822 670
 65 L. R. A.

Renner v. Marshall (1816) 1 Wheat. 215, 4
 L. ed. 74 249
 Republic, The, 9 C. C. A. 386, 20 U. S. App.
 561, 61 Fed. 109 87
 Respublica v. Sparhawk, 1 Dall. 357, 1 L.
 ed. 174 205
 Rex v. —, 2 Chitty, 136 769
 v. Bodenham, 1 Cowp. 78 769
 v. Bodenham, 9 Ad. & El. 504 769
 v. Brotherton, 1 Strange, 702 685
 v. Cornfoot, 1 Bott, Poor Law
 Cas. 465 691
 v. Cornforth, 2 Strange, 1162 690
 v. Cox, 2 Burr. 785 685
 v. Dunnell, 1 East P. C. 442 322
 v. Ellis, 6 Barn. & C. 145, 9 Dowl.
 & B. 174, 5 L. J. Mag. Cas. 1 769
 v. Hunt, 8 Barn. & Ald. 444, 2 Chit-
 ty, 180 769
 v. Pike, 3 Car. & P. 598 320, 322
 v. Powell, 1 Leach, C. L. 110 322
 v. Travers, 1 Strange, 700 323
 v. Williams, 7 Car. & P. 320 322
 v. Wright, 8 T. R. 298, 4 Revised
 Rep. 649 990
 Reynolds v. Harris, 14 Cal. 667, 76 Am.
 Dec. 459 421, 423
 v. Reynolds, 3 Wend. 244 675
 Rice v. Day, 34 Neb. 100, 51 N. W. 464 828
 v. Simmons, 2 Harr. (Del.) 309, 31
 Am. Dec. 766 986
 Rich v. Minneapolis, 37 Minn. 423, 5 Am.
 St. Rep. 861, 35 N. W. 2 679
 v. Sowles, 64 Vt. 408, 15 L. R. A.
 850, 23 Atl. 723 675
 Richards v. Hodges, 2 Wms. Saund. 83 691
 v. Judd, 15 Abb. Pr. N. S. 184 587
 Richardson v. Danvers, 176 Mass. 413, 50
 L. R. A. 127, 79 Am. St. Rep.
 320, 57 N. E. 688 235
 Richmond v. Judy, 6 Mo. App. 465 519
 v. Long, 17 Gratt. 375, 84 Am. Dec.
 461 375
 v. Mississippi Mills, 52 Ark. 30, 4 L.
 R. A. 413, 11 S. W. 960 371
 v. Moore, 107 Ill. 429, 47 Am. Rep.
 445 688
 Richmond & D. R. Co. v. Norment, 84 Va.
 167, 10 Am. St. Rep. 827, 4 S.
 E. 211 670
 Rickard v. Du Bon, 43 C. C. A. 360, 103
 Fed. 868 383
 Riddeil v. Sutton, 5 Bing. 200, 2 Moore & P.
 345, 7 L. J. C. P. 60, 30 Revised
 Rep. 569 675
 Riesz's Appeal, 73 Pa. 485 979
 Rigglin v. Magwire, 15 Wall. 549, 21 L.
 ed. 232 796
 Riggs v. State, 3 Coldw. 85, 91 Am. Dec.
 272 208
 Riley v. West Virginia C. & P. R. Co. 27 W.
 Va. 147 670
 Rineer v. Collins, 156 Pa. 342, 27 Atl. 28 979
 Ringo v. Wing, 49 Ark. 457, 5 S. W. 787 372
 Ringstaff v. Lancaster & C. R. Co. 64 S. C.
 546, 43 S. E. 22 290
 Rio Grande R. Co. v. Brownsville, 45
 Tex. 88 566
 Ritchie v. People, 155 Ill. 98, 29 L. R. A.
 79, 40 Am. St. Rep. 315, 40 N.
 E. 464 595
 Robbins v. Chicago, 4 Wall. 657, 18 L. ed.
 427 631, 749
 Robert v. Sadler, 104 N. Y. 229, 58 Am.
 Rep. 498, 10 N. E. 428 952
 Roberts, W. & T. Co. v. Sun. Mut. Ins. Co.
 13 Tex. Civ. App. 64, 35 S.
 W. 955 176
 Robertson v. Baldwin, 165 U. S. 275, 41 L.
 ed. 715, 17 Sup. Ct. Rep. 326 42
 v. Stichel, 127 U. S. 507, 32 L. ed.
 203, 8 Sup. Ct. Rep. 1286 405
 Robinson v. Baltimore & S. Min. & Reduc-
 tion Co. 26 Wash. 484, 67 Pac.
 274 385
 v. New York C. & H. R. R. Co. 66 N.
 Y. 11, 23 Am. Rep. 1 726
 v. Webb, 11 Bush, 465 463
 v. White, 26 Ark. 139 708
 Robison v. Rupert, 23 Pa. 523 863
 Robson v. Tomlinson, 54 Ark. 229, 15 S.
 W. 456 371
 Rodgers v. State, 30 Tex. App. 510, 17 S.
 W. 1077 821
 Rodman v. Munson, 13 Barb. 197 110

| | | | |
|---|---------------|--|---------------|
| Rodrigues v. Habersham, 1 Speers L. 318 | 295 | Saull v. Browne, L. R. 10 Ch. 64, 44 L. J. | |
| Roehm v. Horat, 178 U. S. 1, 44 L. ed. 953, | | Ch. N. S. 1, 31 L. T. N. S. 493, | |
| 20 Sup. Ct. Rep. 780 | 307 | 23 Week. Rep. 50, 13 Cox, C. | |
| Rogers v. Crain, 30 Tex. 288 | 320 | C. 30 | 870 |
| v. Phenix Ins. Co. 121 Ind. 570, 28 | | Savannah, F. & W. R. Co. v. Beavers, 113 | |
| N. E. 498 | 175 | Ga. 398, 54 L. R. A. 314, 39 | |
| v. Wm. Rogers Mfg. Co. 17 C. C. A. | | S. E. 82 | 293 |
| 575, 35 U. S. App. 843, 70 Fed. | | v. Godkin, 104 Ga. 855, 69 Am. St. | |
| 1017 | 885 | Rep. 187, 30 S. E. 378 | 441 |
| Rohr v. Kindt, 3 Watts & S. 563, 39 Am. | | Sawyer, Re, 124 U. S. 200, 31 L. ed. 402, 8 | |
| Dec. 53 | 978 | Sup. Ct. Rep. 482 | 870 |
| Rommel v. Schambacher, 120 Pa. 579, 6 Am. | | v. Corse, 17 Gratt. 230, 99 Am. Dec. | |
| St. Rep. 732, 11 Atl. 779 | 89 | 445 | 405, 406 |
| Root v. Kling, 7 Cow. 613, Affirmed in 4 | | Saxlehner v. Apollinaris Co. 13 Times L. | |
| Wend. 113, 21 Am. Dec. 102 | 989 | R. 258 | 886 |
| Roper v. Johnson, L. R. 8 C. P. 167, 42 L. J. | | v. Elsner & M. Co. 179 U. S. 19, 45 | |
| C. P. N. S. 65, 28 L. T. N. S. | | L. ed. 60, 21 Sup. Ct. Rep. 7... | 886 |
| 206, 21 Week. Rep. 384 | 307 | Schaefer v. Baltimore Marine Ins. Co. 33 | |
| Ross v. Ross, 129 Mass. 243, 37 Am. Rep. | | Md. 109 | 394 |
| 321 | 184 | Schmidt v. Northern Life Assn. 112 Iowa, | |
| v. Swan, 7 Lea. 467 | 720 | 41, 51 L. R. A. 141, 84 Am. St. | |
| v. Ward, 14 S. D. 240, 86 Am. St. | | Rep. 323, 83 N. W. 800 | 510, 511 |
| Rep. 746, 85 N. W. 183 | 990 | Schneider v. Sansom, 62 Tex. 201, 50 Am. | |
| Rossmiller v. State, 114 Wis. 169, 58 L. R. | | Rep. 521 | 688 |
| A. 93, 91 Am. St. Rep. 910, 89 | | Schollenberger v. Pennsylvania, 171 U. S. | |
| N. W. 839 | 959 | 1, 43 L. ed. 49, 18 Sup. Ct. | |
| Rowe v. Addison, 34 N. H. 306 | 678 | Rep. 757 | 872 |
| Rowland v. Gallatin, 75 Mo. 134, 42 Am. | | Schonfield v. Turner, 75 Tex. 324, 7 L. R. | |
| Rep. 395 | 160, 161 | A. 189, 12 S. W. 626 | 511 |
| Rumford Chemical Works v. Muth, 1 L. R. | | Schroyer v. Lynch, 8 Watts, 453 | 405 |
| A. 44, 35 Fed. 524 | 885 | Schultz Case. See LA REPUBLICQUE FRAN- | |
| Rumsey v. New York & N. E. R. Co. 133 N. | | CAISE v. SCHULTZ | |
| Y. 79, 15 L. R. A. 618, 28 Am. | | Schultze v. Holtz, 82 Fed. 448 | 383 |
| St. Rep. 600, 30 N. E. 654 | 707 | Schwartz v. Saunders, 46 Ill. 18 | 117 |
| Ruohs v. Backer, 6 Helsk. 395, 19 Am. | | Scott v. Key, 11 La. Ann. 232 | 184 |
| Rep. 598 | 121 | v. Lane, 109 N. C. 154, 13 S. E. | |
| Ruse v. Mutual Ben. L. Ins. Co. 23 N. | | 772 | 684, 685 |
| Y. 516 | 165 | v. McNeal, 154 U. S. 34, 38 L. ed. | |
| Russ v. Alpaugh, 118 Mass. 369, 19 Am. | | 896, 14 Sup. Ct. Rep. 1108 | |
| Rep. 464 | 581 | 759, 760 | 761 |
| Russell v. Devon County, 2 T. R. 667, 1 Re- | | v. Smith, 121 N. C. 94, 28 S. E. | |
| vised Rep. 585 | 376 | 64 | 907, 913 |
| Rutland Electric Light Co. v. Marble City | | Scranton v. Wheeler, 113 Mich. 565, 67 | |
| Electric Light Co. 65 Vt. 377, | | Am. St. Rep. 484, 71 N. W. | |
| 20 L. R. A. 821, 36 Am. St. Rep. | | 1091 | 637 |
| 808, 26 Atl. 635 | 773 | v. Wheeler, 179 U. S. 141, 45 L. ed. | |
| Ryan v. Missouri, K. & T. R. Co. 65 Tex. | | 126, 21 Sup. Ct. Rep. 48, Af- | |
| 13, 57 Am. Rep. 589 | 811, 812 | firming 6 C. C. A. 585, 16 U. S. | |
| v. Towar, 128 Mich. 463, 55 L. R. A. | | App. 152, 57 Fed. 803 | 635 |
| 310, 92 Am. St. Rep. 481, 87 N. | | Scrip Bill, Re, 23 Colo. 504, 48 Pac. 512 | 426 |
| W. 644 | 293 | Seanor v. Whatcom County, 13 Wash. 52, | |
| v. United States, 136 U. S. 68, 34 L. | | 42 Pac. 552 | 342 |
| ed. 447, 10 Sup. Ct. Rep. 913 | 685 | Sears v. Crocker, 184 Mass. 586, 69 N. E. | |
| Rylands v. Fletcher, L. R. 3 H. L. 330 | 658 | 327 | 681 |
| Rymer v. Standfield [1895] 1 Ch. 19, 64 L. J. | | Seattle Crockery Co. v. Haley, 6 Wash. 302, | |
| Ch. N. S. 86, 12 Reports, 22, 71 | | 86 Am. St. Rep. 156, 33 Pac. | |
| L. T. N. S. 590, 43 Week. Rep. | | 650 | 829, 830 |
| 87 | 229, 230, 231 | Seele v. Deering, 70 Mo. 343, 1 Am. St. Rep. | |
| | | 314, 10 Atl. 45 | 160 |
| | | Seely v. Blair, Wright (Ohio) 358 | 988, 989 |
| | | v. Bridgeport, 53 Conn. 1, 22 Atl. | |
| | | 1017 | 249 |
| | | Seixo v. Provezende, L. R. 1 Ch. 192, 12 | |
| | | Jur. N. S. 215, 14 L. T. N. S. | |
| | | 314, 14 Week. Rep. 357 | 883, 885, 886 |
| | | Sentell v. New Orleans & C. R. Co. 166 U. | |
| | | S. 698, 41 L. ed. 1169, 17 Sup. | |
| | | Ct. Rep. 608 | 815 |
| | | Servis v. Beatty, 32 Miss. 52 | 766 |
| | | Seymour v. Cushway, 100 Wis. 590, 69 Am. | |
| | | St. Rep. 957, 76 N. W. 769 | 975 |
| | | Shaffer v. Union Min. Co. 55 Md. 74 | 595 |
| | | Shane v. Francis, 30 Ind. 93 | 110 |
| | | Sharpless v. Philadelphia, 21 Pa. 147, 59 | |
| | | Am. Dec. 759 | 189 |
| | | Shaw v. Silloway, 145 Mass. 503, 14 N. E. | |
| | | 783 | 607 |
| | | Shawmut Nat. Bank v. Boston, 118 Mass. | |
| | | 125 | 299 |
| | | Shelby v. Cincinnati, N. O. & T. P. R. Co. | |
| | | 85 Ky. 224, 3 S. W. 157 | 125, 126 |
| | | Shelby Case. See SHELBY v. CINCINNATI, | |
| | | N. O. & T. P. R. Co. | |
| | | Shelley's Case, 1 Coke, 98a | 116, 119 |
| | | Shepard v. Creamer, 160 Mass. 496, 36 N. | |
| | | E. 475 | 378 |
| | | Sherbourne v. Yuba County, 21 Cal. 113, | |
| | | 81 Am. Dec. 151 | 375 |
| | | Sherlock v. Alling, 44 Ind. 184 | 970, 971 |
| | | Sherman v. Fall River Iron Works Co. 2 | |
| | | Allen, 524, 79 Am. Dec. 799 | 300 |
| | | Sherman's Case, 1 Vent. 210 | 691 |
| | | Sherrill v. Western U. Tele. Co. 109 N. C. | |
| | | 527, 14 S. E. 94 | 670 |

S.

| | |
|---|---------------|
| St. Clair Street R. Co. v. Eadle, 43 Ohio St. | |
| 01, 54 Am. Rep. 802, 1 N. E. | 728 |
| 519 | |
| St. Louis v. Bircher, 7 Mo. App. 169 | 948 |
| v. Western U. Tele. Co. 63 Fed. 68 | 774 |
| St. Louis & S. F. R. Co. v. James, 161 U. S. | |
| 545, 40 L. ed. 802, 16 Sup. Ct. | |
| Rep. 821 | 921 |
| St. Louis, I. M. & S. R. Co. v. Leftwich, 54 | |
| C. C. A. 1, 117 Fed. 127 | 663 |
| v. Paul, 173 U. S. 404, 43 L. ed. 746, | |
| 19 Sup. Ct. Rep. 419 | 61, 65, 595 |
| St. Mary's Beneficial Soc. v. Burford, 70 | |
| Pa. 321 | 519 |
| St. Paul Water Co. v. Ware, 16 Wall. 566, | |
| 21 L. ed. 485 | 750 |
| St. Peter v. Denison, 58 N. Y. 416, 17 Am. | |
| Rep. 258 | 657, 663 |
| St. Peter's Church v. Brown, 21 R. I. 367, | |
| 43 Atl. 642 | 231 |
| St. Peter's Episcopal Church v. Washing- | |
| ton, 109 N. C. 21, 13 S. E. 700 | 907, 908, 913 |
| Saks v. Birmingham, 120 Ala. 180, 24 So. | |
| 728 | 948 |
| Samuels v. Gorbam, 5 Cal. 227 | 945 |
| San Antonio & A. P. R. Co. v. Gray, 95 | |
| Tex. 424, 67 S. W. 763 | 133 |
| Sanders v. Johnson, 29 Ga. 526 | 687 |
| Sanderson v. White, 18 Pick. 328, 29 Am. | |
| Dec. 591 | 377 |
| San Luis Obispo County v. Greenberg, 120 | |
| Cal. 300, 52 Pac. 797 | 948 |
| 65 L. R. A. | |

- Shewell v. Knox, 12 N. C. (1 Dev. L.) 405. 738
 Shields v. Ohio, 95 U. S. 319, 24 L. ed. 229
 Shinkle v. Crook, 17 Pa. 159. 103
 Shoaf v. Palatine Ins. Co. 127 N. C. 808, 80
 Am. St. Rep. 804, 37 S. E. 451. 740
 Short v. Bullion-Beck & C. Minn. Co. 20
 Utah, 24, 45 L. R. A. 603, 57
 Pac. 721. 62
 Shonbrink v. Salmond, 3 Burr. 1637. 115
 Shull v. New Birdsell Co. 15 S. D. 8, 86
 N. W. 654. 160
 Siegel, C. & Co. v. Eaton & P. Co. 165 Ill.
 550, 46 N. E. 449. 120
 Silsby Mfg. Co. v. Chico, 24 Fed. 893. 787
 Simon v. Henry, 62 N. J. L. 486, 41 Atl.
 692. 657
 Simpson v. Simpson, 114 Ill. 603, 2 N. E.
 258, 4 N. E. 137, 7 N. E. 287. 581
 Singer Mfg. Co. v. June Mfg. Co. 163 U. S.
 169, 41 L. ed. 118, 16 Sup. Ct.
 Rep. 1002. 890
 Sing Lee, Ex parte, 96 Cal. 354, 24 L. R.
 A. 195, 31 Am. St. Rep. 218, 31
 Pac. 245. 315
 Singleton v. Carroll, 6 J. J. Marsh. 527, 22
 Am. Dec. 95. 116
 Singly v. Warren, 18 Wash. 434, 63 Am. St.
 Rep. 806, 51 Pac. 1066. 428
 Sioux Falls v. Kirby, 6 S. D. 62, 25 L. R.
 A. 621, 80 N. W. 156. 160
 Skrainka v. Scharringhausen, 8 Mo. App.
 522. 346
 Slater v. Mercereau, 64 N. Y. 138. 631
 Slaughter House Cases, 16 Wall. 36, 21 L.
 ed. 394. 426
 Slingerland v. International Contracting
 Co. 169 N. Y. 60, 56 L. R. A.
 494, 61 N. E. 995. 635
 Smalley v. Southern R. Co. 57 S. C. 243,
 35 S. E. 489. 202
 Smith v. Atkins, 18 Vt. 461. 605
 v. Burrus, 106 Mo. 94, 13 L. R. A.
 59, 27 Am. St. Rep. 329, 16 S.
 W. 881. 988
 v. Cottrell, 94 Ind. 379. 423
 v. Derr, 34 Pa. 126, 76 Am. Dec.
 641. 184
 v. Empire Lumber Co. 57 Ark. 222,
 21 S. W. 225. 371
 v. Floyd County, 85 Ga. 420, 11 S.
 E. 850. 489
 v. Hintrager, 67 Iowa, 109, 24 N.
 W. 744. 829
 v. Michigan Buggy Co. 175 Ill. 619,
 67 Am. St. Rep. 242, 51 N. E.
 569. 829
 v. Nashua Street R. Co. 69 N. H.
 504, 44 Atl. 133. 233
 v. Rochester, 76 N. Y. 506. 160
 v. Savannah, F. & W. R. Co. 100 Ga.
 96, 27 S. E. 725. 441
 v. State, 41 Tex. 352. 319, 321-323
 v. Tripp, 13 R. I. 152. 257
 v. Washington, 20 How. 135, 15 L.
 ed. 858. 636
 v. Western U. Teleg. Co. 83 Ky. 104,
 4 Am. St. Rep. 126. 811
 Smith Case. See SMITH v. STATE.
 Smout v. Ilbery, 10 Mees. & W. 1, 12 L. J.
 Exch. N. S. 357. 810
 Snowball, Ex parte, L. R. 7 Ch. 548, 41
 L. J. Bankr. N. S. 49, 26 L. T.
 N. S. 894, 20 Week. Rep. 786. 824
 Snyder v. Foster, 77 Iowa, 638, 42 N. W.
 506. 180
 Soon Hing v. Crowley, 113 U. S. 703, 28
 L. ed. 1145, 5 Sup. Ct. Rep. 730. 57
 SoRelle v. Western U. Teleg. Co. 55 Tex.
 308, 40 Am. Rep. 805. 670
 Southern California R. Co. v. Slauson, 138
 Cal. 342, 94 Am. St. Rep. 58, 71
 Pac. 352. 943
 Southern Exp. Co. v. Dickson, 94 U. S.
 549, 24 L. ed. 285. 721
 Southern Ohio R. Co. v. Morey, 47 Ohio
 St. 207, 7 L. R. A. 701, 24 N. E.
 269. 838
 Southern P. Co. v. Denton, 146 U. S. 202,
 36 L. ed. 943, 13 Sup. Ct. Rep.
 44. 920
 v. Hyatt, 132 Cal. 240, 54 L. R. A.
 522, 64 Pac. 272. 280
 65 L. R. A.
 South Florida R. Co. v. Price, 32 Fla. 46,
 13 So. 638. 876
 South Portland Land Co. v. Munger, 36 Or.
 457, 54 Pac. 815, 60 Pac. 5. 789
 Sovern v. Yorlan, 16 Or. 269, 8 Am. St.
 Rep. 203, 20 Pac. 100. 527
 Spaulding v. Lowell, 23 Pick. 71. 190
 Spears v. Hartly, 3 Esp. 81, 6 Revised Rep.
 814. 607
 Speck v. Riggan, 40 Mo. 405. 423
 Spence v. Schultz, 103 Cal. 208, 37 Pac.
 220. 750
 Spink v. Francis, 19 Fed. 670, 20 Fed. 567.
 Springs v. Sanders, 62 N. C. (Phill. Eq.) 67
 Sprull v. Leary, 85 N. C. (13 Ired. L.)
 225. 707
 Squire v. Tellier (Mass.) 69 N. E. 312. 315
 v. Western U. Teleg. Co. 98 Mass.
 232, 93 Am. Dec. 157. 671
 Stackpole v. Healy, 16 Mass. 33, 8 Am.
 Dec. 121. 679
 Stagner v. State, 9 Tex. App. 440. 319
 Staley v. Hamilton, 19 Fla. 275. 109
 Stamper v. Stamper, 121 N. C. 251, 28 S.
 E. 20. 688
 Standard Quicksilver Co. v. Hahshaw, 132
 Cal. 115, 64 Pac. 113. 424
 Standeford v. Wingate, 2 Duv. (Ky.) 440.
 Stanly v. Hendricks, 35 N. C. (13 Ired.
 L.) 80. 742
 Stapylton v. Thaggard, 33 C. C. A. 353, 62
 U. S. App. 638, 91 Fed. 93. 297
 Star Brewery Co. v. Primas, 163 Ill. 662,
 45 N. E. 145. 515
 State v. Balch, 31 Kan. 465, 2 Pac. 609. 989
 v. Barrels of Liquor, 47 N. E. 374. 80
 v. Barry, 11 N. D. 428, 92 N. W.
 809. 764
 v. Bean, 91 N. C. 554. 170
 v. Billings, 77 Iowa, 417, 42 N. W.
 458. 154
 v. Brooksbank, 28 N. C. (6 Ired. L.)
 78. 685
 v. Buchanan (Wash.) 59 L. R. A.
 342, 70 Pac. 52. 63
 v. Cainan, 94 N. C. 880. 913
 v. Cameron, 2 Pinney (Wis.) 490. 972
 v. Chapman, 1 S. D. 414, 10 L. R. A.
 432, 47 N. W. 411. 156
 v. Clark, 33 N. H. 334, 66 Am. Dec.
 723. 171
 v. Cole, 132 N. C. 1069, 44 S. E.
 301. 716
 v. Collins, 16 R. I. 371, 3 L. R. A.
 304, 17 Atl. 131. 235
 v. Dalton, 22 R. I. 77, 48 L. R. A.
 775, 84 Am. St. Rep. 818, 46
 Atl. 234. 173
 v. Douglas, 26 Wis. 428, 7 Am. Rep.
 87. 703
 v. Farrington, 90 Iowa, 673, 57 N.
 W. 606. 157
 v. Fire Creek Coal & Coke Co. 83
 W. Va. 188, 6 L. R. A. 359, 25
 Am. St. Rep. 891, 10 S. E. 288. 594
 v. George, 60 Minn. 503, 63 N. W.
 100. 972
 v. Goodwill, 33 W. Va. 179, 6 L. R.
 A. 621, 25 Am. St. Rep. 863, 10
 S. E. 285. 594
 v. Holden, 14 Utah, 71, 37 L. R. A.
 103, 46 Pac. 756, 14 Utah, 96,
 37 L. R. A. 108, 46 Pac. 1105,
 169 U. S. 366, 42 L. ed. 780,
 18 Sup. Ct. Rep. 383. 55, 57,
 62, 64, 65
 v. Howard, 82 N. C. 626. 685
 v. Jackman, 69 N. H. 331, 42 L. R.
 A. 438, 41 Atl. 347. 435
 v. Jones, 132 N. C. 1043, 61 L. R.
 A. 777, 95 Am. St. Rep. 688,
 43 S. E. 939. 73
 v. Julow, 129 Mo. 163, 20 L. R. A.
 257, 50 Am. St. Rep. 443, 31
 S. W. 781. 313, 315
 v. La Croix, 8 S. D. 374, 66 N. W.
 944. 156
 v. Lewis, 134 Ind. 250, 20 L. R. A.
 52, 33 N. E. 1024. 619
 v. Long, 117 N. C. 701, 23 S. E.
 431. 901
 v. Loomis, 115 Mo. 307, 21 L. R. A.
 789, 22 S. W. 350. 312, 503,
 594, 595
 v. Mace, 5 Md. 337. 766

- State v. McGlimsey, 80 N. C. 377, 30 Am. Rep. 80 685
 v. Miller, 15 Minn. 344, Gil. 277 769
 v. Moore, 104 N. C. 749, 10 S. E. 183 685
 v. Mullen, 35 Iowa, 189 972
 v. Munford, 73 Mo. 650, 39 Am. Rep. 532 171
 v. Narrows Island Club, 100 N. C. 477, 6 Am. St. Rep. 618, 5 S. E. 411 935
 v. New-Boston, 11 N. H. 407 678
 v. Osawkee Twp. 14 Kan. 419, 19 Am. Rep. 69 192
 v. Pendergrass, 19 N. C. (2 Dev. & B. L.) 365, 31 Am. Dec. 416 901
 v. Penley, 107 N. C. 810, 12 S. E. 455 902
 v. Perigo, 70 Iowa, 657, 28 N. W. 452 685
 v. Pugsley, 75 Iowa, 742, 38 N. W. 498 154
 v. Ray, 131 N. C. 817, 60 L. R. A. 634, 92 Am. St. Rep. 795, 42 S. E. 980 766
 v. Read, 49 Iowa, 85 900
 v. Ricketts, 74 N. C. 192 154
 v. Robey, 3 Nev. 320 685
 v. Robinson, 14 Minn. 447, Gil. 333 86
 v. St. Croix Boom Corp. 60 Wis. 565, 19 N. W. 396 708
 v. Schmitt, 49 N. J. L. 579, 9 Atl. 774 968
 v. Shugar, 138 Ala. 86, 35 So. 28 988
 v. Smith, 100 Iowa, 1, 69 N. W. 269 172
 v. Sponaugle, 45 W. Va. 415, 43 L. R. A. 727, 32 S. E. 283 580
 v. Taft, 118 N. C. 1190, 32 L. R. A. 122, 54 Am. St. Rep. 768, 23 S. E. 970 619
 v. Thomas, 118 N. C. 1221, 24 S. E. 535 908
 v. White, 18 R. I. 477, 28 Atl. 970 915
 v. Williams, 26 N. C. (4 Ired. L.) 400 234
 v. Yopp, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458 685
 v. Zimmerman, 47 Kan. 242, 27 Pac. 999 909
 State ex rel. McCaffery v. Aloe, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494 157
 Collings v. Beck, 81 Ind. 500 143
 Abbott v. Beddingfield, 125 N. C. 256, 34 S. E. 412 575
 Walser v. Bellamy, 120 N. C. 212, 27 S. E. 113 708
 712, 713, 714, 715 710
 Atty. Gen. v. Davis, 44 Mo. 129 715
 Savannah v. Dewe, R. M. Charlt. (Ga.) 397 703
 Anheuser-Busch Brewing Asso. v. Eby, 170 Mo. 497, 71 S. W. 52 708
 Bunting v. Gales, 77 N. C. 283, 709 710
 Morley v. Godfrey, 54 W. Va. 54, 46 S. E. 185 619
 Gattis v. Griffin, 125 N. C. 333, 34 S. E. 429 708
 Dalby v. Hancock, 125 N. C. 325, 34 S. E. 516 708
 Atty. Gen. v. Hawkins, 44 Ohio St. 109, 5 N. E. 238 704
 Lewis v. Hogg, 22 Wash. 646, 62 Pac. 143 340
 Kenny, Prosecutor, v. Hudspeth, 59 N. J. L. 320, 36 Atl. 662 704
 Barnes v. Lewis, 73 N. C. 141, 21 Am. Rep. 461 734
 Koppstein v. Lipa, 28 Ohio St. 665 94
 Cuppel v. Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760 94
 Greene v. Owen, 125 N. C. 212, 34 S. E. 424 714
 Bryan v. Patrick, 124 N. C. 651, 33 S. E. 151 708
 Hofmann v. Scarritt, 128 Mo., loc. cit. 339, 30 S. W. 1026 142
 Clark v. Stanley, 66 N. C. 67, 8 Am. Rep. 488 711
 Brown v. Wallichs, 12 Neb. 234, 11 N. W. 321 610
 State ex rel. McCall v. Webb, 125 N. C. 243, 34 S. E. 430 708
 Caldwell v. Wilson, 121 N. C. 467, 28 S. E. 561 714
 717, 718, 719
 Neeves v. Wood County, 41 Wis. 28 190
 State, Meyers, Prosecutor, v. Hudson County Electric Co. 60 N. J. L. 350, 37 Atl. 618 774
 Hudson Teleph. Co. Prosecutor, v. Jersey City, 49 N. J. L. 804, 60 Am. Rep. 619, 8 Atl. 124 774
 Bits, Prosecutor, v. Meyer, 40 N. J. L. 252, 29 Am. Rep. 233 829
 State Ins. Co. v. Schreck, 27 Neb. 527, 6 L. R. A. 524, 20 Am. St. Rep. 696, 43 N. W. 340 176
 Stevenson v. Bay City, 26 Mich. 44 799
 Stewart v. Harvard College, 12 Allen, 58 v. Houston, & T. C. R. Co. 62 Tex. 248 378
 Stillwell v. Mellersh, 20 L. J. Ch. N. S. 356 351
 Stines v. Dorman, 25 Ohio St. 580 229
 Stockton v. Frey, 4 Gil. 406, 45 Am. Dec. 138 515
 Stockwell v. Hunter, 11 Met. 448, 45 Am. Dec. 220 670
 Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334 290
 v. Mississippi, 101 U. S. 814, 25 L. ed. 1079 922
 v. New York, 25 Wend. 173 58
 v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799 618
 Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 393, 45 N. E. 634 918
 Straus v. Beardsley, 78 N. C. 5 864
 Strause v. Western U. Tele. Co. 3 Blas. 104, Fed. Cas. No. 13,531 733
 Strauss v. Newburgh Electric R. Co. 6 App. Div. 264, 39 N. Y. Supp. 998 810
 Strong v. Brewer, 17 Ala. 706 728
 Stuart v. La Salle County, 83 Ill. 341, 25 Am. Rep. 397 103
 v. Western U. Tele. Co. 66 Tex. 550, 69 Am. Rep. 623, 18 S. W. 351 871
 Suess v. Noble, 31 Fed. 855 670
 Sumfield v. Hathaway, 44 Conn. 521, 26 Am. Rep. 483 872
 Sumfield Case. See SUMFIELD v. HATHAWAY.
 Sullivan v. Dunham, 161 N. Y. 290, 47 L. R. A. 715, 76 Am. St. Rep. 274, 65 N. E. 923 952
 v. Dunham, 10 App. Div. 438, 41 N. Y. Supp. 1083 663
 v. Tuck, 1 Md. Ch. 59 788
 Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83 675
 Sun Mut. Ins. Co. v. Tufts, 20 Tex. Civ. App. 147, 50 S. W. 181 176
 Supreme Lodge A. P. L. v. Unverzagt, 76 Md. 104, 24 Atl. 323 829
 Sutphen v. North Hempstead, 80 Hun, 409, 30 N. Y. Supp. 128 236
 Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968 715
 Swann v. Swann, 21 Fed. 299 687
 Swart v. Kimball, 48 Mich. 443, 5 N. W. 635 688
 Sweeney v. Baker, 13 W. Va. 183, 31 Am. Rep. 757 768
 v. United States, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344 988
 Sweptson v. Harvey, 69 N. C. 387 787
 v. Johnston, 84 N. C. 449 929
 Swift v. Staten Island Rapid Transit R. Co. 123 N. Y. 645, 25 N. E. 378 688
 Swisher v. Williams, Wright (Ohio) 754 292
 Sylvester Coal Co. v. St. Louis, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649 688
 146
 T.
 Taft v. Adams, 3 Gray, 126 704
 v. Kessel, 16 Wis. 274 976
 Taggart v. Newport Street R. Co. 16 R. I. 688, 7 L. R. A. 205, 19 Atl. 326 567
 Tarrant & Co. v. Johann Hoff, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959 886
 886

- Tatem v. Wright, 28 N. J. L. 429 782
 Tatum v. Sharpless, 6 Phila. 18 528
 Taylor v. Beckham, 178 U. S. 577, 44 L. ed. 1187, 20 Sup. Ct. Rep. 900 .. 699, 710
 v. Boyd, 3 Ohio, 338, 17 Am. Dec. 603 422
 v. Caldwell, 3 Best & S. 826, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week. Rep. 726 117
 v. Carpenter, 11 Paige, 292, 42 Am. Dec. 114, 2 Sandf. Ch. 603 886
 v. Delaware & H. Canal Co. 113 Pa. 162, 57 Am. Rep. 446, 8 Atl. 43 292
 v. Ervin, 119 N. C. 276, 25 S. E. 875 685
 v. Hawkins, 16 Q. B. 321, 20 L. J. Q. B. N. S. 314, 15 Jur. 746 986
 v. Vann, 127 N. C. 243, 87 S. E. 263 714
 Teele v. Bishop of Derry, 168 Mass. 341, 38 L. R. A. 629, 60 Am. St. Rep. 401, 47 N. E. 422 230
 Temple v. Williams, 91 N. C. 82 926
 Tennessee v. Bank of Commerce, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654 918
 Tennessee & C. R. Co. v. East Alabama R. Co. 75 Ala. 524, 51 Am. Rep. 475 571
 Terry v. Davis, 114 N. C. 31, 18 S. E. 943, 829 829
 Texas v. White, 7 Wall. 700, 19 L. ed. 227, 6 Rose's Notes, 1066 708
 Texas & St. L. R. Co. v. Rust, 19 Fed. 245 720
 Thames v. Jones, 97 N. C. 121, 1 S. E. 692 928
 Thames, The, 14 Wall. 98, 20 L. ed. 804 721
 Thayer v. Kelley, 28 Vt. 19, 65 Am. Dec. 220 605
 v. Mann, 19 Pick. 535 607
 Thebaut v. Canova, 11 Fla. 143 936
 Third Nat. Bank v. Divine Grocery Co. 97 Tenn. 603, 34 L. R. A. 445, 37 S. W. 390 312
 Thomas v. People, 107 Ill. 517, 47 Am. Rep. 458 760
 v. Thomas, 51 Ill. 162 74
 v. West Jersey R. Co. 101 U. S. 87, 25 L. ed. 950 290
 Thompson v. Montgomery, L. R. 41 Ch. Div. 35, 58 L. J. Ch. N. S. 374, 60 L. T. N. S. 766, 37 Week. Rep. 637 832, 863, 886, 889
 v. Western U. Tele. Co. 107 N. C. 449, 12 S. E. 427 670
 Thomson v. Boonville, 61 Mo. 283 160
 Thomson-Houston Electric Co. v. Capitol Electric Co. 12 C. C. 643, 22 U. S. App. 669, 65 Fed. 341 799
 Thorogood v. Bryan, 8 C. B. 115, 18 L. J. C. P. N. S. 336 723, 724, 725, 728, 729
 Threadgill v. McLendon, 76 N. C. 24 742
 Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408 657, 658
 Tillett v. Lynchburg & D. R. Co. 115 N. C. 662, 20 S. E. 480 902
 Tingle v. Fisher, 20 W. Va. 497 372
 Tison v. Howard, 57 Ga. 410 445
 Titus v. Boston, 149 Mass. 164, 21 N. E. 310 680
 Tobey v. Hakes, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551 94
 Town v. Michigan C. R. Co. 84 Mich. 221, 47 N. W. 665 557
 Townsend, Re, 39 N. Y. 171 45
 v. Epstein, 93 Md. 537, 52 L. R. A. 409, 86 Am. St. Rep. 441, 49 Atl. 629 775
 Trabue v. Dwelling House Ins. Co. 121 Mo. 75, 23 L. R. A. 719, 42 Am. St. Rep. 523, 25 S. W. 848 176
 Tracy v. Gunn, 29 Kan. 508 977
 Train v. Boston Disinfecting Co. 144 Mass. 523, 59 Am. Rep. 113 619
 Travers v. Snyder, 38 Ill. App. 382 103
 Travis v. Skinner, 72 Mich. 162, 40 N. W. 234 190
 Treadwell v. Whittier, 80 Cal. 574, 5 L. R. A. 498, 13 Am. St. Rep. 175, 22 Pac. 266 218
 Trinity College v. Traveler's Ins. Co. 113 N. C. 244, 22 L. R. A. 291, 18 S. E. 175 165
 Tripcony's Case (1554) 2 Dyer, 105a 244
 Triat v. Child, 21 Wall. 441, 22 L. ed. 623... 514
 65 L. R. A.
 Troy v. Cheshire R. Co. 23 N. H. 83, 55 Am. Dec. 177 678
 Trull v. Eastman, 3 Met. 121, 37 Am. Dec. 126 581
 Tucker v. Eldred, 6 R. I. 404 678
 v. Tower, 9 Pick. 109, 19 Am. Dec. 350 951
 Tully v. Tully, 159 Mass. 91, 84 N. E. 79 333
 Tunstall v. Clifton (Tex. Civ. App.) 49 S. W. 244 829
 Turner v. Fitchburg R. Co. 145 Mass. 433, 14 N. E. 627 289
 v. Hawkeye Teleg. Co. 41 Iowa, 461, 20 Am. Rep. 605 811
 v. Ringwood Highway Board, L. R. 9 Eq. 418, 21 L. T. N. S. 745, 18 Week. Rep. 424 678
 v. Turner, 15 Jur. 218 870
 Tyler v. Hamersley, 44 Conn. 419, 26 Am. Rep. 479 871
 v. Odd Fellows' Mut. Relief Asso. 145 Mass. 134, 13 N. E. 360 .. 511
 U.
 Union Bank v. Coster, 3 N. Y. 212, 53 Am. Dec. 280 733
 Union Mill & Min. Co. v. Dangberg, 81 Fed. 115 415
 Union P. R. Co. v. Artist, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365 376, 377
 v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65 668
 v. Lapsley, 16 L. R. A. 802, 2 C. C. A. 151, 4 U. S. App. 554, 51 Fed. 177 727
 v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619 292
 Union Petroleum Co. v. Bliven Petroleum Co. 72 Pa. 173 213
 Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118 826
 v. Moore, 25 C. C. A. 150, 49 U. S. App. 153, 79 Fed. 705 826
 United States v. Addyston Pipe & Steel Co. 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271 347
 v. Carr, 1 Woods, 480, Fed. Cas. No. 14,732 208
 v. Clark, 81 Fed. 710 207, 208
 v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249 345
 v. La Vengeance, 3 Dall. 297, 1 L. ed. 610 80
 v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349 638, 639
 v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073 781
 v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540 345
 United States Chemical Co. v. Provident Chemical Co. 64 Fed. 946 345
 University v. Maulsby, 43 N. C. (8 Ired. Eq.) 257 705
 Upton v. Hume, 24 Or. 431, 21 L. R. A. 493, 41 Am. St. Rep. 863, 33 Pac. 812 989, 990
 V.
 Vanderhoof v. Shell, 42 Or. 578, 72 Pac. 126 787
 Vanderpoel v. Gorman, 140 N. Y. 563, 24 L. R. A. 548, 37 Am. St. Rep. 601, 35 N. E. 932 371
 Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208 614
 Vaas v. Riddick, 89 N. C. 6 734
 Vickers v. Durham, 132 N. C. 880, 44 S. E. 685 913
 Vincent v. Nantucket, 12 Cush. 103 190
 Voltz v. Blackmar, 64 N. Y. 440 522
 Von Arx v. San Francisco Grunell Verein, 113 Cal. 377, 45 Pac. 685 94
 W.
 Wabash R. Co. v. Wasserman (not yet reported) 144
 Wade v. National Bank of Commerce, 114 Fed. 377 828
 Wadhams v. Gay, 73 Ill. 415 422

- Wadsworth v. Union P. R. Co. 18 Colo. 810, 23 L. R. A. 812, 36 Am. St. Rep. 309, 33 Pac. 515.... 70
- v. Western U. Teleg. Co. 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574..... 670
- Waggoner-Gates Mill. Co. v. Ziegler-Zalass Commission Co. 128 Mo. 473, 81 S. W. 28..... 370
- Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354..... 804
- Wait v. O'Neill, 34 L. R. A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408..... 300
- Wakefield v. Newell, 12 R. I. 75, 34 Am. Rep. 598..... 253
- Walden v. Craig, 14 Pet. 154, 10 L. ed. 397. 760
- Waldsmith v. Waldsmith, 2 Ohio. 160..... 674
- Walker v. Brinkley, 131 N. C. 17, 42 S. E. 333..... 783
- v. Pierce, 38 Vt. 97..... 572
- v. Tucker, 70 Ill. 527..... 117
- Wall, Ex parte, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569..... 70
- Wallace v. Detroit City R. Co. 58 Mich. 231, 24 N. W. 870..... 233
- v. Finch, 24 Mich. 255..... 522
- v. Reno, 27 Nev. —, 63 L. R. A. 337, 73 Pac. 531..... 54
- Wallack v. Society for Reformation of Juvenile Delinquents, 87 N. Y. 28..... 912
- Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511..... 595
- Walser ex rel. Wilson v. Jordan, 124 N. C. 683, 33 S. E. 139..... 708
- Walter Baker & Co. v. Sanders, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889..... 886
- Ward v. Elizabeth City, 121 N. C. 1, 27 S. E. 993..... 714
- v. St. Vincent's Hospital, 39 App. Div. 624, 57 N. Y. Supp. 784..... 381
- Warder v. Enslin, 73 Cal. 291, 14 Pac. 874..... 80
- Ware v. Weatherall, 2 McCord, L. 413..... 205
- Warner v. Jaffray, 96 N. Y. 248, 48 Am. Rep. 616..... 372
- Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924..... 166
- Warren v. Chandler, 98 Iowa, 237, 67 N. W. 242..... 977
- Washington Beneficial Soc. v. Bacher, 20 Pa. 425..... 94
- Wason v. Walter, L. R. 4 Q. B. 86, 8 Best & S. 671, 38 L. J. Q. B. N. S. 34, 19 L. T. N. S. 709, 17 Week. Rep. 169..... 990
- Waters v. People, 23 Colo. 33, 33 L. R. A. 836, 58 Am. St. Rep. 215, 46 Pac. 112..... 426
- v. Richmond & D. R. Co. 108 N. C. 349, 12 S. E. 950..... 685
- v. Townsend, 65 Ark. 613, 47 S. W. 1054..... 80
- Waters Peirce Oil Co. v. Little Rock, 39 Ark. 412..... 871
- Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694..... 314
- Watson v. Thompson Lumber Co. 49 Ark. 83, 4 S. W. 62..... 372
- Wattles v. South Omaha Ice & Coal Co. 50 Neb. 251, 36 L. R. A. 424, 61 Am. St. Rep. 554, 69 N. W. 785..... 300
- Watts v. Kilburn, 7 Ga. 356..... 103
- v. Norfolk & W. R. Co. 39 W. Va. 196, 23 L. R. A. 674, 45 Am. St. Rep. 894, 19 S. E. 521..... 663
- Weathersby v. State, 29 Tex. App. 278, 15 S. W. 823..... 321
- Weed v. Dyer, 53 Ark. 160, 13 S. W. 592..... 83
- v. Jewett, 2 Met. 608, 37 Am. Dec. 115..... 606
- Welborn v. Sechrist, 88 N. C. 292..... 688
- Weldon v. State, 32 Ind. 81..... 322
- Wells v. Tucker, 3 Blinn. 366..... 815
- Welsh v. State, 126 Ind. 71, 9 L. R. A. 604, 25 N. E. 883..... 973
- Wenham v. State, 65 Neb. 394, 58 L. R. A. 825, 91 N. W. 421..... 63
- West v. New York, 10 Paige, 539..... 912
- v. Rawson, 40 W. Va. 480, 21 S. E. 1019..... 617
- Western Assur. Co. v. Stoddard, 88 Ala. 606, 7 So. 379..... 175
- 65 L. R. A.
- Western U. Teleg. Co. v. Adams, 75 Tex. 531, 6 L. R. A. 844, 16 Am. St. Rep. 920, 12 S. W. 857..... 670
- v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480..... 811
- v. Bowles (Tex. Civ. App.) 76 S. W. 456..... 670
- v. Chambers (Tex. Civ. App.) 77 S. W. 273..... 670
- v. Cooper, 71 Tex. 507, 1 L. R. A. 728, 10 Am. St. Rep. 772, 9 S. W. 598..... 670
- v. Feebles, 75 Tex. 537, 12 S. W. 860..... 670
- v. Moore, 76 Tex. 66, 18 Am. St. Rep. 25, 12 S. W. 949..... 670
- v. Norton (Tex. Civ. App.) 62 S. W. 1081..... 671
- v. Rich, 19 Kan. 517, 27 Am. Rep. 159..... 567
- v. Shaw (Tex. Civ. App.) 77 S. W. 433..... 670
- v. Simpson, 73 Tex. 422, 11 S. W. 385..... 670
- Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724..... 214
- Wetmore v. Mellinger, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870..... 828
- Weyand v. Atchison, T. & S. F. R. Co. 75 Iowa, 573, 1 L. R. A. 650, 9 Am. St. Rep. 504, 39 N. W. 899..... 721
- Wheat v. Smith, 50 Ark. 266, 7 S. W. 161..... 79
- Wheaton v. Beecher, 66 Mich. 307, 33 N. W. 503..... 988
- Wheeler v. Boone, 108 Iowa, 238, 44 L. R. A. 821, 78 N. W. 909..... 236
- v. State, 24 Wis. 52..... 768
- White v. Godfrey, 97 Mass. 472..... 682
- v. Morris, 107 N. C. 99, 12 S. E. 80..... 685
- v. Nicholls, 3 How. 286, 11 L. ed. 591..... 985
- v. Pickering, 12 Serg. & R. 435..... 927
- Whitehouse v. Androscooggin R. Co. 52 Me. 208..... 663
- Whitfield v. Le Despencer, 2 Cowp. 734..... 405
- Whiting v. Sheboygan & F. du L. R. Co. 25 Wis. 167, 3 Am. Rep. 30..... 188, 189, 192
- Whitney v. Union R. Co. 11 Gray, 359, 71 Am. Dec. 715..... 804
- Whitted v. Fuquay, 127 N. C. 68, 37 S. E. 141..... 688
- Whitwell, Ex parte, 98 Cal. 78, 19 L. R. A. 427, 35 Am. St. Rep. 152, 32 Pac. 870..... 315
- Whitworth v. Stuckey, 1 Rich. Eq. 410..... 295
- Wickersham v. Chicago Zinc Co. 18 Kan. 481, 26 Am. Rep. 784..... 799
- Wightman v. Chicago, & N. W. R. Co. 73 Wis. 169, 2 L. R. A. 185, 9 Am. St. Rep. 778, 40 N. W. 689..... 437
- Wilcox v. Draper, 12 Neb. 138, 41 Am. Rep. 763, 10 N. W. 579..... 733
- Wilder v. De Cou, 26 Minn. 10, 1 N. W. 48..... 936
- Willey v. Collier, 7 Md. 273, 61 Am. Dec. 346..... 514
- Wilkinson v. Hoke, 39 W. Va. 405, 19 S. E. 520..... 618
- Williams v. Citizens, 40 Ark. 290..... 79
- v. Citizens' R. Co. 130 Ind. 71, 15 L. R. A. 64, 30 Am. St. Rep. 201, 29 N. E. 408..... 775
- v. Collins, 4 N. C. (2 Car. Law Repos.) 583..... 733
- v. Fears, 179 U. S. 274, 45 L. ed. 186, 21 Sup. Ct. Rep. 129..... 65
- v. Glasgow, 1 Nev. 533..... 56
- v. Hald, 118 N. C. 481, 24 S. E. 217..... 902
- v. Kimball, 35 Fla. 49, 26 L. R. A. 746, 48 Am. St. Rep. 238, 16 So. 783..... 184
- v. Mitchell, 45 C. C. A. 265, 106 Fed. 168..... 885, 886
- Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L. R. A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065..... 377
- v. New Jersey Southern R. Co. 26 N. J. Eq. 398..... 372
- Willis v. Vallette, 4 Met. (Ky.) 186..... 798

| | | | |
|---|---------------|--|----------|
| Willson v. Milliken, 42 L. R. A. and notes on page 459, 103 Ky. 165, 82 Am. St. Rep. 578, 44 S. W. 660. | 441 | Woodruff v. Neal, 28 Conn. 165, 167 | 681, 952 |
| Wilson v. Fitch, 41 Cal. 383 | 988 | Woods v. Ridley, 27 Miss. 119 | 675 |
| v. White, 71 Ga. 506, 51 Am. Rep. 269 | 750 | Woodward v. Boston, 115 Mass. 81 | 774 |
| v. Young, 31 Wis. 574 | 863 | Wool v. Edenton, 117 N. C. 6, 23 S. E. 40 | 720 |
| Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134 | 416, 418, 419 | Workman v. New York, 170 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212 | 375 |
| Winborne v. Elizabeth City Lumber Co. 130 N. C. 82, 40 S. E. 825 | 928 | Works v. Junction R. Co. 5 McLean, 425, Fed. Cas. No. 18,046 | 936 |
| Winchester v. Baltimore & S. R. Co. 4 Md. 231 | 709 | Worthy v. Brady, 91 N. C. 265, 108 N. C. 440, 12 S. E. 1034 | 685 |
| v. Capron, 63 N. H. 605, 56 Am. Rep. 554, 4 Atl. 795 | 682 | Wotherspoon v. Currie, L. R. 5 H. L. 508, 42 L. J. Ch. N. S. 130, 27 L. T. N. S. 803 | 886 |
| Winslow v. Cummings, 8 Cush. 358 | 230, 231 | Wright v. Compton, 53 Ind. 337 | 670 |
| v. Merchants' Ins. Co. 4 Met. 306, 38 Am. Dec. 368 | 329 | v. Fire Ins. Co. 12 Mont. 474, 19 L. R. A. 211, 31 Pac. 87 | 176 |
| v. Morton, 118 N. C. 486, 24 S. E. 417 | 709, 710 | v. Holbrook, 52 N. H. 120, 13 Am. Rep. 12 | 750 |
| Winston v. Taylor, 99 N. C. 210, 6 S. E. 114 | 170 | v. Stinson, 16 Wash. 368, 47 Pac. 761 | 340 |
| Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678 | 679 | v. Young, 6 Wis. 127, 70 Am. Dec. 453 | 976 |
| Winton v. Cornish, 5 Ohio, 477 | 299 | Wyandotte v. Drennan, 46 Mich. 478, 9 N. W. 500 | 704 |
| Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370 | 973 | Wynehamer v. People, 13 N. Y. 378 | 312 |
| Wolf v. Meggs (1597) Cro. Eliz. pt. 2, D. 544 | 244 | Y. | |
| Wolfe v. State, 79 Ala. 201, 58 Am. Rep. 590 | 826 | Yancey v. Greenlee, 90 N. C. 317 | 928 |
| Wollenberg v. Rose, 41 Or. 316, 68 Pac. 804 | 789 | Yeatman v. Hart, 6 Humph. 375 | 320 |
| Womack v. McQuarry, 28 Ind. 103, 92 Am. Dec. 306 | 117 | Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064 | 313 |
| Wood v. Adler-Goldman Commission Co. 59 Ark. 270, 27 S. W. 490 | 371 | Young v. Com. 9 Va. Law Reg. 618, 45 S. E. 327 | 172 |
| v. Griffin, 46 N. H. 251 | 800 | v. Detroit, G. H. & M. R. Co. 56 Mich. 435, 23 N. W. 69 | 558 |
| v. Hammond, 16 R. I. 108, 17 Atl. 324, 18 Atl. 198 | 231 | v. East Alabama R. Co. 80 Ala. 100 | 722 |
| v. Rayburn, 18 Or. 3, 22 Pac. 521 | 798 | v. Griffith, 84 N. C. 715 | 688 |
| Woodbury v. Bowman, 13 Cal. 634 | 422 | v. Western U. Teleg. Co. 107 N. C. 370, 9 L. R. A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044 | 670 |
| Woodcock v. Boatie, 118 N. C. 822, 24 S. E. 362 | 739 | v. Wright, 4 Wis. 144, 65 Am. Dec. 303 | 976 |
| Wood County Court v. Boreman, 34 W. Va. 362, 12 S. E. 400 | 617, 618 | Yuice v. Vose, 99 U. S. 533, 25 L. ed. 355 | 918 |
| Wood Reaping & Mowing Mach. Co. v. Smith, 50 Mich. 665, 45 Am. Rep. 57, 15 N. W. 906 | 787 | Z. | |
| Woodford v. Eades (1721) 1 Strange, 425 | 245 | Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446 | 787 |
| Woodman v. Metropolitan R. Co. 149 Mass. 335, 4 L. R. A. 213, 14 Am. St. Rep. 427, 21 N. E. 482 | 750 | Zumpfe v. Gentry, 153 Ind. 219, 54 N. E. 805 | 602 |

STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

England.

Statutes.

| | |
|--|-----|
| 23 Hen. VIII. chap. 3. Attaint | 246 |
| 37 Hen. VIII. chap. 5. Attaint | 246 |
| 4 & 5 Ph. & M. chap. 8. Abduction | 690 |
| 43 Eliz. chap. 6. Charitable gifts | 230 |
| 29 Car. II. chap. 7. Sunday labor | 685 |
| 4 Anne. chap. 16. Amendment of law | 243 |
| 7 Geo. III. chap. 42, § 3. Highways | 679 |
| 13 Geo. III. chap. 78, §§ 16, 27. Highways | 679 |
| 14 Geo. III. Wager policies | 165 |
| 45 & 46 Vict. Married women's property act. | 110 |

United States.

Constitution.

| | |
|--|-----|
| Art. 1, § 8. Powers of Congress | 918 |
| Art. 1, § 10. Impairing obligation of contracts | 701 |
| Art. 3. Judicial powers | 766 |
| Art. 4, § 2, cl. 1. Privileges of citizens of each state | 782 |
| Amend. 1. Prohibiting religious establishment | 686 |
| 65 L. R. A. | |

| | |
|---|--|
| Amend. 5. Due process of law | 703 |
| Amend. 11. Judicial power | 871 |
| Amend. 13. Slavery or involuntary servitude forbidden | 43 |
| Amend. 14. Equal protection of the laws | 40, 53, 207, 311, 425, 593, 600, 613, 619, 704, 759, 782, 870, 918 |

Statutes.

| | |
|---|---------------|
| 1789, § 34. Judiciary act | 716 |
| 1840, August 6. Jurisdiction of state of Wisconsin | 950 |
| 1857, Feb. 26. Jurisdiction of state of Minnesota | 957 |
| 1890, July 2, chap. 647. Illegal contracts | 345 |
| 1890, Sept. 19, § 7. Construction of bridge | 629 |
| 1895, March 2. Removal of snow and ice from sidewalks | 432 |
| 1897, March 2. Removal of snow and ice from sidewalks | 432 |
| 1898, July 1. Bankruptcy act | 110, 607, 795 |
| Statutes at Large. | |
| Vol. 9, p. 57, chap. 89. Jurisdiction of state of Wisconsin | 959 |
| Vol. 11, p. 166, chap. 60. Jurisdiction of state of Minnesota | 959 |

| | |
|--|----------|
| Vol. 26, p. 209. Illegal contracts | 345 |
| Vol. 26, p. 454, chap. 907. Construction of bridge | 629 |
| Vol. 28, p. 509, chap. 178. Removal of snow and ice from sidewalks | 482 |
| Vol. 30, p. 544, ¶ 11. Defining "debt" | 110 |
| Vol. 30, p. 547. Bankrupt law | 110 |
| Vol. 30, p. 550, chap. 541. Bankrupt law | 524, 795 |
| Vol. 30, p. 562, § 63. Proving debts | 110 |
| Vol. 30, pp. 564, 565. Bankrupt law | 607 |

Revised Statutes.

| | |
|--|-----|
| §§ 4283-4285. Liability for injury from accident | 85 |
| § 4747. Pension not liable to attachment | 333 |

Revised Statutes, Supplement.

| | |
|---|-----|
| Vol. 1, chap. 882, p. 690, § 22. Issuance of excursion tickets at special rates | 143 |
| Vol. 2, chap. 61, p. 369. Issuance of excursion tickets at special rates | 143 |

Compiled Statutes, 1901.

| | |
|---|----------|
| P. 671. Removal of snow and ice from sidewalk | 482 |
| Pp. 2948, 2941. Liability for injury from accident | 85 |
| P. 8171. Issuance of excursion tickets at special rates | 143 |
| P. 3200. Illegal contracts | 345 |
| P. 3279. Pension not liable to attachment | 333 |
| P. 3419. Defining "debt" | 110, 796 |
| P. 3423. Bankrupt law | 110 |
| P. 3425. Bankruptcy act | 796 |
| P. 3428. Bankruptcy act | 524, 795 |
| Pp. 3434, 3442. Bankruptcy act | 797 |
| P. 3447. Proving debts | 110 |
| P. 3449. Bankruptcy act | 607 |

Arkansas.

Constitution.

| | |
|---|----|
| Art. 9, § 7. Separate property of married women | 74 |
|---|----|

Statutes.

| | |
|--|-----|
| 1889, p. 76, chap. 61. Protection of servants and employees of railroads | 595 |
| 1893, p. 345. Preference among creditors | 371 |
| 1899, p. 4. Husband not responsible for wife's antenuptial debts | 74 |
| 1899, Feb. 13, p. 11. Destruction of liquor kept for illegal sale | 77 |
| 1903, p. 141. Right of certain parties to testify in certain causes | 75 |

Sandels & Hill's Digest.

| | |
|--------------------------------|-----|
| §§ 5090, 5091. Mortgages | 371 |
|--------------------------------|-----|

California.

Constitution.

| | |
|--|-----|
| Art. 11, § 6. Municipal affairs | 947 |
| Art. 12, § 16. Where action may be brought on contract | 91 |
| Art. 14, § 1. Water rights | 943 |

Statutes.

| | |
|---|-----|
| 1875-76, chap. 149, p. 149. Charter of Marysville | 947 |
| 1901, chap. 209, p. 635. License tax | 947 |

Civil Code.

| | |
|---|-----|
| §§ 1488, 1489. Offer of performance | 92 |
| § 3440. Sale of property | 944 |

Code of Civil Procedure.

| | |
|--------------------------------------|-----|
| § 647. Matters excepted to | 88 |
| § 657. Appeal | 421 |
| § 663. Appeal to supreme court | 88 |
| § 1049. Pending action | 423 |

Political Code.

| | |
|---|-----|
| Pt. 1, tit. 3. Political rights and duties of persons | 947 |
| 05 L. R. A. | |

| | |
|---|-----|
| Pt. 2, tit. 3. Legal distances in the state | 947 |
| Pt. 3, tit. 8. Education | 947 |
| § 2831. Highways | 951 |
| § 2843, subd. 10. Sprinkling roads | 952 |
| § 3366. License tax | 947 |
| Pt. 4, tit. 8. Government of cities | 947 |
| § 4408. Powers of common council | 948 |
| Pt. 5, tit. 3. Publication of the Codes | 947 |

Colorado.

Constitution.

| | |
|---------------------------------------|-----|
| Art. 2, § 3. Due process of law | 425 |
|---------------------------------------|-----|

Statutes.

| | |
|---|-----|
| 1899, chap. 93, p. 175. Forbidding the docking of horses' tails | 425 |
|---|-----|

Connecticut.

General Statutes, 1902.

| | |
|--|----|
| § 588. Voluntary association may sue and be sued | 93 |
| § 802. Reasons of appeal | 93 |

Delaware.

Constitution.

| | |
|------------------------------|-----|
| Art. 1, § 5. The press | 984 |
|------------------------------|-----|

Laws.

| | |
|---|-----|
| Vol. 2, chap. 449. Trial of indictment for publishing libel | 984 |
|---|-----|

Revised Code, 1852.

| | |
|---|-----|
| Chap. 107, p. 800. Trial of indictment for publishing libel | 984 |
|---|-----|

District of Columbia.

Statutes.

| | |
|---|-----|
| 1904, Feb. 10. Removal of snow and ice from sidewalks | 430 |
|---|-----|

Florida.

Constitution, 1885.

| | |
|---|-----|
| Art. 2, §§ 1-3. Rights of married women | 109 |
|---|-----|

Revised Code, 1892.

| | |
|---|-----|
| §§ 1505-1509. Rights of married women | 109 |
|---|-----|

Georgia.

Code, 1882.

| | |
|------------------------------------|-----|
| § 2932. Dismissal or nonsuit | 439 |
|------------------------------------|-----|

Civil Code.

| | |
|--|-----|
| § 2956. Delivery of bill of lading in pledge | 444 |
| § 3539. Goods in possession of agent | 445 |
| § 3553. Stoppage, rights of assignee | 444 |
| § 3786. Dismissal or nonsuit | 439 |
| § 5043. Renewal of action | 439 |

Idaho.

Constitution.

| | |
|--|-----|
| Art. 15, § 3. Diversion of water | 416 |
| Art. 15, §§ 4, 5. Water rights | 413 |

Statutes.

| | |
|---|-----|
| 1899, p. 381. Water rights | 411 |
| 1901, p. 200. Property right in water | 416 |

Revised Statutes.

| | |
|----------------------------------|-----|
| § 3157. Water rights | 411 |
| § 3163. Diversion of water | 418 |

Illinois.

Statutes.

| | |
|---|----|
| 1861, p. 143. Married woman's law | 74 |
|---|----|

- 1887, p. 205, § 1. Issuance of benefit certificates 510
 1898, p. 130. Fraternal beneficiary societies 510
Hurd's Statute, 1895.
 Chap. 73, § 258. Fraternal beneficiary societies 511

Indiana.*Bill of Rights.*

- Art. 1, § 1. Equal rights 600
Statutes.

- 1865, p. 120. Liability of stockholder 601
 1875, Aug. 24, p. 29. Liability of stockholders 601
 1881, p. 423. Order of paying debts of decedent 601
 1885, March 3, p. 36. Preferred creditors 601
 1899, p. 193. Assignment of future wages 600
Gavin & Hord's Statutes.
 Vol. 1, § 57. Concurrent jurisdiction over waters 969

Revised Statutes, 1852.

- P. 360, § 11. Liability of stockholders ... 601
 P. 421, § 38. Liability of stockholder 601
 P. 423, § 10. Liability of stockholder 601

Revised Statutes, 1881.

- § 2378. Order of paying debts of decedent 601
 § 5117. Separate property of married women 74

Burns's Revised Statutes, 1901.

- §§ 970-972. Wages exempt from attachment 601
 § 2534. Order of paying debts of decedent 601
 § 5077. Liability of stockholders 601
 § 5198, 5231. Liability of stockholders ... 601
 § 6964. Married women 601
 § 7051. When wages a preferred claim ... 601
 § 7059, 7059c. Assignment of future wages 600

Iowa.*Code, 1873.*

- § 4160. Jurisdiction of criminal case 766

Code, 1897.

- P. 55. Admission of Iowa 968
 P. 56, § 3. Jurisdiction over boundary waters 968
 § 5555. Forbidding search in nighttime .. 522

Kentucky.*Constitution.*

- § 170. Exemption of educational institutions from taxation 121

Statutes.

- 1854, March 4. Creation of corporation .. 121
 1873-4, chap. 386, p. 40. Inspection of oils 427

Maryland.*Statutes.*

- 1900, chap. 579, p. 907. Sale of merchandise 315

Massachusetts.*Declaration of Rights.*

- Art. 1. Property rights 594
Statutes.

- 1810, chap. 94. Charitable institutions .. 377
 1890, chap. 358. Charitable institutions .. 374
 1891, chap. 125, § 1. Fines upon and reductions from wages of employees 594

65 L. R. A.

Revised Statutes, 1836.

- Chap. 61, § 4. Legitimacy of child 184
 Chap. 74, § 5. Valid mortgage 372

Public Statutes, 1882.

- Chap. 125, § 5. Legitimacy of child 182
Revised Laws.
 Chap. 133, § 5. Legitimacy of child 182

Michigan.*Compiled Laws, 1897.*

- § 6234, subdiv. 5. Obstruction of street by cars 558

Minnesota.*Constitution.*

- Art. 10, § 3. Liability of stockholder 795

Mississippi.*Constitution.*

- § 17. Compensation for property taken . 568
 §§ 179-190. Corporations 576
 § 187. Establishment of depot 566

Statutes.

- 1837, May 13. Railroad charter 565
 1862, March 11. Railroad charter 569
 1873, p. 567, chap. 295. Consolidation of railroad 565
 1882, p. 1023, chap. 559. Railroad lease .. 564
Code, 1892.

- § 2931. Public places and railroads 574
 § 2933. Use of street for pipes and conduits 576
 § 2947. Jurisdiction of streets 576
 § 2948. Power to maintain waterworks .. 576
 § 2974. Railroad crossings 574
 § 3555. Bridges and highway crossings .. 568

Missouri.*Constitution.*

- Art. 2, § 4. Object of constitutional government 593
 Art. 2, § 30. Due process of law 593

Revised Statutes, 1889.

- P. 198, § 424. Assignment 370
 § 7058. Truck act 593
 § 7060. Penalty for violating truck act .. 593

Revised Statutes, 1899.

- § 1127. Issuance of excursion tickets at special rates 143
 § 3649. Injunction 146
 Chap. 121, art. 3, §§ 8142, 8143. Payment of wages 593
 § 8144. Penalty for violation of article .. 593
 § 8145. Disposition of fines collected 593

Nebraska.*Constitution.*

- Art. 1, § 3. Due process of law 612
 Art. 3, § 4. Compensation of members of legislature 609
 Art. 3, § 15. Passage of local or special laws 609

Statutes.

- 28th Gen. Assem. chap. 124, p. 630. Publication of statutes .. 608

Compiled Statutes, 1901.

- Chap. 31, art. 3, § 3. Duty of game warden .. 612

Nevada.*Constitution.*

- Art. 1, § 1. Right of citizens to property 53

| | |
|--|----|
| Art. 4, § 17. Multiplicity of subjects | 63 |
| Art. 4, § 20. Local and special laws | 63 |
| Art. 4, § 21. Laws to be general and uniform | 63 |

Statutes.

| | |
|--|-----|
| 1865, March 4. Duties of lieutenant governor | 708 |
| 1903, Feb. 23, p. 33, chap. 10. Eight-hour law | 53 |

Compiled Laws, 1875.

| | |
|---------------------------------------|----|
| § 283. Mining; eminent domain | 54 |
| <i>Compiled Laws, 1887.</i> | |
| § 281. Entry upon mineral lands | 54 |

New Hampshire.*Statutes.*

| | |
|--|-----|
| Ed. 1791, Feb. 8. Laying out highways .. | 679 |
| Ed. 1792, p. 278. Laying out highways .. | 680 |
| Ed. 1797, p. 309. Laying out highways .. | 680 |
| Ed. 1805, p. 328. Laying out highways .. | 680 |
| Ed. 1815 p. 385. Laying out highways .. | 680 |
| 1829, chap. 52, p. 543. Laying out highways .. | 680 |
| 1858, chap. 2128, p. 2024. Shade trees in Portsmouth .. | 681 |
| 1859, chap. 2258, p. 2131. Shade trees in Dover .. | 681 |
| 1861, chap. 2502, p. 2543. Preservation and protection of shade trees .. | 681 |
| 1868, chap. 1, p. 127. Shade trees in towns .. | 681 |
| 1875, chap. 39, p. 464. Protection of shade trees .. | 681 |
| 1889, chap. 82, p. 97. Public control of shade trees .. | 681 |
| 1895, chap. 85, p. 439. Protection of shade trees .. | 681 |
| 1897, chap. 44, p. 36. Nursery trees in highways .. | 682 |
| 1901, chap. 98, p. 592. Control of shade trees .. | 682 |

Revised Statutes, 1843.

| | |
|--|-----|
| Chap. 49, § 13. Assessment of highway damages .. | 680 |
|--|-----|

Compiled Statutes, 1854.

| | |
|--|-----|
| Chap. 52, § 18. Assessment of highway damages .. | 680 |
|--|-----|

General Statutes, 1867.

| | |
|--|-----|
| Chap. 34, §§ 9-11. Preservation and protection of shade trees .. | 681 |
| Chap. 61, § 15. Assessment of highway damages .. | 680 |

General Laws, 1878.

| | |
|--|-----|
| Chap. 37, §§ 9-11. Shade trees .. | 681 |
| Chap. 67, § 19. Assessment of highway damages .. | 680 |

Public Statutes.

| | |
|---|-----|
| Chap. 82, §§ 1, 2. Digging up highways .. | 751 |
|---|-----|

Public Statutes, 1901.

| | |
|--|-----|
| Chap. 40, pp. 164, 166, §§ 4, 9-11. Shade trees .. | 681 |
| Chap. 67, § 18. Assessment of highway damages .. | 680 |

New York.*Statutes.*

| | |
|--|-----|
| 1880, chap. 36. Comparison of writings by experts | 102 |
| 1888, chap. 555. Comparison of writings by experts | 102 |
| 1889, chap. 382, p. 511, § 40. Identification of criminals | 105 |
| 1895, chap. 723, p. 484. Consolidation of corporations | 227 |
| 1896, chap. 56, p. 23. Consolidation of corporations | 227 |
| 1896, chap. 440, p. 401. Identification of criminals | 105 |
| 1897, chap. 415, p. 461. Labor law | 41 |
| 1899, chap. 507, p. 1172. Labor law | 41 |
| 65 L. R. A. | |

Code of Criminal Procedure.

| | |
|---|-----|
| § 491. Warrant for execution of convict | 105 |
| §§ 507, 508. Death penalty | 106 |

Penal Code.

| | |
|--|----|
| § 384h, subdiv. 1. Limiting hours of labor | 39 |
|--|----|

North Carolina.*Declaration of Rights.*

| | |
|-----------------------------|-----|
| § 12. Law of the land | 713 |
|-----------------------------|-----|

Constitution.

| | |
|---|-----|
| Art. 1, § 17. Law of the land | 713 |
| Art. 1, § 26. Religious liberty | 686 |
| Art. 4, § 33. Existing offices not vacated by amendments .. | 716 |
| Art. 8, § 1. Corporations .. | 920 |

Statutes.

| | |
|---|-----|
| 1872-73, chap. 81-88, pp. 111-118. Constitutional amendments .. | 716 |
| 1891, chap. 323, p. 293. Revenue act | 171 |
| 1891, chap. 465, p. 524. Description of land | 688 |
| 1900, chap. 247, p. 337. Revenue act | 170 |
| 1901, chap. 9, p. 137. Revenue act | 171 |
| 1903, chap. 233, p. 293. Cities .. | 911 |

Public Laws.

| | |
|---|-----|
| 1899, chap. 62. Domestication of foreign corporation .. | 917 |
|---|-----|

Private Laws.

| | |
|--|-----|
| 1903, chap. 170, p. 362. Charter of Washington | 908 |
|--|-----|

Code.

| | |
|--|----------|
| 177. Action by party in interest | 741 |
| 185. Parties to the action | 928 |
| 254. Duty of clerk on appeal | 929 |
| 255. Duty of judge on appeal | 929 |
| 272. Amendments of course after allowance of demurrer .. | 930 |
| 338. Injunction .. | 911 |
| 426-428. Judgment .. | 929 |
| 2079. Sheriffs .. | 913 |
| 2103. Widow entitled to dower .. | 684 |
| 2106. Rights of husband .. | 684 |
| 3782. Forbidding Sunday labor .. | 685 |
| 3800. Municipal taxation .. | 170, 910 |
| 3808. Town constable .. | 913 |
| 3811. Policemen .. | 913 |
| 3818. Criminal jurisdiction of mayors .. | 913 |
| 3820. Violation of town ordinance .. | 912 |
| 3872. Continuance in office .. | 716 |

Clark's Code.

| | |
|--|-----|
| P. 584, § 425. Relief awarded to plaintiff | 739 |
|--|-----|

North Dakota.*Constitution.*

| | |
|---|-----|
| 7. Right of trial by jury | 764 |
| 111. Jurisdiction of county court | 759 |

Statutes.

| | |
|---|-----|
| 1875, pp. 122, 123. Change of venue in criminal cases | 765 |
| 1901, p. 173, chap. 134. Location of highway .. | 188 |

Compiled Laws.

| | |
|---|-----|
| § 885, subdivs. 7, 9, 10, 17. Use of streets .. | 773 |
| §§ 7312-7318. Change of venue in criminal cases | 765 |

Revised Codes, 1877.

| | |
|--|-----|
| §§ 285-291. Change of venue in criminal cases .. | 765 |
|--|-----|

Revised Codes, 1899.

| | |
|---|-----|
| § 1050. Public roads | 190 |
| § 1053. Power to open highways | 189 |
| § 1091. Bridges part of highway | 189 |
| § 1114. Roads in care of supervisors .. | 100 |

| | |
|--|-----|
| § 2148, subdiv. 7, 60. Powers of city council | 192 |
| § 2503. Parks and public grounds | 192 |
| § 5956, subd. 7. Public use; eminent domain | 773 |
| § 6317. Petition for letters of administration | 759 |
| § 6325, subdiv. 2. Appointment of special administrator | 759 |
| § 6328. Authority of special administrator | 759 |
| § 6331. When special administration ceases | 759 |
| § 7560. Abuse of property | 761 |
| <i>Political Code, 1899.</i> | |
| Chap. 17. Highways, bridges, and ferries | 189 |
| <i>Code of Criminal Procedure.</i> | |
| Art. 5, chap. 9, §§ 8110-8122. Change of venue in criminal cases | 764 |

Ohio.*Bill of Rights.*

| | |
|---|-----|
| § 2. Special privileges or immunities | 782 |
| <i>Statutes.</i> | |
| 1884, March 20. Pure-food law | 870 |
| 1900 (94 Ohio Laws, p. 101). Inheritance tax | 778 |
| <i>Revised Statutes.</i> | |
| § 213. Security not required of state or officer | 778 |
| § 2731-1. Payment of inheritance tax | 778 |
| § 2731-13. Appeal from probate court | 778 |
| § 5227. Notice of appeal to circuit court | 778 |
| § 6408. Mode of appeal | 778 |
| § 6411. Proceedings in probate court | 778 |
| § 6986-1, 6986-2. Employment of children | 833 |
| <i>Bates's Annotated Statutes.</i> | |
| Vol. 1, §§ 409-7, 409-8. Prosecution for sale of adulterated food | 871 |
| Vol. 2, §§ 4200-4-4200-8. Pure-food law | 870 |

Oregon.*Statutes.*

| | |
|---|-----|
| 1801, chap. 173. Assessment of damages after default | 249 |
| <i>Bellinger & Cotton's Annotated Codes and Statutes.</i> | |
| § 326. Recovery of real property | 792 |
| § 328. What complaint must contain | 792 |
| § 329. Right of defendant must be pleaded | 792 |
| § 330. Verdict | 792 |
| § 339. Conclusiveness of judgment | 792 |
| § 412. Dismissal of suit in equity | 793 |
| § 748. Former judgment | 792 |

Pennsylvania.*Statutes.*

| | |
|--|-----|
| 1867, April 4 (P. L. 768). Water commissioners | 217 |
| 1870, August 5 (P. L. 1871, p. 1548). Public building commission | 216 |
| 1881, June 29 (P. L. 147). Store-order act | 594 |

Rhode Island.*Constitution.*

| | |
|--|-----|
| Art. 1, § 15. Right of trial by jury | 248 |
| <i>Statutes.</i> | |
| 1647. General Court of Tryalls | 245 |
| 1648. General Court of Tryalls | 245 |
| 1650. Attorney general | 246 |
| 65 L. R. A. | |

| | |
|--|-----|
| 1779. Confiscation | 247 |
| 1893, chap. 23, § 5. Judiciary act | 237 |
| <i>Digest, 1719.</i> | |

| | |
|---|-----|
| P. 15. "General Court of Tryalls" | 248 |
| P. 45. Law in force | 237 |
| <i>Digest, 1767.</i> | |

| | |
|---|-----|
| P. 56. Law in force | 237 |
| P. 59. Sunday proceedings in courts | 237 |
| <i>Revision, 1798.</i> | |

| | |
|--|-----|
| P. 166, § 13. Assessment of damages by court | 237 |
| <i>Revision, 1822.</i> | |

| | |
|--|-----|
| P. 126, § 13. Assessment of damages by court | 237 |
| <i>Revision, 1844.</i> | |

| | |
|--|-----|
| P. 129, § 14. Assessment of damages by court | 237 |
| <i>Revised Statutes, 1857.</i> | |

| | |
|--|-----|
| Chap. 186, § 7. Assessment of damages by court | 237 |
| <i>General Statutes, 1872.</i> | |

| | |
|--|-----|
| Chap. 202, § 7. Assessment of damages by court | 237 |
| <i>Public Statutes, 1882.</i> | |

| | |
|--|-----|
| Chap. 213, § 8. Assessment of damages by court | 237 |
| <i>General Laws, 1896.</i> | |

| | |
|--|-----|
| Chap. 36, § 15. Action on breach of duty to repair highway | 235 |
| Chap. 72, § 1. Duty to keep highways in repair | 235 |

| | |
|--|-----|
| Chap. 243, p. 830, § 5. Assessment of damages on default | 236 |
| <i>Public Laws.</i> | |

| | |
|---|-----|
| 1896, chap. 345. Bicycles, personal baggage | 235 |
| 1900, chap. 757. Construction of sidepaths for bicycles | 235 |
| 1902, chap. 971, p. 40, § 5. Allowance of alimony | 817 |

South Carolina.*General Statutes, 1882.*

| | |
|---|-----|
| § 1632. Sunday labor | 685 |
| <i>Code of Civil Procedure.</i> | |
| § 181. Rule of pleading | 295 |
| <i>Civil Code, 1902.</i> | |
| §§ 2194, 2195. Condemnation of right of way | 200 |

South Dakota.*Statutes.*

| | |
|--|-----|
| 1891, chap. 50. Removal of criminal action | 152 |
|--|-----|

Compiled Laws.

| | |
|--|-----|
| § 5310. Entry made by officer | 158 |
| § 7312. Removal of criminal action | 152 |
| § 7347. Challenge to talesmen | 153 |
| § 7358. Particular causes of challenge | 155 |
| § 7359. Challenge for implied bias | 153 |

Tennessee.*Constitution.*

| | |
|------------------------------------|-----|
| Art. 1, § 8. Property rights | 297 |
| <i>Statutes.</i> | |

| | |
|---|-----|
| 1899, p. 17, chap. 11. Redemption of store orders | 595 |
| 1901, p. 234, chap. 133. Sale of merchandise | 215 |
| 1903, p. 599, chap. 257. Revenue law | 296 |

| | | | |
|---|-----|--|-----|
| Texas. | | 1865-66, chap. 18, p. 85. Legitimizing children of slaves .. | 182 |
| <i>Constitution.</i> | | <i>Henning's Statutes, 1619-1660.</i> | |
| Art. 1, § 5. Competency of witness | 323 | Vol. 1, p. 123. Sunday law | 637 |
| <i>Code of Criminal Procedure.</i> | | <i>Revised Code.</i> | |
| Art. 763. Evidence in criminal actions .. | 323 | Vol. 1, p. 59. Concurrent jurisdiction over waters | 969 |
| Art. 768. Competency of witness | 323 | | |
| <i>Penal Code.</i> | | Washington. | |
| Art. 34. Children not punishable | 323 | <i>Constitution.</i> | |
| Art. 423. Defining "nuisance" | 319 | Art. 1, § 12. Equal privileges | 341 |
| <i>White's Annotated Penal Code.</i> | | Art. 7, § 1. Taxation of property | 339 |
| § 1106. Penetration | 321 | Art. 11, § 9. Release from state taxes .. | 342 |
| Utah. | | <i>Statutes.</i> | |
| <i>Constitution.</i> | | 1895, p. 105, chap. 61. Migratory stock act | 340 |
| Art. 1, § 1. Inherent and inalienable rights | 311 | 1895, pp. 114, 115, chap. 65. Grant of writ of review | 341 |
| Art. 1, § 7. Due process of law | 311 | 1899, p. 295, chap. 141, § 12. Tax on merchandise | 339 |
| Art. 16, § 6. Health and safety of employees in mines, etc. | 55 | 1901, p. 222, chap. 109. Sale of goods in bulk | 316 |
| <i>Session Laws.</i> | | <i>Ballinger's Annotated Codes & Statutes.</i> | |
| 1896, p. 219, chap. 72. Regulation of employment in underground mines | 55 | Vol. 2, §§ 4828, 4838. Action for wrongful death | 335 |
| 1901, March 14, p. 67, chap. 67. Inventory of merchandise before sale | 309 | Vol. 2, § 5741. Grant of writ of review .. | 341 |
| | | Vol. 3, § 1740a. Tax on merchandise .. | 330 |
| Vermont. | | <i>Pierce's Code.</i> | |
| <i>Statutes.</i> | | Chap. 59. Issuance of writ | 341 |
| § 1101. Attachment of real estate | 328 | § 1306. Grant of writ of review | 341 |
| § 1103. Attachment of personal property | 328 | § 8679. Tax on merchandise | 339 |
| § 1108. Removal of property attached .. | 328 | | |
| Virginia. | | West Virginia. | |
| <i>Statutes.</i> | | <i>Code, 1899.</i> | |
| 1789, Dec. 18. Admission of Kentucky .. | 969 | Chap. 99, § 10. Action of assumpsit | 344 |
| 65 L. R. A. | | Chap. 110, § 1. Writ of prohibition | 617 |
| | | Chap. 151, § 1. Keeping gaming tables .. | 617 |
| | | Chap. 155. Search warrants | 618 |

LAWYERS' REPORTS

ANNOTATED.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *Respt.*,
v.
ORANGE COUNTY ROAD CONSTRUCTION COMPANY, *Appt.*

(175 N. Y. 84.)

1. The state cannot forbid independent contractors, performing work for it, to require their employees to labor more than a specified number of hours per day, either under its police power, or on the ground that the legislature may prescribe rules for the manner in which state work shall be performed.
2. A statute prescribing a penalty for requiring more than a certain number of hours' labor from employees engaged in performing work for the state, which is void because applying to all persons generally, cannot be enforced, even against persons who have contracted not to exact more than specified labor.
3. An indictment for violating a statute prohibiting the breach of a contract not to exact more than a specified number of hours of labor per day from persons engaged on state work must show the existence of an express contract, or that the accused was bound by an implied one, by force of statute or otherwise.

(*Haight, J., dissents.*)

(April 28, 1903.)

NOTE.—Limitation of hours of labor by statute or ordinance.

- I. General construction and application of statute, 33.
 - II. Constitutionality of statute.
 - a. Under Federal Constitution.
 1. In general, 33.
 2. Due process of law, 40.
 3. Equal protection of the laws, 42.
 4. Impairing obligation of contract, 42.
 - b. Under state Constitution, 42.
 - III. Police power of state, 44.
 - IV. Right to extra compensation for labor in excess of limited time, 46.
 - V. Criminal liability for violation of statute, 50.
- I. General construction and application of statute.

In the following division will be found the 65 L. R. A.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of the Orange County Court which sustained a demurrer to an indictment charging defendant with violation of the statute limiting the hours of labor. *Reversed.*

The facts are stated in the opinion.

Mr. William D. Guthrie, for appellant:

The statute deprives the defendant corporation of liberty and property without due process of law, and denies to it the equal protection of the laws, and, therefore, is in conflict with the state and national Constitutions.

Holden v. Hardy, 169 U. S. 366, 395, 398, 42 L. ed. 780, 792, 793, 18 Sup. Ct. Rep. 383; *People v. Lochner*, 73 App. Div. 120, 76 N. Y. Supp. 396; *People v. Phyfe*, 136 N. Y. 554, 19 L. R. A. 141, 32 N. E. 978; *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *Wenham v. State*, 65 Neb. 394, 58 L. R. A. 825, 91 N. W. 421; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

The constitutional guaranty was adopted for the purpose of securing individual rights, and protecting all persons against

several decisions in which statutes which in any way change or limit the hours or time of labor are variously construed and applied, assuming that the same are valid and do not offend any of the provisions of either the Federal or a state Constitution.

Where a state statute provides "that eight hours shall constitute a day's work for all laborers, workingmen, mechanics, or other persons now employed, or who may hereafter be employed, by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other municipality of said state, except in cases of extraordinary emergency, etc.," an ordinance of a city which requires male residents between the ages of twenty-one and forty-five years to perform two days' work of ten hours a day on the public streets, or pay \$3 in lieu thereof, is invalid as being obnoxious to the provisions of the statute. *Re Ashby*, 60 Kan. 101, 53 Pac. 336.

A city, in contracting to pave a public street, exercises delegated authority, and acts as an

"the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. ed. 559, 561.

The words "liberty and property" were used in the Constitution in a comprehensive, not a restricted, sense. They include the right of everyone to live and work where he will, to earn a livelihood in any lawful way, to pursue any lawful trade or vocation, to contract with freedom in respect of his labor or his property, to exercise his faculties in all lawful ways, to do any act not injurious to the community; and any statute unnecessarily depriving him of the free exercise of these rights is not due process of law, and will be set aside by the courts.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 756, 757, 28 L. ed. 585, 590, 591, 4 Sup. Ct. Rep. 652; *Yick Wo v. Hopkins*, 118 U.

S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Lauton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427.

The statute before the court, which prevents a class of employers from contracting freely with their employees in the manner permitted to other employers of like labor, deprives that class of liberty and property without due process of law.

McCarthy v. New York, 96 N. Y. 1, 48 Am. Rep. 601; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L. R. A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; *Re Eight-Hour Law*, 21 Colo. 29, 39 Pac. 328; *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

The statute in question also denies to the parties interested the equal protection of the laws.

People v. Harnor, 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541;

agent for the state; and the latter does not, by authorizing the mayor and council to lay the pavement, surrender its paramount authority over the contract for the city streets. The fact that abutting property owners are charged more for the improvement by the application of the restrictive provisions of the law reducing the hours of labor may be admitted, yet, if the work had been done by the state itself, which has supreme authority in such matters, the property owners could not complain that it employed and paid its servants conformably to the statute in question; and so one who, under a contract with the authorities of a city, permits any of its employees engaged on the work to labor more than eight hours per day is liable to the penalties of what is known as the eight-hour law of Kansas. *State v. Atkin*, 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519.

Voluntary service for excessive hours is forbidden by a statute which expressly states that its purpose is to limit the usual hours of labor of street-car employees, although it merely forbids officers of the corporation to exact more than a certain number of hours per day. *Re Ten-Hour Law*, 24 R. I. 603, 61 L. R. A. 612, 54 Atl. 602.

A fireman of the city of New York is not included within the provisions of §§ 2 and 3 of the Laws of 1897, chap. 415, as amended by chap. 298 of the Laws of 1900, which provides that eight hours shall constitute a legal day's 65 L. R. A.

work for all classes of employees in the state, except those engaged in farm and domestic service, unless otherwise provided by law, as § 3 refers only to an employee, as defined by § 2,—that is, "mechanic, workman, or laborer who works for another for hire;" as it is obvious that the legislature did not intend to include the uniformed members of the fire department within the act. The word "hire" evidently does not relate to public officers, or others holding positions under the city, who are included in the classified lists of the civil-service law, such as the uniformed members of the fire department, who are appointed to position after rigid examination and from competitive lists. No contract of hiring is made with them. They receive annual salaries, not wages, either in the common or legal acceptance of the term. And a writ of mandamus to command the fire commissioner of the city "to carry into effect, execute, and enforce the provisions of the labor law, . . . and to so regulate the rules and regulations of the fire department that engineers and firemen thereof shall not be assigned to more than eight hours' duty in any one calendar day," was refused. *People ex rel. Sweeney v. Sturgis*, 78 App. Div. 460, 70 N. Y. Supp. 969.

In *Worthington v. Breed*, 142 Cal. 102, 75 Pac. 675, plaintiff filed his verified petition for a writ of mandate, alleging that he performed certain services for a city of which the defendant was auditor, in pursuance of a con-

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 560, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 87, 46 L. ed. 92, 100, 22 Sup. Ct. Rep. 30; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 154, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816; *Shaver v. Pennsylvania Co.* 71 Fed. 931; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Re Eight-Hour Law*, 21 Colo. 29, 39 Pac. 328; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340; *Bessette v. People*, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Gastineau v. Com.* 108 Ky. 473, 49 L. R. A. 111, 56 S. W. 705; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Templar v. State Board of Examiners*, 131 Mich. 254, 90 N. W. 1058; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362;

State ex rel. Bramley v. Norton, 5 Ohio N. P. 183; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Cadigan*, 73 Vt. 245, 57 L. R. A. 666, 87 Am. St. Rep. 714, 50 Atl. 1079; *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

Although counties and other municipal corporations are public, as distinguished from strictly private, corporations, and, in political and governmental matters, are the representatives and auxiliaries of the state, nevertheless, in all other matters, they are separate, distinct entities, independent of the state, with property rights which are protected by the Constitution, and of which they cannot be deprived without due process of law and just compensation.

Dartmouth College v. Woodward, 4 Wheat. 518, 694, 4 L. ed. 629, 673; *People v. Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178; *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367, 32 L. R. A. 344, 44 N. E. 146; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Atkins v. Randolph*, 31 Vt. 226; *State ex rel. Wheeler v. Foley*, 30 Minn. 350, 15 N.

tract by which he was to receive a certain sum. That his claim was duly proved, and a resolution adopted by the proper board allowing the amount against the general funds of the city; but the defendant, as auditor, refused to draw a warrant for the amount on the ground that the petitioner had permitted a number of laborers and mechanics to work upon the contract more than eight hours per day, and had thereby incurred penalties to a certain amount, under an act limiting the number of hours of daily service of laborers and mechanics, etc., upon public works of the state or any political subdivision thereof; and a judgment sustaining a demurrer to the defendant's answer to that effect was affirmed. The grounds for sustaining the demurrer were: First, that the answer should have shown that there were penalties stipulated in the contract, in order to authorize anyone to withhold any amount of the contract price; second, that in such case the penalties could only be withheld by the officer or person whose duty it was to pay the money due under the contract; and it was no part of the duty of the auditor to pay such money; neither had he any authority to refuse to draw his warrant.

In *State v. Wilson*, 65 Kan. 235, 69 Pac. 172, a judgment of the district court quashing an information against the defendant for a violation of the eight-hour law, on the ground that a school district was not a municipality within the meaning of that law, was reversed. 65 L. R. A.

By the provisions of what is known as the shop hours act of 1892, § 3, "no young person shall be employed in or about a shop for a longer period than seventy-four hours, including mealtimes, in any one week." It was held that the employment of one who was a "young person" within the meaning of the act, whose work was done partly inside the shop and partly away from it in fetching newspapers and delivering them to customers for more than the prescribed number of hours, was a violation of the act; the court saying that it must consider what was the object of the act and the mischief which it was intended to prevent, and that that object was to protect the health of young persons employed in shops, and not to insure sanitary conditions. *Collman v. Roberts* [1896] 1 Q. B. 457, 65 L. J. Mag. Cas. N. S. 63, 74 L. T. N. S. 198, 44 Week. Rep. 445, 18 Cox C. C. 273, 60 J. P. 184.

By the factory and workshop act of 1878 (41 & 42 Vict. chap. 16), § 17, subsec. 2, "a child, young person, or woman, shall not, during any part of the times allowed for meals in the factory or workshop, be employed in the factory or workshop." In *Prior v. Slathwaite Spinning Co.* [1898] 1 Q. B. 881, 67 L. J. Q. B. N. S. 615, 78 L. T. N. S. 532, 46 Week. Rep. 488, 62 J. P. 358, 19 Cox C. C. 54, it appeared that the respondents, in accordance with the requirements of the act, had fixed and specified in a notice affixed to their factory the period of employment and times allowed for meals,

W. 375; *Milam County v. Bateman*, 54 Tex. 153; *Grogan v. San Francisco*, 18 Cal. 590.

The discretion of the legislature in respect to the use and disposition of state funds and the funds and property of municipal corporations is not absolute, but is restrained by the Constitution.

Re Mahon, 171 N. Y. 263, 89 Am. St. Rep. 810, 63 N. E. 1107; *Chapman v. New York*, 168 N. Y. 80, 56 L. R. A. 846, 85 Am. St. Rep. 665, 61 N. E. 108; *Re Greene*, 166 N. Y. 485, 60 N. E. 183; *Bush v. Orange County*, 159 N. Y. 212, 45 L. R. A. 556, 70 Am. St. Rep. 538, 53 N. E. 1121.

So far as the act in question operates to bestow extra compensation upon the employees of public contractors, and, without consideration, to increase the amount payable to contractors, it is clearly a giving of the money of the state to and in aid of private undertakings.

Re Mahon, 171 N. Y. 263, 89 Am. St. Rep. 810, 63 N. E. 1107; *Fox v. Mohawk & H. River Humane Soc.* 165 N. Y. 517, 51 L. R. A. 681, 80 Am. St. Rep. 767, 59 N. E. 353; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

Messrs. L. Laffin Kellogg and William Vanamee, also for appellant:

If the legislature has no right to prescribe the rate of wages, neither has it, in the absence of some good reason for the public welfare, the right to prescribe the hours of labor. Both are matters for agreement between employer and employee. The

same rule as to freedom of contract applies to both.

Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 59 L. R. A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; *State ex rel. Bramley v. Norton*, 5 Ohio N. P. 183; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 378, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *People ex rel. Tyrolier v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776; *Godcharles v. Wigeman*, 113 Pa. 431; 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; *Re Preston*, 63 Ohio St. 428, 52 L. R. A. 523, 81 Am. St. Rep. 642, 59 N. E. 109; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W.

one of the times for meals being from 12:30 to 1 P. M.; that one of the employees who came within the description of "young person" had his dinner in the mill because it was warmer than outside. He had finished his dinner, and, because he had nothing else to do to pass the time away, he got hold of the oil-can and was oiling the spindles. It was no part of his duty to oil the spindles, and no one told him to do so; nor did any of the managers know that he was oiling them. He would not receive any extra pay for oiling them. What he did was contrary to orders, and done of his own accord. The court held that the mere fact that this boy did this to please himself and without orders from anyone did not make it any the less work, and that, therefore, he was working; that the policy of the act in regard to this question of working at mealtimes was that persons who were regarded by the legislature as comparatively defenseless should have their mealtimes reserved intact, and for that purpose the legislation was rigorous. In response to the suggestion that there were cases of hardship in which the moral offense could not be brought home to anybody, and therefore the employer was liable although he really was not responsible for what was done, the court said that the true answer to that was,—the absolute and unfettered discretion which was vested in the justices, both of moderating the fine and in dealing with the 65 L. R. A.

costs; and that the case must be remitted to the justices to convict.

A statute entitled "An Act to Regulate the Manufacture of Clothing, Wearing Apparel, and Other Articles, etc.," and providing in the body that no female shall be employed in any factory or workshop more than eight hours a day, will embrace only employment in the manufacture of articles of the same kind as those expressly enumerated. *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 457.

The act of Massachusetts which provides that no minor under eighteen years of age, and no woman over that age, shall be employed more than ten hours in any one day in any manufacturing establishment, also provides that any person, firm, or corporation employing such persons in such establishment shall post a printed notice in a conspicuous place in every room where such help is employed, which notice shall state the number of hours' work required of such person on each day of the week; and in *Com. v. Osborn Mill*, 130 Mass. 33, it was decided that a complaint which alleged that a manufacturing corporation employed a woman in its manufacturing company without having posted a printed notice in a conspicuous place in the room where she was employed, to wit, the clothing room, stating the number of hours' work required of such persons on each day of the week, as required by the statute, is insufficient in not alleging that the woman was em-

362; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; *Denver v. Bach*, 26 Colo. 530, 46 L. R. A. 848, 58 Pac. 1089; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Fiske v. People*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985; *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120.

The provisions in question have no relation whatsoever to the public health, safety, or morals, and cannot be held valid as a police regulation.

Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *People ex rel. Warren v. Beck*, 10 Misc. 83, 30 N. Y. Supp. 473; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L. R. A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; *Re Eight-Hour Law*, 21 Colo. 29, 39 Pac. 328; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Fiske v. People*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985; *Seattle v. Smyth*, 22

Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120; *State ex rel. Bramley v. Norton*, 5 Ohio N. P. 183.

The dual character of a municipal corporation, i. e., public and private, is clearly recognized in a long line of decisions in this state arising out of the question of the liability of such a corporation for the negligent performance of public work. When the work relates to the interests of the public at large, and is being performed by the corporation in its governmental capacity, it is held not to be liable for negligent performance.

Maemilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; *Ham v. New York*, 70 N. Y. 459; *Terhune v. New York*, 88 N. Y. 247, 42 Am. Rep. 248; *Tone v. New York*, 70 N. Y. 157; *Smith v. Rochester*, 70 N. Y. 506; *Heiser v. New York*, 104 N. Y. 68, 9 N. E. 866.

But when the work is being performed by it in its proprietary or private capacity, for the benefit of its citizens as a compact community, then the officers in charge are held to be its agents, for whose negligence it is liable, and such are the cases of—

Appleton v. Water Comrs. 2 Hill, 432; *Bailey v. New York*, 3 Hill, 538, 38 Am. Dec. 669; *Walsh v. New York & B. Bridge*, 96 N. Y. 428, 107 N. Y. 220, 13 N. E. 911; *New York & B. Sawmill & Lumber Co. v. Brooklyn*, 71 N. Y. 580; *New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618; *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744.

ployed in laboring in a manufacturing establishment belonging to the defendant. The court declined to decide whether or not a complaint could be maintained against the defendant for its failure to post the notice required by the statute without proof that it had employed, in laboring, minors or women more than ten hours a day or sixty hours a week.

By the passage of an act providing that eight hours should constitute a legal day's work for all classes of mechanics, workmen, and laborers, excepting those engaged in agricultural or domestic labor, the legislature did not intend that the act should apply to laborers employed except by the day. *Helphenshtine v. Hartig*, 5 Ind. App. 172, 31 N. E. 845.

Where a statute provided that eight hours shall constitute a legal day's work for all classes of employees in the state, except in cases of extraordinary emergency caused by fire, flood, or danger to life or property, a requirement by water commissioners of a city, who had found it necessary to place a new pump in position in order to increase the pumping capacity of the system and guard against the disastrous consequences which might possibly result from any breakage or impairment of the single pump which had theretofore been the sole reliance of the city, that an extra force of men be employed to make the necessary excavations and foundations for the pump, 65 L. R. A.

who were to work ten hours each day, was a case of such extraordinary emergency; and a writ of certiorari to review the action of the mayor and council in refusing to remove the commissioners for a violation of the statute was dismissed. *People ex rel. Usay v. Waring*, 52 App. Div. 36, 64 N. Y. Supp. 865.

In *Bakers' Employment Act*, 6 Pa. Dist. R. 480, is the attorney general's opinion to the effect that, under that act, which provides "that no employee shall be required, permitted, or suffered to work in a biscuit, bread, or cake bakery, confectionary establishment, more than six days in any one week; said week to commence on Sunday not before 6 o'clock post meridian, and to terminate at the corresponding time on Saturday of the same week,"—the week might commence at any time on Sunday after 6 o'clock in the evening, and would terminate at the corresponding hour on Saturday of the same week.

In *Bacheider v. Bickford*, 62 Me. 526, the court said: "When a contract to work in a gristmill at 8 shillings per day, to be paid weekly, is silent as to the length of time that shall constitute a day's work, the rule established by the statutes of this state, that 'in all contracts for labor ten hours of actual labor shall be a legal day's work, unless the contract stipulates for a longer time,' is applicable." Rev. Stat. chap. 82, § 36. It is not monthly labor, nor agricultural employment.

In its public character, a municipal corporation acts as the arm of the state, and has no discretion but to carry out the legislative will; while in its private character, the legislature has no more power over it than over any other private corporation.

People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; *Baldwin v. New York*, 2 Keyes, 387; *People ex rel. McLean v. Flagg*, 46 N. Y. 401; *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *Williams v. Duaneburgh*, 60 N. Y. 129; *Horton v. Thompson*, 71 N. Y. 513; *People ex rel. Townsend v. Porter*, 90 N. Y. 68; *Rathbone v. Wirth*, 150 N. Y. 459, 35 L. R. A. 408, 45 N. E. 15; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Prince v. Crocker*, 166 Mass. 347, 32 L. R. A. 610, 44 N. E. 446; *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677.

In its private character, at least, the liberty and property of a municipal corporation are within the constitutional guaranties, and it can be deprived of neither without due process of law.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255;

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 690, 43 L. ed. 861, 19 Sup. Ct. Rep. 565; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Re Jensen*, 28 Misc. 378, 59 N. Y. Supp. 653.

Even if the legislature would have had the right to regulate the hours of labor of persons employed by a municipal corporation, nevertheless, the statute in question is not justified, because it is, as well, an encroachment upon the right of the individual employer and employee to contract as they shall see fit.

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976.

Messrs. A. V. N. Powelson and A. H. F. Seeger, for respondent:

Similar statutes have been held to be constitutional in this state and in other jurisdictions.

People v. Warren, 77 Hun, 120, 28 N. Y. Supp. 303; *People ex rel. Warren v. Beck*, 144 N. Y. 227, 39 N. E. 80; *Clark v. State*, 142 N. Y. 101, 36 N. E. 817; *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618; *State v. Atkin*, 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519; *Re Dalton*, 61 Kan. 257, 47 L. R. A. 380, 59 Pac. 336; *State v. McNally*, 48 La. Ann. 1450, 36 L. R. A.

II. Constitutionality of statute.

a. Under Federal Constitution.

1. In general.

Whether any of the statutes regulating or limiting the hours of labor are in violation of the Federal Constitution depends entirely upon the construction to be given to the 14th Article of Amendment of that instrument. And the views of the several courts as to the true meaning and application of that amendment generally, as affecting the validity of the acts of Congress and of the legislatures of the states, respectively, are as follows: The 14th Amendment to the United States Constitution is not designed to interfere with the power of the state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

A decision of the Supreme Court of the United States, holding that an eight-hour law of a certain state does not violate the Federal Constitution, is not binding on the courts of another state in favor of the validity of such a law under the Constitution of that state. *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071.

The decision alluded to was that of *Holden v. Hardy*, 169 U. S. 368, 42 L. ed. 780, 18 65 L. R. A.

Sup. Ct. Rep. 383, *infra*, III., the court saying: "It is a mistaken notion that the 14th Article of Amendment to the National Constitution created any civil rights, or entitled citizens of states to transfer from the states to the Federal government their security and protection."

A city ordinance which makes it unlawful for any contractor or subcontractor upon any of the public works of the city to require or permit any day laborer or mechanic to work more than eight hours in any calendar day is unconstitutional and the reason it is so is, that it interferes with the constitutional right of persons to contract with reference to compensation for their services, where such services are neither unlawful nor against public policy, nor the employment such as might be unfit for certain classes of persons,—as females and infants. *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120.

A restriction of the hours of labor on city contracts to eight hours per day by a contract providing, in accordance with Chicago Rev. Code, § 1687, for the forfeiture of the contract in case laborers work more than eight hours in one day, is unconstitutional as an infringement upon the freedom of contract. *Fiske v. People*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985. In considering the value of this decision, it must be remembered that the court held that the objections to the validity of the contract, not having been made in the court below,

533, 21 So. 27; *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128.

The statute might, and should, therefore, be sustained as a legitimate exercise of the police power of the state over a business affected with a public interest.

People v. Budd, 117 N. Y. 1, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670.

Cullen, J., delivered the opinion of the court:

The appellant was indicted for having, in violation of subdiv. 1, § 384h, of the Penal Code, required more than eight hours' work for a day's labor from certain of its employees; it being at the time a contractor with the county of Orange for the performance of a contract entered into by the latter with the state for the improvement of a public highway. The defendant demurred to the indictment on the ground that the facts stated therein did not constitute a crime, because the section of the Penal Code quoted was unconstitutional and void. The county court sustained the demurrer. The appellate division reversed the judgment and overruled the demurrer. From the order of the appellate division, this appeal is taken.

It seems to me to be entirely clear that the statute cannot be upheld as an exercise of the police power vested in the legislature. I should think the proposition too plain for debate. But if this assertion be considered dogmatic, then I say that the question is settled by the decisions both of this court

and the Supreme Court of the United States. While the field for the exercise of the police power, subject to which all property is possessed by the citizen, and all his callings or vocations must be pursued, is very broad,—so broad that no court has sought to define accurately its extent,—still it is subject to recognized limitations. In the interest of public health, of public morals, and of public order, a state may restrain and forbid what would otherwise be the right of a private citizen. It may enact laws to regulate the extent of the labor which women and children, or persons of immature years shall be allowed to perform, and prohibit altogether their employment in dangerous occupations. *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *Tiedeman*, Pol. Power, § 85. It may limit the hours of employment of adults in unhealthy work (*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383) and it may be that it could prohibit the performance of excessive physical labor in all callings. But, as said in *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, and *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343, while it is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, such measures must have some relation to these ends. In *Re Jacobs*, a law prohibiting the manufacture of cigars or preparations of tobacco in tenement houses was held unconstitutional because it bore no relation to the health of

could not be considered on appeal from a judgment of sale for nonpayment of a special assessment.

The freedom of contract guaranteed by the 14th Amendment to the United States Constitution is not infringed by the provisions of Kan. Gen. Stat. 1901. §§ 3827-3829, making it a criminal offense for a contractor for a public work to permit or require an employee to perform labor upon that work in excess of eight hours each day. *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 145, 24 Sup. Ct. Rep. 124.

The exemption of existing written contracts from the operation of a statute limiting the hours of labor of employees of a public-service corporation (a street railway company) is not on its face so arbitrary, partial, or oppressive as to render it unconstitutional. *Re Ten-Hour Law*, 24 R. I. 603, 61 L. R. A. 612, 54 Atl. 602.

In *People v. Lochner*, 177 N. Y. 145, 69 N. E. 373, the court of appeals of New York was called upon to decide upon the validity of § 110 of art. 8 of the labor law (Laws 1897, chap. 415), which provides that no employee shall be required or permitted to work in a biscuit, bread, or cake bakery, or confectionary establishment, more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week during which such

employee shall work. The court held that the section violated no provision of either the state or the Federal Constitution, but was wholly within the police power of the legislature relating to public health. The chief judge cited the case of *People v. Hynor*, 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, which sustained the constitutionality of what is known as the Sunday barber law, which makes it a misdemeanor for any person to carry on the business or work of a barber on the first day of the week except in the city of New York and the village of Saratoga, where it is permitted until 1 o'clock in the afternoon of that day. Another judge, writing one of the prevailing opinions, stated that in the law under consideration, which restricted the working hours of employees in bakery and confectionary establishments, there might be perceived a statutory regulation, reasonably promotive of the public health because compelling the master of such an establishment to conduct it in a manner the least capable of affecting his product prejudicially. Another of the majority judges, in his claim for the constitutionality of the act, said vital statistics show that those vocations which require persons to remain for long periods of time in a confined and heated atmosphere filled with some foreign substance, which is inhaled into the lungs, are injurious to health, and tend to shorten life; and that bakers and confectioners, who, during working hours, constantly breathe air filled with the

the occupants of tenement houses. If there were three families or less in the tenement house, however numerous their members, the manufacture was allowed, while if there were more than three families, however few their members and however large and extensive the house, the manufacture was forbidden. The statute now before us does not deal with the character of the work, the age, sex, or condition of the employees, nor even the personality of the employer, but applies only to the case of a contract with the state or a municipality. What possible bearing on the health or security of the employees, or on public health, has the fact that the employer is executing a contract for the construction or performance of a state or municipal work? The defendant might be constructing in the next town a road for a turnpike company, or for its own use. In this work it could require labor for as many hours a day as it saw fit, and could get workmen to perform. Yet the same action, involving exactly the same character of work, when done in performance of a contract with the public, is by this statute made criminal. If we assume that a general statute forbidding in all cases the performance of physical labor for more than eight hours out of the twenty-four would be constitutional, that concession would not sustain the validity of the act before us. The vice of the statute is the arbitrary distinction drawn between persons contracting with the state and other employers. In *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S.

150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, a statute which authorized the award of judgment in actions against railway companies of costs not given in suits against other defendants was held void, as violating the equal protection of the law guaranteed by the Federal Constitution, in that it singled them out from all citizens and corporations. It was there said: "Classification for legislative purposes must have some reasonable basis upon which to stand. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this." To the same effect is *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, and the recent case of *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, in the latter of which cases it was held that a statute of Illinois which forbade business combinations for certain purposes was void because there were excepted from its application agriculturists and live-stock dealers. The same doctrine has been recently held by this court in *Re Pell*, 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789. See *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

It is urged that the work is a state work, and that the legislature may prescribe rules for the manner in which it is to be per-

finest dust from flour and sugar, have a tendency to consumption, and, on the authority of a definition in the *Encyclopædia Britannica*, likened their case to that of stone masons and needle grinders, etc. The case was decided by a bare majority of the court, three of the judges dissenting, and two of them protesting vigorously in their opinions against the constitutionality of the section of the act under consideration, one of them saying, among other things: "It is common experience that the baker, like the cooks in hotels, restaurants, and private families, has provided for him in his business, flour, sugar, and the other ingredients duly prepared for immediate use. The claim that the compounding of these constituents, so prepared, in the business of a baker, is an unhealthy occupation, will surprise the bakers and good housewives of this state. The grinding of steel, like the needle grinding of Sheffield, England, and of other similar materials and substances, causing clouds of impalpable dust, is not to be confounded with the avocation of the family baker engaged in the necessary and highly appreciated labor of producing bread, pies, cakes, and other commodities more calculated to cause dyspepsia in the consumer than consumption in the manufacturer. The country miller of fifty years ago, who passed a long and happy life amid the hum of machinery and the grinding process of the upper and nether stones, little dreamed of a coming day when the legislature, in the full panoply of pa-

ternalism, would rescue his successor from the appalling dangers of the life he led until old age summoned him to retire. It has been frequently said that the limits of the police power cannot be accurately defined; that it is not desirable the legislature should be thus trammelled. When this court held that the legislature acted in the legitimate, undiscriminating exercise of the police power in compelling all barbers to observe strictly the first day of the week, commonly called Sunday, except in the village of Saratoga Springs and the city of New York, the legal profession doubtless concluded that the elasticity of the undefined had arrived at its *Ultima Thule*. (*People v. Havnor*, 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541). That this conclusion was erroneous is shown by the fact that the case is now doing duty against the baker, when men in kindred occupations are permitted to work as many hours as necessity dictates."

2. Due process of law.

The statutes limiting the hours of labor seem to have been inspired by those claiming to have an interest to benefit the laborer or employee. And yet one of the chief grounds upon which such statutes have been assailed, is, that it deprives a person of the right to dispose of his labor—which to him is his property—without due process of law.

formed. As a general proposition, this is doubtless true. The state may prescribe regulations for the conduct of its employees. Those employees must comply with the mandate of the legislature. If, in the case of a private person, his foreman or manager should, in intentional violation of the master's command exact more than eight hours' work a day from the men working under him, the master might discharge him, even though his contract of employment was for a definite term. In the case of the state, the employer being not only master, but sovereign, it may be that it could go further, and make the violation of its mandates criminal. This statute, however, does not deal with employees,—at least not exclusively with them. The section reads: "Any person or corporation who, contracting with the state or a municipal corporation, shall require more than eight hours' work for a day's labor . . . is guilty of a misdemeanor." The statute does not define the meaning of "contracting with the state or a municipal corporation." Doubtless a person who is a mere employee of the state, or of a municipal corporation, contracts for the performance of his service. I suppose, however, the statute was intended to apply to the case of what is known in law as an "independent contractor;" that is to say, one who contracts to perform the work at his own risk and cost,—the workmen being his servants, and he (not the state or corporation with whom he contracts) being liable for their misconduct.

The ordinance of a municipality prohibiting the carrying on of public laundries and wash houses, within certain prescribed limits of the municipality, from 10 o'clock at night until 6 o'clock in the morning, is not void on the ground that it deprives a man of the right to labor at all times, or on the ground that it is unreasonable in its requirements, in restraint of trade, or upon any other ground apparent upon the face of the ordinance. *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

The act of the legislature of Nebraska, approved March 31, 1899, to regulate or limit the hours of employment of females in manufacturing, mechanical, and mercantile establishments, hotels and restaurants; to provide for its enforcement and a penalty for its violation; which, in effect, is only a fair and reasonable exercise of the police power, and does not deprive any citizen of his property, or the reasonable use thereof, without due process of law, and does not prohibit the right of contract, but merely regulates the same in a reasonable manner,—is not in conflict with the Constitution, and is in all things valid. *Wenham v. State*, 65 Neb. 394, 58 L. R. A. 825, 91 N. W. 421.

Forbidding the employment of females in certain establishments more than ten hours a day does not unconstitutionally deprive them of life, liberty, or property. *State v. Buchanan*, 29 Wash. 602, 59 L. R. A. 342, 92 Am. St. Rep. 930, 70 Pac. 52.
65 L. R. A.

If it does not apply exclusively to such contractors, it includes them. If not, that is the end of this case, for it does not appear in the indictment that the defendant was not an independent contractor. Now, while, as I have said, if the state itself prosecutes a work, it may dictate every detail of the service required in its performance,—prescribe the wages of workmen, their hours of labor, and the particular individuals who may be employed—no such right exists where it has let out the performance of the work to a contractor, unless it is reserved by the contract. The state in this respect stands the same as its citizens. Its rights are just as great as those of private citizens, but no greater.

As the law cannot be upheld, either as a valid exercise of the police power or because the work was being done for the state, to sustain it, some other ground must be found on which it may rest. Only one is suggested. On the same day upon which the section of the Penal Code before us became a law, there was enacted chapter 415, p. 461, of the Laws of 1897, known as the "labor law." By § 3 of that act it was provided that eight hours should constitute a legal day's work for all classes of employees in this state, except those engaged in farm and domestic labor, unless otherwise provided by law. It was further provided that this should not prevent an agreement for overwork for extra compensation. By chapter 567, p. 1172, of the Laws of 1899, this section was amended so as to withdraw from

The right to contract necessarily includes the right to fix the price at which labor shall be performed, and the mode and time of payment. Each is an essential element of the right to contract; and whosoever is restricted in either, as the same is enjoyed by the community at large, is deprived of liberty and property. *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362.

And so a statute which provides that for all classes of mechanics, servants, and laborers, excepting those employed in farm or domestic labor, a day's work should not exceed eight hours, and that, for working any employee over the prescribed time, the employer should pay extra compensation, in increasing geometrical progression, for the excess over eight hours (the rate of payment for the eighth hour being taken as the basis upon which to reckon such progression),—is unconstitutional, as the constitutional right of the parties to contract with reference to compensation for services is denied. *Ibid.*

Under the United States Constitution, as well as that of Ohio, no person can be denied the equal protection of the laws, or be deprived of his property, against his consent, without due process of law; nor can it be taken from him, even for a public use, without compensation. *Wheeling Bridge & Terminal R. Co. v. Gilmore*, 8 Ohio C. C. 658.

And so, so much of the provisions of the section of a statute as provides that ten hours

the exception provided by it work done by or for the state or a municipal corporation, or by contractors or subcontractors therewith. It further provided that every contract with the state or a municipal corporation which involved the employment of laborers, workmen, or mechanics should contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, subcontractor, or other persons doing or contracting to do the whole or a part of the work contemplated by the contract should be permitted or required to work more than eight hours in any one calendar day, except in cases of extraordinary emergency caused by fire, flood, or danger to life or property, and, in substance, that for failure to comply with this stipulation the

contractor should forfeit his contract and his compensation. It is contended that the legislature may punish criminally a violation by the contractor of his obligations assumed under the provisions of this law. This presents the question of whether the legislature can make the breach of a civil contract, solely as such, a criminal offense. I am not now prepared, either to assert, or deny, the correctness of the proposition. The only case in which there is any discussion of the question which thus far has come to my attention is that of *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326. There the discussion is cursory and incidental, the question not being necessarily involved in the case. The appeal presented the constitutionality of the

shall constitute a day's work, and for every hour that any conductor, fireman, engineer, brakeman, or any trainman, or any telegraph operator of any company, who works under the directions of a superior, or at the request of the company, shall work overtime, he shall be paid for such extra services in addition to his *per diem*, is unconstitutional and void. *Ibid.*

See *Re Eight-Hour Law*, 21 Colo. 29, 39 Pac. 328, *infra*, II. b.

3. Equal protection of the laws.

A still further constitutional objection—so to speak—has been made to those statutes which assume to limit or regulate the time or hours of labor or employment, which seek to restrict the time or hours of work of persons engaged in a particular class of business, as barber shops, bakeries, laundries, etc., *viz.*, that such a law discriminates between those engaged in such designated employment and those engaged in other classes of business; and to other statutes which apply to all classes of employment except a designated one or a mentioned few,—that such laws discriminate in favor of, or against, the latter. These objections are upon the ground that such statutes deny equal protection of the laws.

The ordinance of a municipality prohibiting the carrying on of public laundries and wash houses, within certain prescribed limits of the municipality, from 10 o'clock at night until 6 o'clock in the morning, is not void on the ground that it discriminates between those engaged in the laundry business and those engaged in other classes of business, or between the different classes of persons engaged in the laundry business. *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

The equal protection of the laws is not denied to a contractor for a public work, or his employees, by the provision of Kan. Gen. Stat. 1901, §§ 3827-3829, making it a criminal offense for such contractor to permit or require an employee to perform labor upon the work in excess of eight hours each day. *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124.

A statute which provides that for all classes of mechanics, servants, and laborers, excepting those engaged in farm, or domestic labor, a day's work should not exceed eight hours, is unconstitutional because the discrimination 65 L. R. A.

against farm and domestic labor is special legislation. *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362.

In *Re Eight-Hour Law*, 21 Colo. 29, 39 Pac. 328, the supreme court of Colorado, in answer to certain questions propounded to it under the provisions of the Constitution by a resolution of the house of representatives, as to whether a statute providing that "eight hours shall constitute a legal day's labor in all mines, factories, and smelters in this state," be constitutional and legal, said: "It is not competent for the legislature to single out the mining, manufacturing, and smelting industries of the state, and impose upon them restrictions with reference to the hours of their employees from which other employees of labor are exempt. An act such as proposed would be manifestly in violation of the constitutional inhibition against class legislation."

A statute prohibiting the employment of females in any factory or workshop for more than eight hours a day is unconstitutional as partial and discriminating in its character, whether applying only to manufacturers of wearing apparel and other like articles, or to manufacturers of all kinds of products. *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 457.

See *People v. Warren*, 77 Hun, 120, 28 N. Y. Supp. 303; *People ex rel. Warren v. Beck*, 144 N. Y. 225, 39 N. E. 80, *infra*, V.; *State ex rel. Bramley v. Norton*, 5 Ohio N. P. 183, *infra*, II. b.

4. Impairing obligation of contract.

A statute which provides that "no minor under the age of eighteen years, and no woman over that age, shall be employed in laboring, by any person, firm, or corporation, in any manufacturing establishment . . . more than ten hours in any one day," is not repugnant to the clause of the Constitution for the reason that it impairs the obligation of a contract. The claim of the defendant, a corporation, was that the act of incorporation was a contract with the commonwealth, and that the statute impaired that contract. *Com. v. Hamilton Mfg. Co.* 120 Mass. 383.

b. Under state Constitution.

Whether or not the provisions of statutes of

Federal statute which authorizes the arrest of deserting seamen and the return to the vessels which they may have deserted which was challenged as violating the 13th Amendment of the Constitution forbidding slavery or involuntary servitude. The statute was held good. In the majority opinion, Judge Brown, after referring to an English statute which made artificers and handicraftsmen, who might desert the service of their masters before the expiration of the period for which they had contracted to serve, subject to imprisonment, said: "The breach of a contract for personal services has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others; nor

would public opinion tolerate a statute to that effect." In his dissenting opinion, Judge Harlan said: "If it be said that government may make it a criminal offense, punishable by fine or imprisonment, or both, for anyone to violate his private contract voluntarily made, or to refuse without sufficient reason to perform it,—a proposition which cannot, I think, be sustained at this day in this land of freedom,—it would by no means follow that government could," etc. Granting, however, the claim that the legislature can provide for the punishment criminally of a wilful violation by the contractor of the contract provisions alluded to, it is sufficient to say that the statute before us does not purport to do anything of that kind. If it had provided that any

the kind being considered are obnoxious to the Constitution of a state, is treated in the following cases:

The statute of Kansas providing that eight hours shall constitute a day's work for all laborers, workmen, mechanics, and other persons employed by or on behalf of the state, or by or on behalf of any county, city, township, or other municipality in the state, is a direction of the state to its agents, by which the state declares that all such laborers, etc., engaged in its service shall not work thereunder more than eight hours per day, and is, consequently, constitutional and valid. *Re Dalton*, 61 Kan. 257, 47 L. R. A. 380, 59 Pac. 386.

A statute which provides that "no minor under the age of eighteen years, and no woman over that age, shall be employed in laboring, by any person, firm, or corporation, in any manufacturing establishment . . . more than ten hours in any one day" violates no right of a woman to labor in accordance with her own judgment as to the number of hours, as it does not limit her right to labor as many hours per day or per week as she may desire, or forbid her laboring in any particular business or occupation as many hours per day or per week as she may desire, but merely prohibits her being employed continuously in the same service more than a certain number of hours per day or week, which is clearly within the power of the legislature. *Com. v. Hamilton Mfg. Co.* 120 Mass. 383.

In answer to a question by the house of representatives whether a statute providing that eight hours should constitute a day's labor in all mines, factories, and smelters would be constitutional and legal, the supreme court of Colorado said that the bill violated the right of parties to make their own contracts,—a right guaranteed by the Bill of Rights of Colorado and protected by the 14th Amendment of the Constitution of the United States. The court further said: "For an able and comprehensive exposition of the constitutional provisions applicable to the subject, your attention is invited to the recent case of *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362," *supra*, II. a. 2. *Re Eight-Hour Law*, 21 Colo. 29, 39 Pac. 328.

A statute making it unlawful to work more than eight hours per day in mines or smelters is in violation of Const. art. 2, § 3, guaranteeing liberty and the right to acquire, possess, and 66 L. R. A.

protect property. *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071.

The privilege of contracting is both a liberty and a property right of which one cannot be deprived without due process of law; and the right to labor or employ labor, and make contracts in respect thereto upon such terms as may be agreed upon, is included in the guaranty of Const. art. 2, § 2, that no person shall be deprived of life, liberty, or property without due process of law. *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 457.

And a statute providing that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week, prohibits both the employer and employee from entering into a contract of employment for a greater time, and restricts their right to contract with each other with reference to the hours of labor. *Ibid.*

The legislature, in undertaking to impose an unreasonable and unnecessary burden upon any one citizen or class of citizens, transcends the authority intrusted to it by the Constitution, although it imposes the same burden upon all other citizens or class of citizens. *Ibid.*

A statute prohibiting the employment of females in any factory or workshop more than eight hours a day is unconstitutional as a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties, and a substitution of the legislative judgment for that of the employer and employee in a matter about which they are competent to agree with each other. *Ibid.*

The right to make contracts is inherent and inalienable under Const. art. 2, § 1, declaring that all men are by nature free and independent, and have certain inherent and inalienable rights, among which are life, liberty, and the pursuit of happiness; and any attempt unreasonably to abridge it is unconstitutional. *Ibid.*

A statute which provides that ten hours shall constitute a day's work, and that the employees therein named shall be paid for every hour in excess of ten which they shall be required or permitted to work in addition to their *per diem*, is unconstitutional, as it infringes directly both the spirit and letter of § 1 of the Bill of Rights, providing that all men have certain inalienable rights, among which are

person who, having contracted with the state or a municipality not to require or suffer his employees or workmen to labor more than eight hours a day, should violate that agreement, then the question discussed would be presented. Prior to and at the time of the enactment of the section of the Penal Code, no law had ever required municipal or state contracts to contain any stipulation as to the time the contractors' workmen should be suffered or required to labor. The labor law, as originally passed, on the same day, authorized, in express terms, overwork for extra compensation in the performance of state and municipal contracts. The penal statute draws no distinction between contractors whose contracts had been made prior to its enact-

ment, and those who might contract subsequently. To fall within its provisions, it was sufficient that on the day after its enactment a contractor should require more than eight hours' work a day though he was engaged in the performance of a contract years old, and containing no agreement relating to the hours of labor. The statute does not assume to punish an offender against its provisions because he has violated any contract, but solely because he has done the prohibited act, *i. e.*, required more than eight hours' labor, regardless of the terms and conditions of his contract. The statute should therefore be condemned in its entirety, and cannot be upheld as to the limited class of cases in which it may be the legislature had the power to act, but

those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety. *Wheeling Bridge & Terminal R. Co. v. Gilmore*, 8 Ohio C. C. 658.

In *State ex rel. Bramley v. Norton*, 5 Ohio N. P. 188, the Ohio common pleas held that an ordinance of a city which provided that the specifications prepared by the head of any department of the executive branch of a municipality for any public work or improvement, and upon which, under proper advertisement, bids should be received for the performance of such work or the making of any such improvement, should have inserted therein a clause providing that any and all common labor performed on such work, or the making of any such improvement, as might be contemplated, and in the pursuance of any such specifications, should not exceed eight hours per day, was in conflict with the Bill of Rights in the Ohio Constitution, and also with § 1 of the 14th Amendment of the Constitution of the United States. The court took the position that this was not a case where the occupation or industry pursued was injurious to either the morals, health, safety, or welfare of the public; and so by inference admitted that, in case it were, the ordinance would have been valid under the police power of the legislature.

In an action by a contractor with a city to recover a balance claimed to be due in his favor from the city as the unpaid balance of the contract price for the construction of a sewer for the city, such contract containing a stipulation, as required by the act of the legislature to provide for limiting the hours of daily service of laborers, workmen, and mechanics employed upon public works of, or the work done for, the state of Ohio, or any political subdivision thereof, providing for the violation of certain stipulations in contracts of public works, and imposing penalties for violations of the provisions of the act, and providing for the enforcement thereof, that said contractor should not require or permit any of his employees to labor more than eight hours in any one day, and, as a penalty for a violation of such stipulation, the forfeiture of \$10 for each employee who should be required or permitted to work more than eight hours in any one calendar day,—where by way of answer, and as and for its only defense, such city relies upon and pleads its right to withhold and

retain from such contractor by way of forfeiture, and as penalty for his breach of such stipulation, an amount equal to the amount claimed by said contractor to be due him on said contract,—such answer is demurrable, as the act is obnoxious to the Constitution of the state, violating and abridging, as it does, the right of parties to contract as to the number of hours' labor which shall constitute a day's work, and invades and violates the right both of liberty and of property, as it takes from municipalities and contractors and subcontractors the right to agree with their employees upon the question as to the number of hours which shall constitute a day's work. *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 197, 59 L. R. A. 775, 98 Am. St. Rep. 670, 65 N. E. 885.

See *People v. Lochner*, 177 N. Y. 145, 60 N. E. 373, *supra*, II. a, 1.

III. Police power of state.

In order to sustain the validity of statutes which would otherwise be plain and clear violations of the Federal or a state Constitution, what is commonly known as the "police power" of the state, is invoked. This power has been variously defined as that which is vested in the legislature to make such laws as it shall judge to be for the public good; the power to govern men and things, extending to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state; the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interests. The exercise of it has generally been left with the individual states, but in such exercise a state may not invade the domain of the national government. Most of the law on the subject of police power has been the growth of the nineteenth century, and it may be said of the latter half of it. It must always be distinguished from the administration of criminal law, and from police regulations and police authority; nor should it be confused with eminent domain, as has sometimes been done, or with the power of taxation, as it is distinct from both. Three general rules, or rather questions, are said to be involved in considering whether a law is within the "police power." First, Is there a threatened danger? Second, Does the regulation involve a constitutional right? Third, Is the regulation reasonable?

has not acted. In the case of *Wynehamer v. People*, 13 N. Y. 378, cited with approval in *Re Townsend*, 39 N. Y. 171, 180, a statute authorizing the summary confiscation and destruction of intoxicating liquors was declared void, as violating the provisions of the Constitution which declares that no person shall be deprived of life, liberty, or property without due process of law. It was held that the legislature might constitutionally prevent the future manufacture or importation of such liquors. But it was further held that, inasmuch as the act did not discriminate between such liquors as were possessed when it took effect as a law, and such as that might thereafter be acquired by importation or manufacture, and did not warrant any defense based on that distinc-

tion, it could not be sustained in respect to any liquor, whether existing at the time when the act took effect, or acquired subsequently. This case is not similar to that recently before us in *People ex rel. Devery v. Coler*, 173 N. Y. 103, 65 N. E. 956, where we held a portion of the statute valid, regardless of the question whether other parts of the statute were constitutional or not.

But if we assume that the statute can be upheld as one inflicting punishment for the wilful violation of a contract, and if we further assume that the statute, *ex proprio vigore*, imported into every contract subsequently made an agreement by the contractor not to require more than eight hours' work in a day from his employees, the indictment would still be fatally defective.

The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 457.

It is the province of the courts to determine whether a statute purporting to be an exercise of the police power of the state, but taking away the property of a citizen or interfering with his personal liberty, is an appropriate measure for the promotion of the comfort, safety, and welfare of society. *Ibid.*

Statutes passed in pursuance of the police power of the state must not conflict with the Constitution, and must have some relation to the end sought to be accomplished; and, where their ostensible object is to secure the public comfort, welfare, or safety, they must appear to be adapted to that end, and cannot invade the rights of person and property under the guise of a police regulation where they are not such in fact. *Ibid.*

And so a statute prohibiting the employment of women in factories or workshops for more than eight hours a day cannot be sustained as a police regulation for the promotion of the public health, on the ground that it is designed to protect women on account of their sex and physique, as sex is no bar, under the Illinois Constitution or laws, to the right to contract, and the mere fact of sex will not justify the exercise of the police power for the purpose of limiting the exercise of such right by a woman, unless there is some fair, just, and reasonable connection between such limitation and the public health, safety, or welfare; and there is no reasonable ground why a woman should be deprived of the right to determine for herself how many hours during each day she can and may work in an employment conceded to be lawful in itself and suitable for her to engage in, even if the police power can be exercised to prevent an injury to the individual engaged in a particular calling. *Ibid.*

It is for the courts to determine what are the subjects upon which the police power are to be exercised, and the reasonableness of that exercise; and legislation to protect a citizen against the consequences of his own acts is not within the constitutional exercise of the police power. *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071.

The ordinance of a municipality prohibiting the carrying on of public laundries and wash 65 L. R. A.

houses within certain prescribed limits of the municipality, from 10 o'clock at night until 6 o'clock in the morning, is purely a police regulation within the competency of any municipality possessed of the ordinary powers to make. *Barbler v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

And a Federal tribunal cannot supervise such regulation; any correction of the action of municipal bodies in such matters can come only from state legislation or state tribunals. *Ibid.*

The right of contract is subject to certain limitations which the state may lawfully impose in the exercise of its police power; and the protection of the health and morals, as well as the lives, of citizens is within the police power of the state legislature. *Holden v. Hardy*, 109 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, Affirming 14 Utah, 71, 37 L. R. A. 103, 46 Pac. 756, and 14 Utah, 96, 37 L. R. A. 108, 46 Pac. 1105.

And so a state statute limiting the period of workmen in underground mines, or in the smelting, reduction, or refining of ores, or metals, to eight hours per day, and making its violation a misdemeanor, is a valid exercise of the police power of the state; and the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. *Ibid.*

A limitation of the duration of a day's work in certain employments known as the "eight-hour law," is a valid exercise of the police power of the state, and creates for the employee a legislative protection which is without his power to waive. *Short v. Bullion-Beck & C. Min. Co.* 20 Utah, 20, 45 L. R. A. 603, 57 Pac. 720.

An act which provides that no adult woman shall be employed at labor, or detained in any manufacturing establishment, mercantile industry, laundry, workshop, renovating works, or printing office, for any longer period than twelve hours in any day, or for a longer period than sixty hours in any week, is clearly within the police power of the state which, while it cannot be put forward as an excuse for oppressive and unjust legislation, may be lawfully resorted to for the purpose of preserving

To make out an offense under this view of the law, it would be necessary to charge that the contractor, in one way or the other, either by express agreement or by force of the statute, contracted not to require more than eight hours' labor. The indictment does not charge any stipulation to that effect in the contract, nor does it charge that the contract between the defendant and the county of Orange was made subsequent to the enactment of the statute. There is nothing, therefore, alleged, which charges that the defendant, by requiring more than eight hours' labor, violated any provision of his contract, either express or implied.

The order should be reversed, the demurrer sustained, and the defendant discharged.

Bartlett, Martin, and Vann, JJ., concur with **Cullen, J. Parker, Ch. J.**, and **Werner, J.**, concur in the result, on the sole ground that the indictment is insufficient, because it fails to allege that the contract therein referred to was made subsequent to the enactment of the statute; but they dissent from even the expression of a doubt as to the power of the state to enforce its constitutional mandate by making a violation thereof a crime, whether such viola-

tion arises under a contract with the state or otherwise.

Haight, J., dissenting:

The demurrer to the indictment relied upon is to the effect that the facts stated therein do not constitute a crime, for the reason that the first subdivision of § 384A of the Penal Code, under which the indictment was drawn, is unconstitutional and void. The question, therefore, raised for consideration is the constitutionality of that act, and no other question is presented for determination. Whether the indictment is defective in failing to charge certain facts, or the statute is wanting in some particular to make it effective, are questions with which we have nothing to do upon this review. The question discussed upon the argument of this appeal was the constitutionality of the eight-hour clause of the statute. This was the question raised by the demurrer, and I think that it should now be decided by this court. If questions other than this are to be now determined, then I think a reargument should be ordered, so that the court may have the aid to be derived from a careful discussion of the questions by counsel.

the health, safety, or morals; and a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. The object of such legislation is the good of the public as well as of the individual; and the fact that the individual is willing to waive protection cannot avail. The public good is entitled to protection and consideration; and, in order to effectuate that object, there must be enforced protection to the individual,—such individual must submit to such enforced protection for the public good. *Com. v. Beatty*, 15 Pa. Super. Ct. 5.

In *Wenham v. State*, 65 Neb. 394, 58 L. R. A. 825, 91 N. W. 421, the court said: "The police power of the state cannot be put forward as an excuse for oppressive and unjust legislation, but it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals; and a large discretion is vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

In answer to a question submitted to the supreme court of Rhode Island by the governor of that state, as to whether an act to regulate the hours of labor of certain employees of street railway corporations were in violation of the Constitution of the state of Rhode Island, the court advised and decided that the legislature might, under its police power, properly limit the hours of labor of employees of a public-service corporation, such as a street railway company, to not more than ten out of twenty-four hours, to be performed within twelve consecutive hours. *Re Ten-Hour Law*, 24 R. I. 603, 61 L. R. A. 612, 54 Atl. 602.

It is a matter of universal knowledge with 65 L. R. A.

all reasonably intelligent people of the present age that continuous standing on the feet, by women, for a great many consecutive hours is deleterious to their health. It must logically follow, that which would deleteriously affect any great number of women, who are to be the mothers of succeeding generations, must necessarily affect the public welfare and the public morals. *State v. Buchanan*, 29 Wash. 602, 59 L. R. A. 342, 92 Am. St. Rep. 930, 70 Pac. 52.

A statute which makes it unlawful for persons engaged in mining for minerals, or making excavations beneath the surface of the earth while searching therefor, to work their hands or employees at such labor or industry longer than eight hours in a day of twenty-four hours, and providing a penalty therefor, is a proper exercise of the police power of the legislature, exercised in the interest of the health and safety of such employees. To hold that the performance of work in underground mines, in a deep mineral shaft full of smoke and necessarily damp, is not attended with danger to health, but is equally healthy with the ordinary pursuits in the open, fresh air and light, is simply a position opposed to all natural laws of health. *State v. Cantwell* (Mo.) 78 S. W. 569.

IV. *Right to extra compensation for labor in excess of limited time.*

As will be seen by the cases in the succeeding division, the question has not infrequently arisen, whether, in those jurisdictions where there exists a statute regulating or limiting the time or hours of labor, one who performs labor or service in excess of the limited time can recover for such excess in the absence of an agreement to that effect. And, as will also be seen, it has almost invariably been decided that no action for such excess can be

NEVADA SUPREME COURT.

Re William G. BOYCE.

(.....Nev.....)

- *1. The act of February 23, 1903, providing an eight-hour day for all workmen in mines, smelters, and mills for the reduction of ores, is not void, under § 1 of article 1 of our state Constitution, guaranteeing to citizens the right to acquire and possess property; nor is the statute in conflict with § 21 of article 4, which provides that, in all cases where a general law can be made applicable, all laws must be general and of uniform operation throughout the state.
2. Nor is the act mentioned inimical to the 14th Amendment to the Federal Constitution, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life or liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."
3. The people, and through them the legislature, have supreme power in all matters of government where not prohibited by constitutional limitations; and, while

*Headnotes by TALBOT, J.

maintained without an agreement to pay for the same.

The act of Congress declaring "that eight hours shall constitute a day's work for all laborers or workmen . . . employed by or on behalf of the government of the United States" is in the nature of a direction by the United States to its agents; and is not a contract with laborers to that effect, and does not prevent the officers of the government from making agreements with laborers by which the day's labor may be more or less than eight hours a day. *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128, Reversing 10 Ct. Cl. 276; *Averill v. United States*, 14 Ct. Cl. 200.

And so where a laborer has been in the habit of working for the government twelve hours a day at a certain compensation per day, and, in answer to his request, is informed that, if he wishes to remain in the service, he must continue to work twelve hours per day, and receives his pay accordingly, he cannot afterwards recover for the additional time over eight hours as a day's labor. *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128, Reversing 10 Ct. Cl. 276.

Where a contractor with the United States employed a laborer in work on the contract, and was to pay him, there was no privity between the laborer and the United States, to sustain a claim for wages, as the mode, manner, and rate of the contractor's compensation were a matter between him and the United States, and were one with which the laborer had nothing to do; and a claim against the government, by the laborer, to the effect that he had labored ten hours per day on the contract, and claiming of the government remuneration for the extra additional two hours, will not be allowed. *United States v. Driscoll*, 96 U. S. 421, 24 L. ed. 847.

65 L. R. A.

the powers of the Federal government are restricted to those delegated, those of the state government embrace all that are not forbidden.

4. All acts of the legislature are presumed to be valid until it is clearly shown that they violate some constitutional restriction.
5. The legislature has inherent authority, under the general police power of the state, to enact laws for the promotion of the health, safety, and welfare of the people, and its arm cannot be stayed when exercised for these purposes.
6. If the restriction of the hours of labor be deemed a regulation or limitation on the right to acquire property, the occupations to which the act applies are not considered healthful; and it was therefore within the power and discretion of the legislature to enact the statute for the protection of the health and prolongation of the lives of the workmen affected, and the resulting welfare of the state.
7. Questions relating to the wisdom, policy, and expediency of statutes are for the people's representatives in the legislature assembled, and not for the courts, to determine.

(Belknap, Ch. J., dissents.)

(January 11, 1904.)

Under U. S. Rev. Stat. § 3490, U. S. Comp. Stat. 1901, p. 2339, providing that the workmen in the mints should be employed at wages "to be determined by the director of the mints" the government will not be held responsible to a watchman who is on duty twelve hours each day, where the director, did not agree to pay him for the time beyond eight hours per day. *Collins v. United States*, 24 Ct. Cl. 340.

Where a state statute provided that ten hours of actual labor should be a legal day's work unless the contract stipulated for a longer time, and there was no stipulation in words between the parties as to the number of hours which should constitute a day's work, one who was employed by a paper company as a laborer in its pulp mill from March to December, which mill was run the whole twenty-four hours by a day crew and night crew, the men in each crew alternating each week in their work,—those who worked in the day time in one week working in the nighttime in the succeeding week,—who had worked in this manner during the term of his employment, and knew when he began work that there were two crews working in the manner described; and who, with the other workmen, received his pay of a sum per day agreed upon between him and the company for each day he had been employed during the week, and at no time of payment complained or objected that he had not received the correct amount due him, and made no claim for payment for labor performed in over hours until after his employment had terminated,—cannot afterward recover pay for the extra hours, as an agreement is express none the less that it is expressed by conduct, and not by words. *Fitzgerald v. International Paper Co.* 96 Me. 220, 52 Atl. 655.

The provision of a statute that the period of employment of working men in all under-

APPPLICATION for a writ of habeas corpus to obtain petitioner's release from custody to which he had been committed for violation of the eight-hour law. *Writ denied.*

The facts are stated in the opinions.

Mr. F. M. Huffaker for petitioner.

Messrs. John H. Murphy, Frank P. Langan, and H. F. Bartine, with **Mr. James G. Sweeney,** Attorney General, for the State:

A statute can only be declared unconstitutional where specific restrictions upon the power of the legislature can be pointed out, and the case can be shown to come within them, and not upon any general theory that the statute is unjust, or oppressive, or impolitic, or in conflict with a spirit supposed

to pervade the Constitution, but not expressed in words.

Saucy v. Dooley, 21 Nev. 390, 32 Pac. 437; *State ex rel. Ash v. Parkinson*, 5 Nev. 23; *State ex rel. Clark v. Irwin*, 5 Nev. 120; *Evans v. Job*, 8 Nev. 337; *State ex rel. Dunn v. Humboldt County*, 21 Nev. 238, 29 Pac. 974; *State ex rel. Cutting v. Westfield*, 24 Nev. 37, 49 Pac. 554.

If an act can be given two interpretations, one of which will make it constitutional, and the other unconstitutional, it will be presumed that the legislature had the constitutional purpose in view; and the law will be so construed.

Ex parte Livingston, 20 Nev. 284, 21 Pac. 322.

He who asserts the unconstitutionality of

ground mines or workings, or in smelters or other institutions for the reduction or refining of ores or metals, shall be eight hours per day, applies with equal force to the employer and employee; and a person who works for another, in a mill or reduction works, more than eight hours per day, cannot recover the *quantum meruit* for his services during the over time. *Short v. Bullion-Beck & C. Min. Co.* 20 Utah, 20, 45 L. R. A. 603, 57 Pac. 720.

A servant may claim neither an express nor an implied contract to pay for services rendered under a contract of employment which is in violation of laws fixing a penalty for doing the act upon which recovery is sought; and in no case can a contract be implied when the parties to it are *in pari delicto*, and where plaintiff, to make his case, must resort to the illegal transaction in proof and pleading. *Ibid.* One of the judges dissented, taking the ground that the laws limiting the hours of labor were inspired by the desire to protect the laborer from the rapacity of the avaricious employer, and that the effect of the majority decision was to punish the employee.

Under an ordinance of a city providing that eight hours shall constitute a full day's work, and that no city officials shall employ workmen to work over time unless such overwork be recommended by the health commissioner, one who works more than eight hours per day, continues to draw his pay without protest for ten months, signs payrolls, and receives orders and cashes the same without a suggestion that he is not fully satisfied therewith, in the absence of an express contract, cannot, after the expiration of eighteen months, maintain an action against the city upon the technical ground that eight hours constitute a day's work, claiming that during all these months his pay has been but a fragment of the amount due. *Vogt v. Milwaukee*, 99 Wis. 258, 74 N. W. 789.

Where one agrees to work for another at a stipulated price per day, and accepts, at the end of each week, six times that amount, and he does not demand more pay, or insist on a smaller number of hours of work per day, or exact any agreement to that effect from his employer, by continuing in the employer's service under the terms of the employment he waives any right to claim additional compensation, and is not entitled to recover from his employer for hours' work in addition to the eight hours per day, which the statute provides shall consti-

tute a legal day's work. *Grisell v. Noel Bros. Flour, Feed Co.* 9 Ind. App. 251, 36 N. E. 452.

A statute providing that in all factories, workshops, sawmills, logging or lumber camps, booms or drives, mines or other places used for mechanical, manufacturing, or other purposes, where men or women are employed, ten hours per day shall constitute a legal day's work; but that nothing in the act shall be construed to apply to domestic or farm laborers, or other laborers who agree to work more than ten hours per day,—does not apply to a contract with one who is an expert in taking, finishing, and retouching photographs, nor to employment by the week, month, or year, but only applies to factories, etc., and such places where the mechanical and manufacturing industries of the kind mentioned are carried on. And the fact that it expressly exempts domestics and farm laborers from its operation does not imply that labor in a photograph establishment should fall within the provisions of the act. *Schurr v. Savigny*, 85 Mich. 144, 48 N. W. 547.

It was not the intention of the legislature, by an enactment that eight hours should constitute a legal day's work for all classes of mechanics, workmen, and laborers, excepting those engaged in agricultural or domestic labor, but permitting overwork for an extra compensation by agreement between employer and employee, to regulate, or in the slightest degree interfere with, contracts or agreements between employers or employees, as the permissive clause clearly shows. And where the circumstances under which employment is taken show that more than eight hours' labor will be expected for a day's work, and the laborer takes employment and works beyond eight hours, there can be no recovery for extra time, unless expressly agreed. *Helphenstine v. Hartig*, 5 Ind. App. 172, 31 N. E. 845.

And where one employed as an engineer to run an engine in a mill, before he accepted the employment, entered into an agreement with his employer concerning the labor he was to perform and the compensation he was to receive, which was satisfactory to him; and he began work in pursuance of it, and continued for eight months,—it will be presumed, from his experience as an engineer, from the kind of mill, from the length of time it had been owned and operated by the employers, and from the fact that he did not accept the employment until they had such an understanding as to what

a statute must establish beyond a reasonable doubt the conflict or inconsistency which renders it void.

Denver v. Knowles, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041; *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287; *Powell v. Com.* 114 Pa. 270, 60 Am. Rep. 350, 7 Atl. 913; *Brown v. Maryland*, 12 Wheat. 436, 6 L. ed. 678; *Ogden v. Saunders*, 12 Wheat. 270, 6 L. ed. 606; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 782; *Munn v. Illinois*, 94 U. S. 126, 24 L. ed. 84; *State v. Peel Splint Coal Co.* 36 W. Va. 835, 17 L. R. A. 385, 15 S. E. 1000; *Pennsylvania R. Co. v. Riblet*, 66 Pa. 164, 5 Am. Rep. 360; *University of California v. Bernard*, 57 Cal. 612; *Sinking Fund Cases*, 99 U. S. 718, 25 L. ed. 496; *State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep.

490; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Ah Lim v. Territory*, 1 Wash. 159, 9 L. R. A. 395, 24 Pac. 588; *State v. Addington*, 77 Mo. 110; *State ex rel. Harris v. Laughlin*, 75 Mo. 147; *Humes v. Missouri P. R. Co.* 82 Mo. 230, 52 Am. Rep. 369; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 414, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Newland v. Marsh*, 19 Ill. 385.

That the law may seem unreasonable, oppressive, or absurd, or that there may be objections to its policy or expediency, is not sufficient to justify its judicial repeal.

New York v. Miln, 11 Pet. 138, 9 L. ed. 662; *Cooley, Const. Lim.* 164; *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 993; *Pattison v. Yuba County*, 13 Cal. 175; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec.

would be expected of him, and the compensation he was to receive for his labors, as to enable them to enter into an agreement concerning the same, that he knew what the custom was, and that he would be expected to labor more than eight hours for a day's work. *Ibid.*

Where one performed work as a night watchman under a contract with a street railway company for a certain sum per night, at which rate he was paid each half month, the contract being verbal, and nothing having been said about the number of hours to constitute a day's work; and he and the company's assistant superintendent and foreman all knew that it was the absolute custom and invariable rule that the employees should work as many hours as the convenience or business of the company demanded, for the pay agreed upon as one day's pay; and he several times gave written orders upon the company for his half-monthly pay, specifying the number of days and the amount figured at the stipulated price per day, and gave regular receipts stating that they were in full of all demands for work done during the regular and irregular working hours in the service of the company, up to and including the date of the pay roll thus receipted; which however he had not read until the last receipt was given, when he left the company's employ; when the receipt was read to him before he signed it, and he understood it, and the meaning of the words used in it, and during his service made no claim for any extra pay; and it was evident that he knew that the authority of the assistant superintendent and foreman to employ men was limited to so much per day, regardless of the number of hours work,—he cannot recover of the company for extra hours' work above ten hours per day under a statute making ten hours a legal day's work in factories, workshops, etc. *Bartlett v. Street R. Co.* 82 Mich. 658, 46 N. W. 1034.

Plaintiff was employed by the superintendent of the department of docks as a scowman at a certain sum per day for his services, and worked ten hours per day, and in an action sought to recover for two hours' extra work rendered each day, basing his claim on the statute which provides: "On and after the passage of this act eight hours shall constitute a day's work for all classes of mechanics, workmen, and laborers, excepting those engaged in farm and domestic labor, but overwork for extra compensation by agreement between em-

ployer and employee is hereby admitted." At the end of each two weeks during the service plaintiff received payment for his services at the stipulated rate per day, and, at the time of receiving each payment, he signed a pay roll containing a receipt in full. He had mentioned the matter of extra time to his foreman, but he never spoke to the superintendent or any other officer on the subject, and never found any fault with the time returned for him, and never asked to have any over-time returned. It was held that he could not recover. The court said that by settled rules of construction the provision in regard to overwork for extra compensation by agreement between employer and employee must be held to mean that neither extra labor can be required, nor extra compensation demanded, except in the case of an agreement therefor, previously made by the parties. *McCarthy v. New York*, 96 N. Y. 1, 48 Am. Rep. 601.

Under an agreement whereby the plaintiff was to work for the defendant for a certain sum per week, both parties at the time of the making of the agreement understanding that the work was of such a nature as to call for the constant supervision and attention of the plaintiff for sixteen hours, but that the actual physical labor required averaged only four hours, per day; and the statute provided that "eight hours' work, done and performed in any one day, shall be deemed a lawful day's work, unless otherwise agreed by the parties,"—plaintiff was not entitled to recover double the amount agreed upon because of having worked double the number of hours required by statute for a day's work. *Luske v. Hotchkiss*, 37 Conn. 219, 9 Am. Rep. 314.

Under a statute which provided that "In all contracts for or relating to labor ten hours of actual labor shall be taken to be a day's work, unless otherwise agreed by the parties; and no person shall be required or holden to perform more than ten hours' labor in any one day, except in pursuance of an express contract requiring a greater time,"—the plaintiff worked for the defendant during the winter months from sunrise to sunset, under an agreement for a specified sum per day, there being no agreement as to how many hours should constitute a day's work. The court held that it was a fact for the jury to find whether there was an implied agreement that the number of hours from sunrise to sunset should constitute a day's

759; *Passenger Oases*, 7 How. 287, 402, 12 L. ed. 704, 752; *Leonard v. Wiseman*, 31 Md. 201; *Com. ex rel. Dysart v. M'Williams*, 11 Pa. 61; *Davis v. State*, 3 Lea, 376; *Varick v. Smith*, 5 Paige, 160, 28 Am. Dec. 417; *Williams v. Cammack*, 27 Miss. 209, 6 Am. Dec. 508; *Ah Lim v. Territory*, 1 Wash. 162, 9 L. R. A. 305, 24 Pac. 588; *People v. Gillson*, 109 N. Y. 406, 4 Am. St. Rep. 465, 17 N. E. 343.

The police power extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals.

Wallace v. Reno (Nev.) 63 L. R. A. 337, 73 Pac. 531; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Coates v. New York*, 7 Cow. 604; *Brick Presby. Church v. New York*, 5 Cow. 538; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; 4 Bl. Com. 162; *Coe v. Schultz*, 47 Barb. 65; *Com. v. Alger*, 7 Cush. 53; *New York v. Miln*, 11 Pet. 102, 9 L. ed. 648.

The Constitution presupposes the exist-

work, and that it might be implied, from the nature of the employment and the conduct of the parties, that what he did in the day was to be reckoned as a day's work. *Brooks v. Cotton*, 48 N. H. 50, 2 Am. Rep. 172.

Under the act of May 24, 1888, limiting the hours that letter carriers in the city shall be employed per day, a letter carrier is entitled to extra pay for the time that he is so employed in excess of eight hours a day, where he is directed by the postmaster to work the extra hours, as the postmaster is the agent of the United States to direct the employment of letter carriers, and they are entitled to pay for the time they are employed, during the intervals between their trips, in the postoffice in such manner as the postmaster may direct, under § 647 of the postal laws and regulations of 1887. *United States v. Post*, 148 U. S. 124, 37 L. ed. 392, 13 Sup. Ct. Rep. 587; *United States v. Gates*, 148 U. S. 134, 37 L. ed. 396, 13 Sup. Ct. Rep. 570, Affirming 27 Ct. Cl. 244.

In *Garlinger v. United States*, 30 Ct. Cl. 473, the facts in the case were that the claimant was in the employ of the government a certain number of calendar days, for which his compensation was fixed by law at a certain sum per day, and he had been paid that sum for each of said number of calendar days; his claim was, and the court allowed, additional compensation, for the reason that the Treasury regulations provided that, in case of night work, a certain number of hours only should be required of each inspector, and that, if certain additional service was required of him upon any given night, he should be relieved from duty the following night. It appeared that the regulations of the Treasury Department, under which the claimant performed services, and which had the force of law, defined the statutory day as something different from the calendar day, and provided expressly that two statutory days' service might be rendered in one calendar day, and that such regulations went further, and provided that a night inspector might receive pay for a calendar day during which he rendered no service whatever. 65 L. R. A.

ence of the police power, and is to be construed with reference to that fact.

Carthage v. Frederick, 122 N. Y. 273, 10 L. R. A. 178, 10 Am. St. Rep. 490, 25 N. E. 480; *Sedgw. Stat. & Const. Law*, 435; *Tiedeman, Pol. Power*, 12; *Ex parte Shrader*, 33 Cal. 279; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302; *State v. Fosdick*, 21 La. Ann. 256; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 669, 24 L. ed. 1039; *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, 29 Kan. 253, 44 Am. Rep. 634.

It is not necessary, nor is it possible, to frame a statute which will affect more than a certain class of people. The inquiry to be made is whether or not the statute operates equally upon all persons who are brought within the relationship and cir-

The court distinguished *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128, *supra*, saying that the distinction between the two was that in that case the claimant was seeking to recover additional compensation for extra time where such additional compensation was prohibited by law. That here the suit was not to recover for extra time, but for a day's service rendered which had never been paid for, as the claimant had done two days' work, and had been paid for only one, and the unpaid-for service was not additional or extra, but entire and complete,—a thing by itself.

See *People v. Warren*, 77 Hun, 120, 28 N. Y. Supp. 303; *People ex rel. Warren v. Beck*, 144 N. Y. 225, 39 N. E. 80,—*infra*, V.

V. Criminal liability for violation of statute.

The removal of obstructions to navigation in the river and harbor of the country is a part of the public work of the government. Men employed in removing such obstructions are employed upon public works; and so the master of a steam snag boat belonging to the War Department, who employs his seamen in removing such obstructions, and exacts from them more than eight hours' labor per day at such work, is liable to indictment under the United States statute forbidding the same. *United States v. Jefferson*, 60 Fed. 736.

A United States statute making it unlawful for a contractor or subcontractor upon any of the public works of the United States, whose duty it shall be to employ, direct, or control the services of laborers or mechanics upon such public works, "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency," is within the rule in which the only intention required is an intention to do the prohibited act,—that is to say, the crime is complete when the prohibited act has been intentionally done. *United States v. John Kelso Co.* 86 Fed. 304.

In this case it was contended for the defendant corporation that the intention was a necessary element of the crime, and the corporation,

cumstances provided for; and, if a statute does this, though it may not affect every citizen or person alike, or every portion of the state, it is not open to constitutional objections.

Ex parte Smith, 38 Cal. 710; *State v. Consolidated Virginia Min. Co.* 16 Nev. 432; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *State v. Peel Splint Coal Co.* 36 W. Va. 832, 17 L. R. A. 385, 15 S. E. 1000; *Dent v. West Virginia*, 129 U. S. 124, 32 L. ed. 626, 9 Sup. Ct. Rep. 231; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *New York v. Miln*, 11 Pet. 139, 9 L. ed. 662; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338; *State v. Nelson*, 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 22.

The act merely limits the contract of the operator of the mine, smelter, or ore reduction works with his employee to work in

as such, was incapable of entertaining a criminal intention; but the court held, as stated, that the intent to do the act which the statute denominated criminal was sufficient, and that the intent of the corporation might be proved in such case the same as the malicious intention in a civil action for a malicious prosecution or malicious libel.

Where, under the United States statute forbidding the intentional employment of laborers upon public works more than eight hours in each day, an information which does not in express terms charge that the act of the defendant in requiring and permitting its laborers to work more than eight hours in each calendar day was intentional, but such charge is necessarily implied from the language used in the information, the information will be held good after verdict. *United States v. San Francisco Bridge Co.* 88 Fed. 891.

Where one agrees to furnish to the government of the United States two barges, to be delivered within a certain time from the making of the contract, which, if built according to certain specifications furnished him, are to be purchased by the government from him, the building of the barges is in no sense a part of the public works, as the barges are his, and are to be his until the government purchases them. They may or may not become the property of the government. The transfer of title to them depends upon conditions which cannot be determined until the barges are completed; and so, an information against such an one under the act of Congress forbidding a contractor or subcontractor to employ upon any of the public works of the United States laborers or mechanics to work more than eight hours in any calendar day, for working employees over eight hours per day on such barges, should be dismissed, and the defendant discharged. *United States v. Ollinger*, 55 Fed. 959.

A municipal ordinance making it a misdemeanor for any person when having labor performed for the purpose of carrying out a contract with the city, to demand, receive, or contract for more than eight hours' labor in one

any of such places more than eight hours during any twenty-four hours. It leaves him free to hire as many men as he pleases to continue his industry, both day and night, every day in the week, month, and year; and it in no way attempts to interfere with the rate of compensation.

People v. Lochner, 73 App. Div. 120, 76 N. Y. Supp. 401; *Easer v. Spaulding*, 17 Nev. 289, 30 Pac. 896; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Tiedeman*, Pol. Power, §§ 181-183; *Curtis v. O'Brien*, 20 Iowa, 376, 89 Am. Dec. 543; *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46; *Kneetle v. Neucomb*, 22 N. Y. 249, 78 Am. Dec. 186; *Moxley v. Ragan*, 10 Bush, 156, 19 Am. Rep. 61; *Bosler v. Rheem*, 72 Pa. 54; *Bauer v. Samson Lodge, K. of P.* 102 Ind. 262, 1 N. E. 571; *Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354; *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; *Taylor v. Saurman*, 110 Pa. 3, 1 Atl. 40; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711;

day from any person employed, is unconstitutional and void. The court said that it was an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and was a direct infringement of the right of such persons to make and enforce their contracts. That, if the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, the ordinance might be upheld as a sanitary or police regulation, but that the making it a misdemeanor for a citizen to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day could not be justified. *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 228, 24 Pac. 737.

While the council of a city has a right, by ordinance, to designate the number of hours in which laborers and mechanics shall work on the public works of a city, it has not the power to make a violation of such an ordinance a misdemeanor; a misdemeanor being an indictable offense which the general assembly only can create. *State v. McNally*, 48 La. Ann. 1450, 36 L. R. A. 533, 21 So. 27.

Purely statutory offenses cannot be established by implication; and so, the provision that ten hours' labor, performed within twelve consecutive hours, shall constitute a day's labor, which is contained in § 2 of the New York act of June 1, 1892, and the provision of the next section as to extra compensation for additional hours, do not constitute a penal prohibition of contracts for a greater number of hours' work in a day, and the penalty prescribed by § 4 of that act does not apply to these sections; as an intention to change the rule of the common law will not be presumed from doubtful provisions, and the presumption is that no such change is intended, unless the enactment is clear and explicit in that direction. Acts otherwise innocent and lawful do not become crimes unless there is a clear and positive expression of the legislative intent to make them crim-

Powell v. Com. 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913; *Warren v. Sohn*, 112 Ind. 213, 13 N. E. 863.

Laws regulating the manner of paying wages by the employer to the employee have been upheld.

Cumberland Glass Mfg. Co. v. State, 58 N. J. L. 224, 33 Atl. 210; *State v. Peel* *Splint Coal Co.* 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000; *People v. Havnor*, 149 N. Y. 204, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; *Holden v. Hardy*, 169 U. S. 366, 395, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 383; *Com. v. Beatty*, 15 Pa. Super. Ct. 19; *Com. v. Brown*, 8 Pa. Super. Ct. 339; *Com. v. Hamilton Mfg. Co.* 120 Mass., 383; *Opinion of the Justices*, 163 Mass. 594, 28 L. R. A. 344, 40 N. E. 713; *State v. Buchanan*, 29 Wash. 608, 59 L. R. A. 342, 92 Am. St. Rep. 930, 70 Pac. 52.

Sunday laws are upheld, not so much on account of the moral phase, but because mankind requires a day of rest and relaxation from labor.

Lindenmuller v. People, 33 Barb. 568; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 16 Am. St. Rep. 396, 23 N. E. 253; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246; *Shaffer v. Union Min. Co.* 55 Md. 74; *Opinion of the Justices*, 163 Mass. 589, 28 L. R. A. 344, 40 N. E. 713; *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682, 53 S. W. 955, Affirmed in 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *St. Louis, I. M. & S. R. Co. v. Paul*, 64 Ark. 83, 37 L. R. A. 504, 62 Am. St. Rep. 154, 40 S.

W. 705, Affirmed in 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419.

The state may prescribe regulations for the protection of those who, by their contract of employment, willingly perform dangerous service, and have no legal remedy if injured.

People v. Smith, 108 Mich. 527, 32 L. R. A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; *State v. Smith*, 58 Minn. 35, 25 L. R. A. 759, 59 N. W. 545; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068; *State v. Nelson*, 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 22.

Eight-hour laws are upheld.

Com. v. Hamilton Mfg. Co. 120 Mass. 383; *State v. Holden*, 14 Utah, 71, 37 L. R. A. 103, 46 Pac. 756, 14 Utah, 96, 37 L. R. A. 108, 46 Pac. 1107, Affirmed in 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Wenham v. State*, 65 Neb. 394, 58 L. R. A. 825, 91 N. W. 421; *State v. Buchanan*, 29 Wash. 602, 59 L. R. A. 342, 92 Am. St. Rep. 930, 70 Pac. 52; *Com. v. Beatty*, 15 Pa. Super. Ct. 5; *People v. Lochner*, 73 App. Div. 120, 76 N. Y. Supp. 396; *Short v. Bullock-Beck & C. Min. Co.* 20 Utah, 20, 45 L. R. A. 603, 57 Pac. 720.

The legislature under our system has power to repress what is hurtful to the general good.

Ex parte Andrews, 18 Cal. 678; *State v. Petit*, 74 Minn. 376, 77 N. W. 225, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; *State v. Sopher*, 25 Utah, 318, 60 L. R. A. 468, 95 Am. St. Rep. 845, 71 Pac. 482; *People v. Havnor*, 149 N. Y. 203, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; *State v. Nichols*, 28 Wash. 628, 69 Pac. 372; *Ex parte Northrup*, 41 Or. 489, 69 Pac. 445; *Ex parte Kennedy*, 42 Tex. Crim. Rep. 148,

inal. *People v. Phyle*, 136 N. Y. 554, 19 L. R. A. 141, 32 N. E. 978.

In *People v. Warren*, 77 Hun, 120, 28 N. Y. Supp. 303, it was held that § 504 of title 24 of chap. 105 of the Laws of 1891, which provides that in a contract for any work to be done, with the city of Buffalo, the contractor "shall bind himself, in the performance of such work, not to discriminate, either as to workmen, or wages, against members of labor organizations, or to accept any more than eight hours as a day's work, to be performed within nine consecutive hours," is not obnoxious to art. 14, § 1, of the Constitution of the United States, forbidding any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or of § 1 of art. 1 of the Constitution of the state of New York, which provides that no member of the state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. And the judgment and sentence of the police court of Buffalo, convicting the defendant for having, as superintendent of a paving company, hired laborers employed on work under a contract between the company and the city of Buffalo in 65 L. R. A.

violation of the section of the act before stated, was upheld by the general term of the supreme court. As no appeal could be taken from the judgment of the general term to the court of appeals, a writ of habeas corpus was sued out for the avowed purpose of testing the constitutionality of the provision in the charter of the city of Buffalo above quoted. The special term of the superior court of the city of Buffalo dismissed the writ, and the general term affirmed that decision. On appeal to the court of appeals, that court held that the section quoted was wholly administrative in its nature, and directed in detail the manner in which contracts should be drawn relating to any work required to be done by the city; that it was not penal in character, and did not impose upon anyone entering into a contract with the city any duty or obligation whatsoever; but simply dealt with the general subject of contracts, and prescribed certain provisions to be inserted by the city in any contract. And that, in the view thus taken, it was unnecessary to consider the constitutional question sought to be presented; and reversed the order vacating the writ of habeas corpus, and discharged the relator. *People ex rel. Warren v. Beck*, 144 N. Y. 225, 39 N. E. 80.

P. H. V.

51 L. R. A. 270, 53 S. W. 129; *Hennington v. State*, 90 Ga. 396, 4 Inters. Com. Rep. 413, 17 S. E. 1009, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Re Ten-Hour Law*, 24 R. I. 603, 61 L. R. A. 612, 54 Atl. 602.

Mr. Alfred Chartz amicus curiæ.

Talbot, J., delivered the opinion of the court:

Plaintiff was arrested, convicted, and sentenced for working in an underground mine more than eight hours in one day, contrary to the provisions of an act passed by our last legislature which provides:

"Sec. 1. The period of employment of working men in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 2. The period of employment of working men in smelters and in all institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 3. Any person who violates either of the preceding sections of this act, or any person, corporation, employer, or his or its agent, who hires, contracts with, or causes any person to work in an underground mine or other underground workings, or any smelter or any other institution or place for the reduction or refining of ores or metals for a period of time longer than eight hours during one day, unless life or property shall be in imminent danger, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than \$100, nor more than \$500, or imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

"Sec. 4. This act shall take effect sixty days from and after its passage."

Nev. Stat. 1903, chap. 10, p. 33.

Upon his failure to pay the fine of \$100 imposed, he was committed to the custody of the sheriff. He applies to this court for his liberty, and on his behalf it is urged that his conviction is void because the statute conflicts with § 1 of article 1 of our state Constitution, which declares that "all men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness," and that the act is inimical to the 14th Amendment to the Federal Constitution, which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or 65 L. R. A.

property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Although the constitutionality of this eight-hour law is now challenged before us for the first time, and questions of much interest and great import are involved, the fundamental principles which govern the determination of its validity have heretofore been recognized and enunciated by this court and by the Supreme Court of the United States, the earthly tribunals having final jurisdiction in this commonwealth; and the purpose, force, and validity of similar statutes have been carefully considered by that court and others in several states. It will be seen that the act does not attempt in any way to regulate the amount of wages which an employer shall pay, or an employee receive, for services by the day, or otherwise performed. The language forbids any person from working in underground mines, smelters, or mills for the reduction of ores more than eight hours per day, and the penalty is imposed alike on the man who labors in those places longer than the time prescribed, and on the owner who hires, and thereby encourages an infraction of the statute by others in his service. If he worked more than eight hours in his own mine, he would be subject to the same punishment as the man who labors for others; and the effect of the statute is to prevent all persons from working in the places named more than the designated number of hours. The employer is not required to pay any more per hour for the labor or value he receives than he paid previous to the passage of the act. He may hire as many men as he may choose, and he and the employee are as free to fix the compensation for services performed on the basis of their actual value as before. Both are prohibited from having the latter work more than eight hours per day in the employments affected; but if loss, temporary or otherwise, be occasioned by this curtailment of labor, it is apparent that the statute does not require it to be borne by the employer. Labor properly directed creates wealth, and all honest toil is noble and commendable. The right to acquire and hold property, guaranteed by our Constitution, is one of the most essential for the existence and happiness of man, and for our purposes here we may consider it to be the cornerstone in the temple of our liberties, and that it implies and includes the right to labor. It may also be granted that labor, the poor man's patrimony, the creator of wealth, and upon which all must depend for sustenance, is the highest species of property, and the right to toil is as sacred and secure as the millions of the wealthy; but individual rights, however

great, are subject to certain limitations necessary for the good of others and the community, and inherent in every well-regulated government. While we are not forgetful of the important rights and constitutional guaranties of the individual, they are, at the most, only branches of the common tree, while the welfare of the state, which includes the protection of the health and lives of the people in their various industrial pursuits, is the trunk, without which the tree could not stand or bear fruit. The public good and the health of a considerable portion of our population, when placed in the balance, must outweigh and turn the scale, regardless of slight inconveniences and reasonable restrictions which individuals may suffer. This principle is of greater importance to everyone than his more direct personal rights, for, without the prevalence and enforcement of this doctrine, no government could sustain itself and extend protection to its citizens. Broadly speaking, the right to acquire and hold property, which presupposes the one to labor at all ordinary pursuits, is subordinate to this greater obligation not to injure others, individually or collectively, and to contribute and aid in the support of the government in all its legitimate objects, among which we may consider the protection of the health and lives of that large portion of the people in this state who delve in the earth in search of the precious metals that help enrich the commerce of the world, and who there and in the smelters and ore reduction works come in contact with poisonous minerals, and breathe dust, foul air, and noxious fumes and gases. In this connection it should be remembered that the statute applies to underground mines, and not to placer claims or to men working in the open above the surface. That a large proportion of our population are engaged in the pursuits in which the hours of labor are restricted is a matter of general knowledge. The legislature, in 1875, declared the mining, milling, and smelting of ores to be for the public use, and, when necessary for these purposes, authorized the taking of private property by way of eminent domain. Comp. Laws, § 283. And in 1887 they declared that mining was the paramount interest of the state, and authorized condemnation proceedings for its promotion in certain instances. Comp. Laws, § 281.

We cannot close our eyes, and deny that employment in the places named in the statute is unhealthful, when it is so commonly known that men contract rheumatism and miner's consumption working underground in powder smoke, and damp, bad air; that they become leaded from the fumes in smelters; and that the most of those em-

ployed in one of the largest quartz mills in the state during the past several years became afflicted in from a few to several months with fine particles of flinty dust, which, with the inflation and contraction in breathing, cut the lungs, and resulted in premature and early death. We are not prepared to say that the mining, milling, and smelting of ores are not avocations so unhealthy and hazardous that they may not come under the protecting arm of the legislature; but to recognize these conditions, and pass measures for their amelioration, and which may protect the health and prolong the lives of the men so employed, we think, is within the legitimate powers of the lawmaking branch of our government. As we will indicate later, the supreme courts of Utah and the United States have held these occupations to be unhealthful in that state, and there is no apparent reason why they are not equally so here. If these matters were uncertain when their existence is necessary to sustain the law, the doubt should be resolved in favor of the statute, for, as held by this court in several decisions, its validity will be presumed until it is clearly shown to be unconstitutional. Justice Harlan, in delivering the opinion of the Supreme Court of the United States a few weeks since in the case involving the Kansas law making eight hours a day for all engaged on public work, state, city, or county,—a different question than that involved here,—made these pertinent statements: "So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts, in cases before them, to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts, as embodying the will of the people, unless they are plainly and palpably, and beyond all question, in violation of the fundamental law of the Constitution." [*Atkin v. Kansas*, 191 U. S. 223, 48 L. ed. 158, 24 Sup. Ct. Rep. 124.]

In *Wallace v. Reno*, 27 Nev. —, 63 L. R.

A. 337, 73 Pac. 531, we held that the people, and through them the legislature, had supreme power in all matters of government, where not restricted by constitutional limitations; and, adopting the language of the Supreme Court of the United States, we said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizen, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi est suprema lex*, and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. . . . All rights are held subject to the police power of the state." The cases holding that the legislature may pass measures for the protection of the health, safety, and lives of the citizens are too numerous to require citation. These have been enacted and upheld in a variety of forms which limit in a greater or less degree the control and acquisition of property. Quarantine regulations, state and national, for the protection of the many and in restraint of the individual, and affecting people and various animals, prevail generally. The use of safety devices has been enforced in mining, mills, and factories, and on railroads. By ordinance, vestibules are required on street cars to protect motormen from the inclemency of the weather. Various trades are prohibited or regulated, so as not to injure the health of those employed or others. A proportion of private property is exacted by way of taxation for the support of schools, asylums, hospitals, and for other public and beneficial purposes, present and future. More directly, laws have been sustained shortening the hours of labor in bakeries, barber shops, and laundries,—places less unhealthy and affecting a smaller class than mines and smelters,—and for women in manufacturing establishments. Considerations peculiar to sex have been advanced in some instances in support of the latter, but to have strong, healthy men, instead of sickly and disabled ones, without earning and self-supporting capacity, and resultant widows and orphans dependent upon private and public charity, is quite as important to the state in time of peace or war; and the health and lives of all the people, wherever endangered, should receive care and protection.

Of the statute we have under consideration,

§§ 1 and 2 are copied literally, and § 3 substantially, from an act found in the Session Laws of Utah for 1896, at page 219, chap. 72, which was sustained as being not unconstitutional by the supreme court of that state and of the United States. *State v. Holden*, 14 Utah, 71, 37 L. R. A. 103, 46 Pac. 756, 14 Utah, 96, 37 L. R. A. 108, 46 Pac. 1105, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Short v. Bullion-Beck & C. Min. Co.* 20 Utah, 20, 45 L. R. A. 603, 57 Pac. 720.

The Utah Bill of Rights, in slightly varying language, contains the same guaranty as ours for acquiring and holding property, but § 6 of article 16 in the Constitution of that state directs that "the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines." This must be regarded as a command to the legislature there on a subject in regard to which our Constitution is silent; but the validity of the statute under challenge depends upon power which may exist without the command. This direction to the legislature would imply and supply power if it did not otherwise exist, but, as we have already seen, the authority to provide for the health, safety, and welfare of the citizen is inherent in the police power of the legislature, without any express provision. Our Constitution being silent in that regard, our legislature could exercise the power at their discretion, while there the command made action obligatory. Here the legislature is the uninstructed general agent of the people, free to exercise its own judgment in matters coming within the police powers of the state; and the power necessary to sustain the validity of the statute exists here as well as there and would exist there regardless of the command. It should be remembered that the Utah Constitution does not direct the legislature to regulate the hours of labor in mines and smelters, but only to provide for the health and safety of employees therein; and that this law in that state can be sustained only as a health regulation, such as are within the general police powers regardless of the constitutional command, for otherwise it is not authorized any more there than here. The extent of the command is for the legislature to provide for the health of these employees. Every legislature is authorized to provide for the health of the people, where endangered, and for their welfare in other ways. The power is as inherent here as it is complete there, and, if the curtailment to eight of the hours of labor in the mines and smelters in Utah promotes the health of the employees, *ergo* it does the same here. Since the Constitution of Utah confers no power that is not possessed by

our legislature, and the conditions in mines and smelters may not be considered materially different there from what they are here, it is presumed that when our legislature adopted this statute it adopted the construction which had been placed upon it at the time of its adoption by the supreme court of that state and the United States. It was said in *State v. Robey*, 8 Nev. 320, that "it is well settled that where a statute has received a judicial construction, and is afterwards adopted by another state, the construction as well as the terms of the statute will be deemed adopted." To the same effect are *Williams v. Glasgow*, 1 Nev. 533, and *McLane v. Abrams*, 2 Nev. 199; and in *Gould v. Wise*, 18 Nev. 254, 3 Pac. 30, it was held that the re-enactment of the statute after an authoritative construction by the courts, and in that case by the United States district court, was a legislative adoption of the court's construction.

The questions involved have been carefully considered and ably discussed in a number of decisions from which we quote.

"If the power to pass the law is conceded, the court cannot set it aside because it may deem its enactment unnecessary or injudicious, or because the court may think that experience has proven it so, or because the court may think itself more sagacious than the legislature, and can, therefore, see more clearly that the law will retard, rather than promote, progress and prosperity, and will be a detriment to the common good when actually applied to human affairs amid the conditions of the future.

"This brings us to the question. Is the first section of the statute, limiting the period of employment of laboring men in underground mines to eight hours per day, except in cases of emergency, where life or property is in imminent danger, calculated to protect the health of such laboring men? The effort necessary to successful mining, if performed upon the surface of the earth, in pure air and in the sunlight, prolonged beyond eight hours, might not be injurious, nor affect the health of able-bodied men. When so extended beneath the surface, in atmosphere laden with gas, and sometimes with smoke, away from the sunlight, it might injuriously affect the health of such persons. It is necessary to use artificial means to supply pure air to men laboring at any considerable distance from the surface. That being so, it is reasonable to assume that the air introduced, when mixed with the impure air beneath the surface, is not as healthful as the free air upon the surface. The fact must be conceded that the breathing of pure air is wholesome, and the breathing of impure air is unwholesome. We cannot say that this law, limiting the

period of labor in underground mines to eight hours each day, is not calculated to promote health; that it is not adapted to the protection of the health of the class of men who work in underground mines. While the provision of the Constitution under consideration makes it the duty of the legislature to enact laws to protect the health and to secure the safety of men working in underground mines, and in factories and smelters, it does not prohibit the legislature from enacting other laws affecting such classes, to promote the general welfare. . . . The authority of the general government is ascertained from the powers delegated, while those of the state government are ascertained from those not prohibited. . . . This leaves the state legislature in the possession of all the lawmaking power not prohibited to it by the Constitution of the United States, or the laws made in pursuance of it, or by the state Constitution. The enactment of some laws is made mandatory. The enactment of others is left to the discretion of the legislature as the public welfare may demand. . . . [The 14th Amendment of the Federal Constitution] forbids the denial to any class of persons the equal protection of the laws by any state, and we have no doubt that class legislation is forbidden. But some pursuits are attended with peculiar hazards and perils, the injurious consequences from which may be largely prevented by precautionary means, and laws may be passed calculated to protect the classes of people engaged in such pursuits. It is not necessary to extend the protection to persons engaged in other pursuits not attended with similar dangers. To them the law would be inappropriate and idle. So, if underground mining is attended with dangers peculiar to it, laws adapted to the protection of such miners from such danger should be confined to that class of mining, and should not include other employments not subject to them. And if men engaged in underground mining are liable to be injured in their health or otherwise by too many hours' labor each day, a law to protect them should be aimed at that peculiar wrong. In this way laws are enacted to protect people from perils from the operation of railroads, by requiring bells to be rung and whistles sounded at road crossings, and the slackening of the speed of the trains in cities. So the sale of liquors is regulated to lessen the evils of the liquor traffic, and other classes of business are regulated by appropriate laws. In this way laws are designed and adapted to the peculiarities attending each class of business. By such laws different classes of people are protected by various acts and provisions. In this way various classes of business are regulated,

and the people protected by appropriate laws from dangers and evils that beset them, safety is secured, health preserved, and the happiness and welfare of humanity promoted. All persons engaged in business that may be attended with peculiar injury to health or otherwise if not regulated and controlled should be subject to the same law; otherwise the law should be adapted to the special circumstances. . . .

"An ordinance of the city and county of San Francisco prohibited the washing and ironing of clothes in public laundries and washhouses within certain prescribed limits of the city and county from 10 o'clock at night until 6 o'clock on the morning of the following day; and one Soon Hing was fined and imprisoned for a violation of it, and he petitioned for a writ of habeas corpus, on the ground that the ordinance was void, because it discriminated between the class of laborers engaged in the laundry business and those engaged in other kinds of business; that it discriminated between laborers beyond the designated limits and those within them; that it deprived the petitioner of the right to labor, and, as a necessary consequence, of the right to acquire property; and that the board had no power to pass it. The writ was denied by the lower court, and the judgment was brought before the Supreme Court of the United States, and affirmed by that court. Among other things, that court said in its opinion: 'The specific regulations for one kind of business which may be necessary for the protection of the public can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discriminations can be said to impair that equal right which all can claim in the enforcement of the laws.' *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. . . .

"Judge Cooley says: 'Whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature, in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits, and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. We must assume that the legis-

lative discretion has been properly exercised.' Cooley, Const. Lim. 6th ed. p. 220. . . .

"The supreme court of Massachusetts, in the case of *Com. v. Hamilton Mfg. Co.* 120 Mass. 383, held that a law declaring that a woman should not be employed at labor by any person, firm, or corporation in any manufacturing establishment more than ten hours in any one day, except in certain cases, and in no case more than sixty hours a week, was constitutional and valid. . . . The court said: 'It does not forbid any person, firm, or corporation from employing as many persons or as much labor as such person, firm, or corporation may desire; nor does it forbid any person to work as many hours a day or a week as he chooses. It merely provides that, in an employment which the legislature has evidently deemed to some extent dangerous to health, no woman shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation can be maintained, either as a health or police regulation, if it were necessary to resort to either of these sources for power. This principle has been so frequently recognized in this commonwealth that reference to the decisions is unnecessary.' . . .

"The section of the statute whose constitutionality is involved in this case includes all employees and employers engaged in working underground mines. None are omitted who may be subject to the peculiar conditions that attend such mining. . . . And we are not authorized to hold that the law in question is not calculated and adapted in any degree to promote the health and safety of persons working in mines and smelters. Were we to do so, and declare it void, we would usurp the powers intrusted by the Constitution to the lawmaking power." *State v. Holden*, 14 Utah, 83, 37 L. R. A. 104, 46 Pac. 758.

In affirming the decision of the supreme court of Utah, the Supreme Court of the United States, in *Holden v. Hardy* [169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383], made a clear and elaborate statement, which is peculiarly applicable here, and of which we reproduce a part of the most direct paragraphs:

"This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and pro-

tection, or the safety of adjacent property. While this court has held, notably in the cases *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, and *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances; and a large discretion 'is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.' *Lawton v. Steele*, 152 U. S. 136, 38 L. ed. 385, 4 Sup. Ct. Rep. 501.

"The extent and limitations upon this power are admirably stated by Chief Justice Shaw in the following extract from his opinion in *Com. v. Alger*, 7 Cush. 53, 84: 'We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.'

"This power, legitimately exercised, can neither be limited by contract, nor bartered away by legislation. While this power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist. Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which were then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether prohibited, or made subject to stringent police regulations. The power to do this has been repeatedly affirmed by this court. *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *Giorza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Crowley* 65 L. R. A.

v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

"While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way, and by such primitive methods, that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies, and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings, a municipal inspection of boilers, and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts, and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signaling the surface, for the supply of fresh air, and the elimination, as far as possible, of dangerous gases, for safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the top of shafts, besides other similar precautions. . . .

"These statutes have been repeatedly enforced by the courts of the several states, their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional.

"In *Daniels v. Hilgard*, 77 Ill. 640, it was held that the legislature had power, under the Constitution, to establish reasonable police regulations for the operating of mines and collieries, and that an act providing for the health and safety of persons employed in coal mines, which required the owner or agent of every coal mine or colliery employing ten men or more to make or cause to be

made, an accurate map or plan of the workings of such coal mine or colliery, was not unconstitutional, and that the question whether certain requirements are a part of a system of police regulations adopted to aid in the protection of life and health was properly one of legislative determination, and that a court should not lightly interfere with such determination unless the legislature had manifestly transcended its province. See also *Litchfield Coal Co. v. Taylor*, 81 Ill. 590.

"In *Com. v. Bonnell*, 8 Phila. 534, a law providing for the ventilation of coal mines, for speaking tubes, and the protection of cages, was held to be constitutional, and subject to strict enforcement. *Com. v. Conyngham*, 66 Pa. 99; *Durant v. Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484.

"But if it be within the power of the legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the state that the public health should be preserved as that life should be made secure. . . .

"Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the state. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees; and, so long as there are reasonable grounds for believing that this is so, its decisions upon this subject cannot be reviewed by the Federal courts.

"While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases generated by the processes of refining or smelting."

Continuing, the United States Supreme Court said: "We concur in the following observations of the supreme court of Utah in this connection in its opinion in No. 2: 'The conditions with respect to health of laborers in underground mines doubtless differ from those in which they labor in smelters and other reduction works on the surface. . . .

face. Unquestionably the atmosphere and other conditions in mines and reduction works differ. Poisonous gases, dust, and impalpable substances arise and float in the air in stampmills, smelters, and other works in which ores containing metals, combined with arsenic or other poisonous elements or agencies, are treated, reduced, and refined; and there can be no doubt that prolonged effort day after day, subject to such conditions and agencies, will produce morbid, noxious, and often deadly effects in the human system. Some organisms and systems will resist and endure such conditions and effects longer than others. It may be said that labor in such conditions must be performed. Granting that, the period of labor each day should be of a reasonable length. Twelve hours per day would be less injurious than fourteen, ten than twelve, and eight than ten. The legislature has named eight. Such a period was deemed reasonable. . . . The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments. Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government.' . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.' . . . We are of opinion that the act in question was a valid exercise of the police power of the state, and the judgments of the supreme court of Utah are therefore affirmed."

In *People v. Lochner*, 73 App. Div. 120, 76 N. Y. Supp. 399, the supreme court of New York said: "The police power of the state is the power which enables it to pro-

mote the health, comfort, safety, and welfare of society. It is very broad and far-reaching, but it is not without its limitations. . . . The line between the valid exercise of the police power and the invasion of the private rights is clearly drawn by Judge Earl in his opinion in *Re Jacobs*, 98 N. Y. 110, 50 Am. Rep. 636. He says: 'Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. . . . If the act and the Constitution can be construed so as to enable both to stand, and each can be given a proper and legitimate office to perform, it is the duty of the court to adopt such construction. . . . The legislature, under the police power, may certainly regulate, or even prohibit, the carrying on of any business in such manner and in such place as to become dangerous or detrimental to the health, morals, or good order of the community.' Judge Vann, in discussing the statute entitled, 'An Act to Regulate Barbering on Sunday,' in *People v. Havnor*, 149 N. Y. 204, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 544, says: 'As barbers generally work more hours each day than most men, the legislature may well have concluded that legislation was necessary for the protection of their health.' And at page 203, 149 N. Y., page 692, 31 L. R. A., page 712, 52 Am. St. Rep., and page 544, 43 N. E., he says: 'It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork, and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare.' It was held in *People ex rel. Nechamcus v. City Prison*, 144 N. Y. 536, 27 L. R. A. 718, 39 N. E. 688, that 'the restraint of personal action is justified when it manifestly tends to the protection of the health and comfort of the community, and no constitutional guaranty is then violated.' In *Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579, 39 N. E. 833, the court laid down the rule that the legislature, in the exercise of its power to conserve the public health, safety, and welfare, may direct that certain improvements or alterations shall be made in existing houses at the owners' expense, and that suitable appliances be supplied to re-

ceive and distribute a supply of water for domestic use. Judge Peckham, in discussing the constitutionality of the act (p. 43, 145 N. Y., p. 714, 27 L. R. A., p. 584, 45 Am. St. Rep., p. 836, 39 N. E.), says: 'Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner.' . . . In Tiedeman on Police Power, 181, the author states: 'If the law did not interfere, the feverish, intense desire to acquire wealth, inciting a relentless rivalry and competition, would ultimately prevent not only the wage earners, but, likewise, the capitalist and employers themselves, from yielding to the warnings of nature, and obeying the instinct of self-preservation by resting periodically from labor.' . . . If the statute under consideration invades the right of property and the liberty of the individual, then many of the statutes of this state that have been held to be constitutional, and their enactment within the police power of the state, are subject to the same criticism. The statute in question does not restrict the right of the defendant to carry on his business, or to engage as many persons as he sees fit in such business, but it simply prohibits him from requiring or compelling his employees to work more than ten hours in any one day, or more than sixty hours in any one week. In other words, the statute does not prohibit any right, but regulates it; and there is a wide difference between regulation and prohibition,—between prescribing the terms by which the right may be enjoyed, and the denial of that right altogether. The defendant is not deprived of any right or privilege which is not denied to others in a similar business. The provisions of the statute in question are directed to all persons engaged in the bakery business. It neither confers special privileges, nor makes unjust discrimination. All who are engaged in that business are entitled to its benefits and subjected to its restrictions.'

The opinions in California and Ohio holding that statutes limiting the hours of labor on public works were unconstitutional, although not in point, may no longer be considered of weight, in the face of the recent decision to the contrary by the Supreme Court of the United States in the Kansas case. The employment was not shown or claimed to endanger health or life, nor could this be said of all the various occupations covered by the Nebraska act. When such strong considerations of public

policy demand, it is not difficult to distinguish in principle between the cases relating to avocations unhealthful and dangerous, and those which are not, and we are unaware that any court where the conditions are the same has rendered an opinion contrary to the views we hold and express, excepting in *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071, where the supreme court of that state took occasion to criticise the decision in *Holden v. Hardy*, and held contrary to the lucid opinion of the United States Supreme Court in that case, declaring that the protection of the health and lives of employees in mines and smelters was within the police power of the state, and that the Utah statute, from which ours is taken, was valid, and not objectionable as class legislation. Nor are we prepared to agree with the bald assertion in the Colorado opinion that the state may not protect the individual against injury to himself: but we do not wish to be understood as placing the decision here on such narrow ground. Under the common law, the man who tries to commit suicide, and fails, may be punished for the attempt to take his own life. A perusal of the decision in *Re Morgan* would lead to the inference that the Utah supreme court was not affirmed by the Supreme Court of the United States in *Holden v. Hardy*, when three courts, including the latter at different times, have asserted to the contrary. The Utah Constitution not only does not, but if a different construction be claimed for it, as was done in the Colorado case, it could not, as against the 14th Amendment, to which all conflicting provisions of state Constitutions, as well as statutes, must yield, convey any authority for legislation abridging the rights, privileges, or immunities of citizens, or for depriving any person of property or liberty without due process of law, or for denying to any person the equal protection of the laws. The opinion in *Re Morgan* implies a warrant in the Utah Constitution which did not exist in Colorado, as a basis of the opinion of the Supreme Court of the United States, when, under well-known elementary principles, the Utah Constitution was of no more force against the Federal Constitution and its amendments than the Colorado statute. It was the conclusion of the court in *Re Morgan* that the statute "unjustly and arbitrarily singles out a class of persons, and imposes upon them restrictions from which others similarly situated and substantially in the same condition are exempt; and that it is not, under our Constitution, a valid exercise of the police power of this state." As we have seen, the United States Supreme Court held differently on both these propo-

sitions, when the prohibitions which may relate to them are as broad and controlling under the 14th Amendment as under the Constitution of Colorado. The conflict in these cases is evident, and it is apparent that the Colorado court had no different and substantial reason for deciding contrarily to the Supreme Court of the United States. When, as held by the highest court in the land, the power of the legislature, as applied to a similar statute in Utah, cannot be stayed by the 14th Amendment, we must conclude that it is not nullified by the state Constitution,—an instrument less potential, and not broader in its relevant guarantees.

Notwithstanding the attempt of the supreme court of Colorado to discredit and overrule the doctrines announced by the Supreme Court of the United States in *Holden v. Hardy*, the latter tribunal has continued to affirm those principles, and in later decisions has stated regarding the case: "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. These principles were extended to the right to acquire property and to enter into contracts with respect to property; but it was said: 'This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers.' The legislation sustained was an act of the state of Utah making the employment of workmen in all underground mines and workings, and in smelters and all other institutions for the reduction and refining of ores or metals, eight hours per day, except in cases of emergency, where life or property shall be in imminent danger. The violation of the statute was made a misdemeanor. It was undoubtedly a limitation on the right of contract,—that of the employer and that of the employed,—enforced by a criminal prosecution and penalty on the former, and on his agents and managers. It was held a valid exercise of the police powers of the state." *Orient Ins. Co. v. Daggs*, 172 U. S. 563, 43 L. ed. 552, 19 Sup. Ct. Rep. 283, Citing *Holden v. Hardy*.

"Inasmuch as the right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the state, we do not think that conclusion, in its application to the power to amend, can be disputed on the ground of infraction of the 14th Amendment." *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S.

409, 43 L. ed. 746, 19 Sup. Ct. Rep. 421, citing *Holden v. Hardy*.

"And so as to the right to contract. The liberty, of which the deprivation without due process of law is forbidden, 'means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned; . . . although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state, as contained in its statutes.' *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 591, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383." *Williams v. Fears*, 179 U. S. 274, 45 L. ed. 186, 21 Sup. Ct. Rep. 129.

In *Austin v. Tennessee*, 179 U. S. 369, 45 L. ed. 224, 21 Sup. Ct. Rep. 134, involving a statute of that state prohibiting the importation and sale of cigarettes, the court said: "While, as was said in *Holden v. Hardy*, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 388, 'the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances; and a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what means are necessary for the protection of such interests.' Thus, while in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, it was held that a statute of Missouri, prohibiting the driving or bringing of any Texas, Mexican, or Indian cattle into the state, was in conflict with the interstate commerce clause of the Constitution, it was subsequently held that the introduction of diseased cattle might be prohibited altogether, or subjected to such regulations as the legislature chose to impose. *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

"In *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, the validity of an act of the state of Utah regulating the employment of workmen in under-

ground mines, and fixing the period of employment at eight hours per day, was in question. There, as here, it was contended that the legislation deprived the employers and employees of the right to make contracts in a lawful way and for lawful purposes; that it was class legislation, and not equal or uniform in its provisions; that it deprived the parties of the equal protection of the laws, abridged the privileges and immunities of the defendant as a citizen of the United States, and deprived him of his property and liberty without due process of law. But it was held, after full review of the previous cases, that the act in question was a valid exercise of the police power of the state, and the judgment of the supreme court of Utah sustaining the legislation was affirmed." *Knorrville Iron Co. v. Harbison*, 183 U. S. 21, 46 L. ed. 55, 22 Sup. Ct. Rep. 4.

"The statute above referred to was held constitutional by the court in *State v. Holden*, 14 Utah, 71, 37 L. R. A. 103, 46 Pac. 756, and the Supreme Court of the United States affirmed such decision in 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, holding that the act in question was a valid exercise of the police power of the state of Utah." *Short v. Bullion-Beck & C. Min. Co.* 20 Utah, 24, 45 L. R. A. 603, 57 Pac. 721.

Similar conclusions are stated in *People v. Lockner*, 73 App. Div. 120, 76 N. Y. Supp. 401.

We think the better reasoning and correct distinction are with the Supreme Court of the United States, and the cases in line with its decisions. As we have already shown, the objection to the statute as being special legislation was held to be untenable by that court, and its opinion based squarely on the fact that the legislature, in the exercise of its police power, could, by limiting the hours of labor, provide for the protection of the health of the men employed in underground mines and smelters. If the statute had been objectionable as class legislation, that court would have held it to be a denial of the equal protection of the laws under the 14th Amendment to the Federal Constitution. Of necessity, many laws must refer to certain classes, such as those governing towns, cities, various occupations, of which the saloon business has been cited as an instance, quarantine laws to prevent the spread of different diseases peculiar to animals and people and different localities, safety devices; and generally a health regulation must be limited, as a matter of fact, if not in direct statutory terms, to that class which will be affected, for no others could receive protection. It is necessary that the law affect all persons alike in

the same class and under similar conditions. These requirements are met by the statute for it controls all alike and extends to every man who engages in underground mining, or in the smelting and milling of ores, and becomes subject to the dangers incident to those occupations. In sustaining a statute requiring the closing of saloons between 12 at night and 6 o'clock in the morning, this court said: "The act is not local or special, in the sense of the constitutional restriction upon the subject. It applies to all saloons and gaming-houses throughout the state which come within the class mentioned in the act, and, as to such classes and places of business, it is of uniform operation throughout the state." *Ex parte Livingston*, 20 Nev 289, 21 Pac. 322.

In *Wenham v. State*, 65 Neb. 394, 58 L. R. A. 825, 91 N. W. 421, the supreme court of Nebraska held that an act prohibiting females from laboring more than ten hours per day, or sixty hours per week, in manufacturing and certain other establishments, was within the police power of the state, and not objectionable as class legislation; and it is said in the opinion: "It would seem at first blush as though a law having the effect to interfere with the business of the one, or shorten the hours of labor of the other, would be repugnant to these constitutional provisions. It must be conceded, however, that every property holder is secured in his title thereto, and holds it under the implied rule and understanding that its use may be so regulated and restricted that it shall not be injurious to the equal enjoyment of others having the equal right to the enjoyment of their property, or to the rights of the community in which he lives. All property in this state is held subject to rules regulating the common good and the general welfare of our people. This is the price of our advanced civilization, and of the protection afforded by law to the right of ownership, and the use and enjoyment of the property itself. Rights of property, like other social and conventional rights, are subject to reasonable limitations in their enjoyment, and to such reasonable restraints and regulations by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think expedient."

To the same effect, and upholding a similar statute, is *State v. Buchanan* (Wash.) 59 L. R. A. 342, 70 Pac. 52, a Washington case.

It may be assumed that, at the time of the adoption of our state Constitution, underground mining had not progressed to such extent that the dangers to health incident were so apparent and well understood as to-day, and consequently that no

provision was made for or against such legislation as that before us, and no consideration given the subject. Time and the light of experience and the progress of the age have shown the desirability of various enactments for the promotion of the happiness and good of the people, regarding which legislators and statesmen were formerly unmindful. As new conditions and necessities arise in the affairs of men, the law must advance to meet them.

For the reasons indicated, we conclude that it was within the power and discretion of the legislature to enact the statute for the protection of the health and prolongation of the lives of the workingmen affected, and the resulting welfare of the state.

The petitioner is remanded to custody.

Fitzgerald, J., concurring:

The question for determination is, Does the eight-hour enactment of the last session of the Nevada legislature violate the Nevada Constitution? True it is claimed in the brief of counsel for petitioner that the said enactment violates also the Constitution of the United States, in its 14th Amendment, but this contention was abandoned at the oral argument; and the Supreme Court of the United States, which is the supreme authority as to what may constitute a violation of that Constitution, has held that such an enactment does not contravene the National Constitution.

Counsel claims that the enactment violates the Constitution of Nevada (1) in § 21 of article 4, as to generality and uniformity of laws; (2) in § 17 of article 4, as to multiplicity of subjects; (3) in § 20 of article 4, as to local and special laws; and (4) in § 1 of article 1, as to (a) class legislation; and (b) its "Bill of Rights," as to, first, personal liberty, and, second, as to acquiring property.

While counsel have cited the foregoing sections as violated by the enactment in question, they have not, in their arguments, kept the discussion on each point separate; but several points are mingled together in their discussion. Hence, the discussion here will have, to some extent, to follow the same method. The said points will, however, be separately discussed as far as, under the circumstances, may be practicable.

Section 20 of article 4 provides: "The legislature shall not pass local or special laws" in certain cases therein named; but the enactment in question here does not seem to come under any of them, unless it be this one: "For the punishment of crimes and misdemeanors." If that be the contention, it will receive attention further on.

Section 21 provides that "in all cases enumerated in the preceding section [see

§ 20] and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Does counsel claim that a health law could "be made general and of uniform operation throughout the state;" that is, applicable to wholesome and unwholesome employments alike, if there are employments wholesome and employments unwholesome? If so, cases cited in the briefs oppose the contention.

Section 17 of article 4 is: "Each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title," etc. The title of this act is as follows: "An act regulating the hours of employment in underground mines and smelters, and ore reduction works, and providing penalties for violation thereof." Does this enactment violate this section as being multifarious in its title? Counsel, though citing the section as violated by the act's title, pay very slight attention to the point in their argument. This fact and the subject itself justify only a brief reference to it here. It is thought that neither the title nor the body of the act violates said section.

This brief reference to the sections of the Constitution claimed to be violated is made to show that all that were cited to the court by counsel received the court's attention. The main contention of counsel will now be considered: Section 1 of article 1, called by counsel the "Bill of Rights," is: "All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness." The contention is that the enactment of 1903 violates this section, as (1) interfering with petitioner's "liberty" (that is, his "liberty to contract"); and (2) his right of "acquiring . . . property." These are the two precise questions in this case. And here too counsel have not chosen to discuss each point separately, but have mingled them together in a general manner. Therefore the brief discussion here to be made will be somewhat similar. One remark, however, will be made, to wit, that although courts of great respectability have, it seems, held that the word "liberty," in other Constitutions similar to ours, in said § 1 of article 1, refers to the "right to contract" or "liberty to contract," is it, after all, entirely clear that it does? It would seem that the notion conveyed by the word "liberty" might ordinarily be deemed to be somewhat different from the word "contract," and also the "right to liberty" and

the "right to contract" somewhat different from each other. But be that as it may, now to the points thus sharply put to issue:

The question presents itself in two aspects: (1) Its general aspect (that is, in reference to legislative enactments upon the right or liberty of all citizens "to contract in reference to their labor," and the right of all citizens to "acquire property"); and (2) the rights of a special class or special classes of citizens in these respects. The first or general aspect of the question does not arise in the matter now in hearing, and therefore will not be discussed. But the second aspect, to wit, the special one of the legislative power to regulate or restrain contracting as to laboring in underground mines and about smelters and reduction works, does arise, and will be considered.

On the specific question of such regulation and restraint as to laboring in underground mines and about smelting and reduction works but two cases have been cited by counsel. These are the case of *State v. Holden*, 14 Utah, 71, 37 L. R. A. 103, 46 Pac. 756, and the case of *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071, and these two cases are directly antagonistic to each other. True, in addition to these two cases there are in Colorado (*Re Eight-Hour Law*, 21 Colo. 29, 39 Pac. 328, and *Re House Bill No. 107*, 21 Colo. 32, 39 Pac. 431) judicial responses to legislative inquiries to the same effect as was the decision of the Colorado court in *Re Morgan*. But those responses were not made after argument by counsel, and do not themselves contain argument, but merely assertion. Therefore the case in *Re Morgan* is essentially, as stated above, the only case in point cited by counsel that was precisely antagonistic to the case cited from Utah.

Before considering these cases, let it be remarked that the legislative power to regulate and restrain the hours of labor in employments other than those mentioned in the Nevada statute has been before numerous appellate courts of the Union, and that the decisions thereon are not uniform; some holding such regulation and restraint constitutional, and others unconstitutional. Therefore whatever aid could be gained from analogy in decisions in other cases would be divided aid,—partly in favor of petitioner, and partly against him; but it is believed the preponderance in number and reason is against him.

As counsel for petitioner place great reliance on *Re Morgan*, that case will be examined. Here a puzzling statement appears. The chief justice in the opinion first gives the enactment of the Colorado legis-

lature in question in the case, which is the same as the one in question in the Utah case, and also in the case now before us; and, secondly, the clause of the Colorado Constitution claimed to be by it violated, which clause is essentially the same as the clause in the Nevada Constitution, and also as the clause in the Utah Constitution (it is not here overlooked that another clause is in the Utah Constitution enjoining upon its legislature the enactment of health laws as to laborers in mines, etc.); and then he says that it is "practically admitted to be true that this act contravenes the constitutional provision quoted in the statement. Let us see if, notwithstanding this conflict, it can be justified as a valid exercise of the police power." Curious admission. If admitted, it must have been by the counsel in the case who were endeavoring in their arguments to uphold the enactment of the Colorado legislature; and, after admitting that the enactment contravened the Constitution, how could counsel, in reason, ask the court to uphold such contravening enactment, under either the police power or under any other power of the legislature? If the enactment contravened the Colorado Constitution it would seem that was an end of the matter. Saying or assuming that it did so violate was a *petitio principii*. It begged the whole question.

Again, the Colorado court in *Re Morgan*, says: "If, in our Constitution there was, as there seems to be in that of Utah, a specific affirmative provision enjoining upon the general assembly the enactment of laws to protect the health of the classes of workmen therein enumerated, it might be that acts reasonably appropriate to that end would not be obnoxious to that provision of our Constitution forbidding class legislation, for it could hardly be said that a classification made by the Constitution itself was arbitrary or unfair, or that it clashed with another provision of the same instrument inhibiting class legislation."

Why could not a classification made by a Constitution be "arbitrary" and "unfair"? Clearly such classification might in reality be arbitrary and unfair, but it probably would not lie in the mouths of justices constituting a court under such Constitution to nullify it because of such arbitrariness and unfairness.

In the paragraph just above quoted does not the Colorado court—that court so much relied upon by those assailing the enactment in question in this court—practically admit that such an enactment as this is a "reasonably appropriate" health regulation? It was only the "health" of the workmen that the Utah Constitution commanded its legislature to enact laws to pro-

tect. It did not say how this health was to be protected. The Utah legislature deemed protection of miners by regulating and controlling the hours of daily labor "reasonably appropriate" protection, and the Utah supreme court likewise held it "reasonably appropriate" and valid. It may be added here that the United States Supreme Court also has held such legislation appropriate and valid. See *infra*.

Now, in essence precisely the same situation existed in Colorado at the time of the decision in *Re Morgan* as did in Utah at the time of the decision in *State against Holden*, and as does now in this state. By universal consent of courts and text writers on the law, the legislature has, without express constitutional grant authorizing it, the power to protect the health of the people over whom it has jurisdiction. Therefore, as a question of legislative power, there is not a particle of difference, in essence, between the situation under the Utah Constitution and that under the Colorado and the Nevada Constitutions. And the question here is purely one of legislative power. The expediency, propriety, or wisdom of the enactment is not before this court. If the legislature has the constitutional power to make the enactment, this court has no power to annul the enactment; and should it, under the case supposed, do so, it could be justly charged with usurpation of power. And courts, the conserving governmental branch under the Constitution or fundamental principles of government, should be most careful not themselves to set the example of usurping power. Let it, however, be said that courts should be equally scrupulous and fearless in preventing others from infractions upon the Constitution which they are sworn to support, protect, and defend. Then, under the direct decision of the Utah supreme court that an eight-hour law is a reasonably appropriate provision to protect the health of those engaged in underground mining, and those in and about smelting and reduction works, and the pregnant admission of the Colorado supreme court to the same effect, and, again, the direct affirmance of the same doctrine by the Supreme Court of the United States in the following cases in that court: *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Orient Ins. Co. v. Daggs*, 172 U. S. 504, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *St. Louis I. M. & S. R. Co. v. Paul*, 173 U. S. 409, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Williams v. Fears*, 179 U. S. 274, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; *Austin v. Tennessee*, 179 U. S. 349, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; and *Knorrville Iron Co. v. Harbison*, 183 U. S. 21, 46 L. ed. 55, 22 Sup. Ct. Rep. 1,

—what of precedent there is in the decisions of other courts is in favor of the validity of the law.

It cannot be said that these decisions of the United States Supreme Court were *obiter*. They were necessary to the decision of the cases. The contention was that the Utah enactment was in violation of the 14th Amendment to the United States Constitution, as (1) abridging the privileges and immunities of citizens of the United States; (2) depriving persons of liberty and property without due process of law; and (3) denying persons within its jurisdiction the equal protection of the laws. The court, held, in effect, that the Utah enactment did no one of these three things. Why? Because it was a legitimate police regulation. Why a legitimate police regulation? Because it was based on a consideration of health; that laborers in underground mines and those in smelters could reasonably and properly be made into a class and the health of that class protected by legislative enactment. Had the foundation been imaginary, the court could not have so held. But the foundation (that is, the consideration of health) being real, proper, and reasonable, the court logically and legally upheld the enactment. The 14th Amendment was violated unless the enactment was a legitimate police regulation, and it was not a legitimate police regulation unless the enactment was based on a legitimate health classification. Therefore the United States Supreme Court directly holds this to be a legitimate health regulation. I cannot say that I am so fully and completely equipped in the doubtful science of medicine as to be able to say that I know that it is not such a reasonably appropriate provision. This is the full extent to which it is necessary to go in this case. Then, too, not a decision of a court that mentions the subject but says that a court cannot set aside an enactment of a legislature unless the enactment is, beyond doubt, in violation of the Constitution under which both the court and the legislature act. Can it be said that, under the showing above made, there is not a doubt that the enactment in question here is beyond all doubt in violation of the Constitution of the state of Nevada? It seems to me that it cannot be so said. Therefore I conclude that this enactment is not unconstitutional as being a violation of the "health" element of the Nevada Bill of Rights.

Now to the "class legislation" element in the enactment: Counsel, in their arguments in this case, have mingled the "class legislation" objection implied, they say, in the Bill of Rights, and the "class legislation" 65 L. R. A.

inhibited in subsequent parts of the Constitution, to wit, §§ 20 and 21 of article 4, and perhaps it may be permissible for me to do the same. Here it cannot truly be said that all class legislation is bad. Decisions by the hundred and by the thousand may easily be found that hold some class legislation is constitutional and valid. Such are too numerous to need citation of instances. The only question is, Is there, or is there not, a real foundation—a foundation in fact, in the nature of things—for the class made? If there is such foundation to support a legislative enactment, then that enactment is constitutional and valid; but, if not, then it is unconstitutional, and therefore void. Should legislators so far forget their duty to God and to man, and so far disregard the oath of office taken by them to support, protect, and defend the Constitution,—the only instrument that gives them any power to act at all legislatively,—as to join together in an enactment persons or things on a mere imaginary something that has no existence in the natures or situations of those persons or those things, and say that those persons or those things must be governed by said enactment, then it would be class legislation; and at least contrary to §§ 20 and 21, above mentioned, and possibly, also, to the Bill of Rights, in § 1 of article 1. But of the latter I do not desire at this place to discourse. For does it not seem that when provision so ample against class legislation, local and special, as that contained in §§ 20 and 21 of article 4 of the Nevada Constitution, is made, the inhibitions of the Bill of Rights, in § 1 of article 1, were aimed at other evils? Be that as it may, I conclude that the enactment of the Nevada legislature in question here is not in violation of the Nevada Constitution, as being "class legislation" of the objectionable kind inhibited in §§ 20 or 21, or of the objectionable kind that may possibly be inhibited in the Bill of Rights of § 1 of article 1, if there be therein any such inhibition.

In support of this conclusion may be cited the direct decision of the Utah supreme court that workers in underground mines and workers in smelters and reduction works may with sound reason be made into classes, and the health of those classes protected by the legislature. To the same effect is impliedly the decision of the court most relied on in argument here, to wit, the Colorado supreme court, in *Re Morgan*. For I think I have above shown that the opinion in the Colorado case impliedly, at least, admits that, with a constitutional provision like that in the Utah Constitution, such legislation might be valid, and also further shown that, in essence, the additional pro-

vision of the Utah Constitution did not at all change the situation. True, the Colorado court held such legislation unconstitutional and void; but it would seem that after the facts stated, and after the admissions made by it, its conclusion against the validity of the enactment before it was a *non sequitur*.

In addition, as stated above, I cannot say that my knowledge of medical science is so complete that I can, in conscience, say that I know that workers in underground mines, or workers in smelters and reduction works, are not engaged in unhealthy employments. The legislature of Nevada, at its session in 1903, impliedly said they were such, and legislated for the protection of such workers; and I cannot, under the reason of the thing, and the authority of the Utah supreme court and that of the United States Supreme Court, to say nothing of the pregnant admission of the Colorado supreme court (May I be permitted to explain that I mean an admission that is pregnant with a principle that is destructive of the final conclusion to which that court came?), say that the said enactment of the Nevada legislature for that purpose was, beyond doubt, a violation of the Constitution of Nevada.

For the foregoing reasons I concur in the conclusion of Justice Talbot that the enactment in question here is not a violation of the Constitution of Nevada, and also in the order that the petitioner be remanded to custody.

Belknap, Ch. J., dissenting:

It is claimed that the law should be upheld as a health law, and was adopted for that purpose by the legislature in its exercise of the police power. The police power is inherent in the legislature, and founded upon the duty of the state to protect life, health, and property of the community, and to preserve good order and morality. Prof. Tiedeman, in his treatise upon the subject [Pol. Power, § 1], says: "The police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil law maxim, *Sic utere tuo, ut alienum non lædas*." This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo, ut alienum non lædas*, it being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may use his own as not to injure others. In *Lawton v. G5 L. R. A.*

Steele, 152 U. S. 136, 38 L. ed. 385, 14 Sup. Ct. Rep. 500, the court said: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane, or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it; and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. . . . To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

In *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, where the court had under consideration a law of New York prohibiting the manufacture of cigars and the preparation of tobacco in any form in tenement houses, after citing decisions to show that the police power is not without limitation, and that in its exercise the legislature must respect fundamental rights guaranteed by the Constitution, it said: "If this were otherwise the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the

interests of the health, the welfare, or the safety of the public, every right of the citizen might be invaded, and every constitutional barrier swept away. Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to, and is convenient and appropriate to promote, the public health. . . . To justify this law, it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manipulation may be injurious to those who are engaged in its preparation and manufacture, but it would have to be injurious to the public health." Again: "When a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has, at least, in fact, some relation to the public health; that the public health is the end actually aimed at; and that it is appropriate and adapted to that end."

To justify the law, it is not sufficient that underground mining and working in smelters may be injurious to the men employed in the mines or smelters, but it must be injurious to the public health. It is not claimed that the law is injurious in this respect. If this law is beneficial to the men working in underground mines and smelters,—and that is insufficient, under the authorities,—it is so only in a remote degree. Rheumatism, miners' consumption, and lead poisoning, it is said, are the maladies to which men affected by this law are exposed. It is difficult to understand how these afflictions may be prevented by its provisions. Lead poisoning and miners' consumption are caused by inhaling fumes from the smelters, or dust in the deep mines. Any daily exposure for a materially less time than eight hours may result in their contraction. In its most favorable aspect, the statute is not helpful to these men, except that shorter hours of labor tend

to preserve the system, while longer hours produce exhaustion and its consequent ill effects. I think the statute was adopted by the legislature in conformity to the trend of legislation throughout the country, shortening the hours of labor in many industrial pursuits, and not as a health regulation.

The principle upon which the police power is exercised by the legislature is based upon the maxim, "So use your own as not to injure others," the literal translation of which is, "Enjoy your own property in such a manner as not to injure that of another person." Broom, *Legal Maxims*, p. 364. "Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security—cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions." Tiedeman, *Pol. Power*, § 1. The maxim can only be invoked in the support of laws for the protection of the public health, and not for the protection of an individual against himself. There can be no more justification for such a law than laws prohibiting men from working in the manufacture of white lead, because they are apt to contract lead poisoning or to prohibit occupation in certain parts of iron smelting works, because the lives of men so engaged are materially shortened. Tiedeman, *Pol. Power*, § 86.

In the case of *Re Morgan*, 26 Colo. 426, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071, a statute similar to the one now under consideration was held unconstitutional. After determining that the statute violated the Bill of Rights, which guarantees to all persons the natural rights of acquiring, possessing, and protecting property, the court proceeded, in an admirable discussion, to the consideration of the question whether the law was a proper exercise of the police power to protect the public health, as follows: "Were the object of the act to protect the public health, and its provisions reasonably appropriate to that end, it might be sustained, for in such a case even the constitutional right of contract may be reasonably limited. But the act before us is not of that character. In selecting a subject for the exercise of the police power, the legislature must keep within its true scope. The reason for the existence of the power rests upon the theory that one must so use his own as not to injure others, and so as not to interfere

with or injure the public health, safety, morals, or general welfare. How can one be said injuriously to affect others or interfere with these great objects by doing an act which confessedly visits its consequences on himself alone? And how can an alleged law that purports to be the result of an exercise of the police power be such in reality, when it has for its only object, not the protection of others, or of the public health, safety, morals, or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it, and him only? . . . In this we must not be understood as limiting the legislature where the facts justify apparent discrimination in passing health laws affecting only certain classes. Indeed, laws having for their object the protection of small portions of a community have been upheld, as in *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659 [24 L. ed. 1036], where a nuisance, obnoxious probably only to part of a village, was abated; but what we mean to decide is that in a purely private lawful business, in which no special privilege or license has been granted by the state, and the carrying on of which is attended by no injury to the general public, it is beyond the power of the legislature, under the guise of the police power, to prohibit an adult man who desires to work thereat from working more than eight hours a day, on the ground that working longer may, or probably will, injure his own health."

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, a decision of the Supreme Court of the United States, in which a statute of the state of Utah similar to the one now under consideration was upheld as not being in conflict with the provisions of the 14th Amendment to the Constitution of the United States, is referred to as an authoritative ruling in support of the law. The Constitution of the state of Utah (art. 16, § 6) declares, among other things, that "the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines," and further provides, in the succeeding sections, that "the legislature by appropriate legislation shall provide for the enforcement of the provisions of this article." In *Holden v. Hardy* it is said: "The supreme court of Utah was of opinion that, if authority in the legislature were needed for the enactment of the statute in question, it was found in that part of article 16 of the Constitution of the state which declared that 'the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines.'" We have no such constitutional provision, and for this reason the case of *Holden v. Hardy* is 65 L. R. A.

inapplicable as an authority here. The only question in that case was whether the statute of Utah violated the provisions of the 14th Amendment to the Constitution of the United States, and the consideration in the opinion of the question of the extent to which the police power may be exercised under the provisions of the state Constitution was not a Federal question, and therefore without the jurisdiction of that court, but was one to be determined only by the courts of the state of Utah.

In *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 682, Judge Peckham said: "In matters pertaining to its proper construction [the Constitution of the state of New York], our decision is final, excepting that if, as construed by us, the Constitution or our laws deny the existence of some right or privilege claimed by a party by virtue of the Federal Constitution or laws, our decision is reviewable by the Federal court, not for the purpose of reviewing our construction of our own Constitution or laws, but to see whether, under the Constitution or laws as construed by us, any right or privilege existing by virtue of the Federal Constitution or laws has been violated or denied, and, if so, to give it effect notwithstanding the state law or Constitution."

In *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, Judge Field said: "In this case we can only consider whether the 4th section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the Constitution of the state. Our jurisdiction is confined to the Federal question involved."

In the *Morgan Case*, 26 Colo. 441, 47 L. R. A. 63, 77 Am. St. Rep. 291, 58 Pac. 1080, the supreme court of Colorado was urged to follow the decision in the *Holden-Hardy Case*, as controlling upon it. After fully considering that decision, and conceding that in the construction of Federal questions it is the duty of state courts to be governed by the decisions of the Supreme Court of the United States, the court said: "If the language used by that august tribunal in *Holden v. Hardy* is to be understood as limiting or defining how far a state legislature may go in the exercise of the police power without transcending any of the limits prescribed by the Federal Constitution, we agree with counsel for petitioner that it was needful to the ascertainment of the question before the court. But if it is not to be thus restricted, and if it was employed with the view to determining what are the true limits of the police power of a state

under its provisions of the Constitution of that state, the remarks in that connection are wholly *obiter*, and not authority in that court itself, much less in any other jurisdiction. *Wadsworth v. Union P. R. Co.* 18 Colo. 610, 23 L. R. A. 812, 36 Am. St. Rep. 309, 33 Pac. 515; *Carroll v. Carroll*, 16 How. 275, 14 L. ed. 936; 2 Black, Judgm. § 611."

Section 1 of article 1 of the Constitution of this state declares: "All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness." Substantially the same principles are embodied in the Declaration of Independence and in the Constitutions of the states. Among these inalienable rights, as proclaimed in the Declaration of Independence, said the Supreme Court of the United States in *Butcher's Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 757, 28 L. ed. 585, 4 Sup. Ct. Rep. 660, "is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. It has been well said that, 'the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' Adam Smith's *Wealth of Nations*, bk. 1, chap. 10."

In the same case Bradley, J., said: "I 65 L. R. A.

hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States," of which he cannot be deprived without invading his right to liberty, within the meaning of the Constitution. And again: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor." *Live Stock D. & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 399, Fed. Cas. No. 8,408.

In *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343, the court said: "The following propositions are firmly established and recognized: A person living under our Constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term 'liberty,' as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

In *Ritchie v. People*, 155 Ill. 101, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 457, the court, in considering a statute similar in principle, said: "It substitutes the judgment of the legislature for the judgment of the employer and employee in a matter about which they are competent to agree with each other. It assumes to dictate to what extent the capacity to labor may be exercised by the employee, and takes away the right of private judgment as to the amount and duration of the labor to be put forth in a specified period. When the legislature thus undertakes to impose an unreasonable and unnecessary burden upon any one citizen or class of citizens, it transcends the authority intrusted to it by the Constitution, even though it imposes the same burden upon all other citizens or classes of citizens. . . . Liberty, as has already been stated, includes the right to make contracts as well with reference to the amount and duration of labor to be performed as concerning any other lawful matter. Hence the right to make contracts is an inherent and inalienable one, and any

attempt to unreasonably abridge it is opposed to the Constitution."

My conclusion is that the constitutional right of employer and employee is destroyed by the express terms of the act, in this: That its provisions undertake to prevent employer and employee from making

their own contracts concerning underground mining and work in smelters, or in any institution or place for the reduction or refining of ores or metals, and that it is not a valid exercise of the police power, as a health regulation. I therefore dissent from the judgment of the court.

ARKANSAS SUPREME COURT.

J. F. HUNT, *Appt.*,
v.

STATE of Arkansas.

(.....Ark.....)

1. A man may be guilty of larceny of property which the Constitution makes the sole and separate property of his wife.
2. A man who obtains money from a woman with intent to convert it to his own use, by means of a well-laid scheme which includes the performance of a marriage ceremony with her, and fraudulent representations that, in case she intrusts him with the money, he will invest it for her benefit, may be convicted of larceny.
3. That money is shown by the evidence to have been obtained from a woman by the instrumentality of her check does not constitute a variance from a charge that the money was obtained from her.
4. A constitutional provision that a bill shall become a law unless returned by the governor with his disapproval within five days does not require him to retain the bill for that time, but he may waive the provision, and return it before the expiration of five days, with the notification that it may become a law without his approval.

(February 27, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Pulaski County convicting him of larceny. *Affirmed.*

The facts are stated in the opinion.

Mr. Gus Fulk, for appellant:

The great body of the common law of England, in so far as it is applicable to our form of government and conditions, and has not been abrogated by statute, is the law of this state to-day. Of its immemorial rules established "at a time whereof the memory of man runneth not to the contrary," one is that neither the husband nor wife can be guilty of larceny of the other's goods. The reason for the rule is manifest. The husband couldn't steal from the wife because

they were in law one person, and he was that legal entity.

If unity of person is the sole and only reason for the rule that the wife cannot steal from the husband, it is also sufficient reason for the rule that the husband cannot steal from the wife. Thus we may at the outset discard the question of ownership as a reason.

The married woman's act of 1875 does not, by necessary implication, repeal the common-law rule that a man cannot steal from his wife, unless it, by implication, destroys the unity of person between them, that being the reason for the rule. Our statute expressly recognizes the unity of person.

Kies v. Young, 64 Ark. 381, 62 Am. St. Rep. 198, 42 S. W. 669; *Pillow v. Sentelle*, 49 Ark. 430, 5 S. W. 783; *Countz v. Markling*, 30 Ark. 17; *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 16 L. R. A. 526, 35 Am. St. Rep. 105, 19 S. W. 747; *Felkner v. Tighe*, 39 Ark. 357; *Robinson v. Eagle*, 29 Ark. 202; *Kline v. Ragland*, 47 Ark. 116, 14 S. W. 474; *Branch v. Polk*, 61 Ark. 388, 30 L. R. A. 324, 54 Am. St. Rep. 266, 33 S. W. 424.

Nearly all of the common-law rights, duties, liabilities, and disabilities incident to the marital relation still exist.

Neelly v. Lancaster, 47 Ark. 175, 1 S. W. 66; *Kosminsky v. Goldberg*, 44 Ark. 401.

It is presumed that the legislature does not intend to make unnecessary changes in the pre-existing body of the law.

Black, *Constr. & Interpretation of Laws*, p. 110.

There is a presumption against the implied repeal of laws.

Black, *Constr. & Interpretation of Laws*, p. 112; *Babcock v. Helena*, 34 Ark. 499; *Coats v. Hill*, 41 Ark. 149; *Chamberlain v. State*, 50 Ark. 132, 6 S. W. 524; *Glidevell v. Martin*, 51 Ark. 559, 11 S. W. 882; *Baughner v. Rudd*, 53 Ark. 417, 14 S. W. 623.

The wife cannot steal the husband's goods, and never could. This is because of the unity of person between them.

State v. Banks, 48 Ind. 197; *Lamphier v. State*, 70 Ind. 317.

Beasley v. State, 138 Ind. 552, 46 Am. St.

NOTE.—On the question whether a husband can be guilty of criminal trespass on wife's property, see, in this series, *State v. Jones*, 61 L. R. A. 777.
65 L. R. A.

Rep. 418, 38 N. E. 35, does not attempt to decide the point in issue here.

Thomas v. Thomas, 51 Ill. 162, was a divorce case in which the ground for divorce was that the wife had committed felony by stealing plaintiff's watch, and eloping with her adulterer. The court held the allegation that defendant had committed felony was no ground for divorce, inasmuch as there had been no conviction on the charge.

Selling property which the seller knows does not belong to him, and appropriating the proceeds to his own use, are not necessarily larceny, to constitute which a felonious taking is essential.

Watkins v. State, 60 Miss. 323.

The husband cannot be guilty of arson of the wife's house.

Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302.

He is not indictable for slandering his wife.

State v. Edens, 95 N. C. 693, 59 Am. Rep. 294.

Two persons only, being husband and wife, cannot be guilty of conspiracy.

People v. Miller, 82 Cal. 107, 22 Pac. 934.

If a master gives his servant a check to take to the bank and get cashed, he has mere custody of the check itself, and commits larceny if he appropriates it; but, if he cashes the check and appropriates the money, he commits embezzlement only, as the money has never been in the master's possession.

Clark, Crim. Law, p. 286; *Haley v. State*, 49 Ark. 147, 4 S. W. 746; *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474; *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123; *People v. Miller*, 64 App. Div. 450, 72 N. Y. Supp. 253; 1 Wharton, Crim. Law, ¶ 964; 1 Bishop, New Crim. Law, ¶ 583.

The indictment alleging the larceny of \$600, and the evidence showing the property taken to have been a check for \$600, this variance was fatal.

State v. McMinn, 34 Ark. 160; *Britton v. State*, 61 Ark. 15, 31 S. W. 569; *Starchman v. State*, 62 Ark. 538, 36 S. W. 940.

A prosecution for common-law larceny by stealing and carrying away will not be sustained by evidence showing that the complaining witness had voluntarily parted with the money to enable the accused to make speculative investments therewith at his own risk.

People v. Miller, 64 App. Div. 450, 72 N. Y. Supp. 253; *Humphries v. Harrison*, 30 Ark. 79; *Buck v. Lee*, 36 Ark. 525; *Petty v. Grisard*, 45 Ark. 117; *Sellmeyer v. Welch*, 47 Ark. 485, 1 S. W. 777; *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42, 7 Am. St. Rep. 78, 6 S. W. 323.
65 L. R. A.

Mr. George W. Murphy, Attorney General, for the State.

Bunn, Ch. J., delivered the opinion of the court:

This is an indictment for the larceny of the money of his wife by the defendant, with a count for obtaining money under false pretenses, which last, however, was not considered in the trial. The circumstances of obtaining the wife's money were of the most aggravating character. The wife, before their marriage, was Miss Maud Nevills, a young woman who had earned the amount of \$600 as a saleswoman in one of the leading dry goods stores in Little Rock, and deposited the same in the German National Bank of this city. The defendant had ascertained this fact in some way and from some source, and paid his addresses to her, and on the 6th of October, 1902, they were married in this city by the pastor of one of its leading churches. It seems that he almost immediately set to work to get hold of this money of his wife, and by one promise and representation and another, mainly to the effect that he would purchase certain business property, or a share in it, with the money thus obtained for her benefit. Being importuned in this way, — yielding, doubtless, much to her wifely feelings, — she gave him a check for said amount on the German Bank, signing her marital name, Maud Hunt, thereto. On being presented in this shape, the German Bank officials declined to pay it. The defendant then induced her to sign her maiden name, Maud Nevills, to the check, — the name on the bankbooks, — and in this shape presented it, and it was paid. This was late in the afternoon of the 14th of October, 1902; and the defendant, on one of the trains in the evening of the same day, in company with another woman, left the city, and the two were next heard of in the city of Los Angeles, California, a few days afterwards. The constable of Big Rock township, in which the city of Little Rock is situated, hearing of the defendant's whereabouts, telegraphed to the chief of police of Los Angeles; giving a description of the defendant, with his name, and an alias; requesting that he be arrested and held until he himself could reach that city from Little Rock. The defendant was taken in charge by the constable on his arrival in Los Angeles, accordingly, and brought back to Little Rock, where one or more indictments were lodged against him in the first division of the circuit court of Pulaski county. The other woman, Bird Sheppard, who went with the defendant to Los Angeles, was in that city when the defendant was taken in charge there by the constable from Little Rock, but was not per-

mitted to board the same train with the defendant on his return in charge of the constable, but succeeded in doing so at El Paso, Texas, *en route*, disembarking from another east-bound train at that place, and testified in the trial. There was evidence in the case to the effect that the defendant had planned the marriage, etc., as part of the scheme to obtain the money, some time before the marriage was consummated; and the circumstances justified the conclusion that the elopement was in fact a permanent desertion of the wife by the defendant. There was no controversy as to the manner of obtaining the money, nor as to the deposit of the same in bank by the wife.

The defendant asked the trial court to give the following instructions, to wit:

"(1) If you find from the evidence that the property alleged to have been stolen was at the time the property of Maud Hunt, and that at the time Maud Hunt was the wife of this defendant, then you will find the defendant not guilty, because in this state the husband cannot be guilty of larceny of the property of his wife.

"(2) If you find from the evidence that the wife of defendant, Maud Hunt, placed in the custody of defendant a check for \$600, to be cashed by him, and the money invested in her name or for her use, and that defendant afterwards cashed said check and converted the said money to his own use, you will find the defendant not guilty of larceny, because that would not be larceny, but embezzlement."

The court refused to give the first of said instructions, and modified the second one by adding: "But, on the other hand, if you believe from the testimony, beyond a reasonable doubt, that defendant, by fraudulent artifice practised upon prosecuting witness, Maud Hunt, did obtain from her a check for \$600, and drew the money on it, and thereby obtained and carried away her money, as alleged in the indictment, and had, at the time he so practised said fraudulent artifice, and obtained and carried away said money, with the felonious intent to steal the same, you will find him guilty of grand larceny, as charged in the first count of the indictment."

The defendant excepted to the ruling of the court in refusing to give the first of these instructions, and in giving the second only as modified. The defendant then asked a third instruction, as follows:

"(3) Defendant, J. F. Hunt, moves the court to instruct the jury to bring in a verdict for the defendant of not guilty, on the ground that there is a variance between the allegations of the indictment and the evidence; the indictment alleging the larceny of \$600, and the evidence showing the 65 L. R. A.

property taken to have been a check for \$600."

The court refused to give this instruction, to which ruling defendant at the time excepted, and exceptions were noted.

The defendant also excepted to the following charge of the court to the jury, to wit:

"You are to exercise your judgment and common sense, neither of which you are to leave behind you when you go into the jury room. Under the laws of the state of Arkansas, a married woman may own property absolutely in her own right. A husband, in this state, may steal the property of his wife. It is for you to determine from the testimony in this case, and the law given you, whether the defendant has stolen the money, as alleged in the indictment. If you find from the evidence, beyond a reasonable doubt, that he conceived the idea that he would steal the money, which he knew or believed the prosecuting witness had, and, for the purpose of enabling him to accomplish that object, he married her, and used artifices upon her, and thereby deceived her, inducing her to deliver to him the money, having all the time the intention of stealing it, the marriage would be no protection to him, but would rather be an aggravation of the offense."

The defendant excepted to the above remarks, and his exceptions thereto were noted.

From the foregoing abstract it readily appears that there are two main issues of law raised by the instructions, to wit, whether or not, in the present state of the law on the subject in this state, a husband can be found guilty and punished for the larceny of the wife's property; and whether, under the facts and circumstances of this case, the offense, if offense at all, is that of larceny, or of embezzlement, getting money under false pretenses, or of some other of the phases of stealing.

Under the common law, a husband could not be found guilty of larceny in respect to his wife's personal property, simply because on their marriage her personality *ipso facto* became his property, and he could not be found guilty of the larceny of his own property. But of recent years, both in this country and in Great Britain, there has been a great enlargement of a married woman's property rights as against her husband, and in some instances an absolute separation of her rights from those of her husband. But the law on the subject may be yet regarded as in a state of transition from the old to the new principles, and for this reason precedents, have not had time to have grown into such magnitude and volume as in most other changes from the common to the statute law rules. As an illustration, either of

the extreme conservatism of the courts, or the defects of the statutes wherein they fall short of a complete revolution, we may take the case of *Thomas v. Thomas*, 51 Ill. 162, cited and much relied on by the appellant's counsel in this case. After some discussion of the question as to the husband's larceny of the wife's property, the conclusion of that court was summed up in this statement: "The act of 1861 [Laws 1861, p. 143] known as the 'married woman's law' has not so far destroyed the relation of husband and wife as to render either guilty of larceny by converting the property of the other." The charge of larceny in that case was made against the wife, who had deserted the husband, and carried with her a watch, or disposed of it so that it could not be found. "Whose watch?" said the court. "Was it her watch, or did it belong to someone else? If it was her own, under the law of 1861 called the 'married woman's law,' she had a right to dispose of it without the consent, or even the knowledge, of the husband. The law gives her that right, and, if she exercises it, however injudiciously, there is no ground of legal complaint on the part of the husband. Again, if it belonged to the husband, it could not, even under that law, be held larceny. That act has not so far destroyed the relation of husband and wife as to render either guilty of larceny by converting the property of the other. Whatever is the civil liability, if any, it is not larceny; and the evidence fails to show that the watch belonged to some other person." We have not the Illinois married woman's act before us, and cannot, therefore, give any definite construction of its statute. We are still left to the inquiry whether or not that statute was so full and complete as to create an entire and absolute separation of a wife's property from the control and influence of the husband over her property. The court in that case said that the act was not so full and complete as to produce that result; leaving the inference that, if such had been the case, then the husband, at least, might be held for the larceny of the wife's property. No statute has wrought any change in the common-law rule as to the wife's dealing with the husband's property, for she still has every interest in his property she ever had. The ordinary married woman's law, as found in the several legislative acts, may fall short of an entire and absolute separation, for these acts are generally specified. But in this state the statute itself is not full and complete to work a revolution in the law on the subject. Moreover, the constitutional provision on the subject is broad enough to cover any conceivable property right of the wife, and is expressed in this language, to wit: "The

65 L. R. A.

real and personal property of any *femme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be, and remain her separate estate and property, and may be devised, bequeathed, or conveyed by her the same as if she were a *femme sole*; and the same shall not be subject to the debts of her husband." [Ark. Const. art. 9, § 7.] The sole question in the case of *Kies v. Young*, 64 Ark. 381, 62 Am. St. Rep. 198, 42 S. W. 669, was whether or not the common-law doctrine prevailed that a husband is responsible for the antenuptial debts of the wife. The court in that case held that that common-law rule prevailed. The rule, however, was subsequently changed by act of the legislature, and the husband is not now responsible for the wife's antenuptial debts. Acts 1899, p. 4. Had our constitutional provision been in the Constitution or the married woman's law of Illinois, we cannot say how the supreme court of the state would have ruled on the subject; nor does it matter what the law of that state was on the subject, since we assume, for the sake of the argument, at least, that its supreme court properly considered it. It was a charge against the wife for the larceny of the husband's property, and the case is thus somewhat differentiated from the one at bar. The commission of the alleged larceny in that case was sought by the plaintiff husband to be made a ground of divorce from his wife; but upon consideration it was finally held, in effect, that, whatever might be said on the question of law involved, there not having been any conviction of the wife for the larceny of the husband's property, the mere charge was no ground for divorce.

As has been intimated, the Constitutions and statute laws of the American states have not gone so far as to make any radical changes as to the wife's relation to the husband's property from the rule of the common law, and these modern laws throw little light on the question of the criminal liability of the wife in her dealing with her husband's property. In the statute of Indiana, § 5117 of the Revised Statutes of 1881 is substantially like our constitutional provision, and the other portion of the married woman's law of that state is substantially like our married woman's law. In *Beasley v. State*, 138 Ind. 552, 46 Am. St. Rep. 418, 38 N. E. 35, the supreme court of that state held that "under the enabling statutes of this [that] state, the husband's interest in his wife's personal property is abolished, and he may be convicted of the larceny of her money." In its essential features, that case was very much like the one at bar, and

practically all the arguments made by counsel in this case were made in that. The court in that case, in concluding the discussion, said: "Prior to the enactment of the several sections of the statutes of this state, the common-law fiction prevailed of the legal unity of husband and wife. In the eye of the law, they were one person, and the husband was that person." Indeed, when left thus in sole ownership and management of her personal property, it would seem to follow that the wife should have all the benefits and power of the law, both civil and criminal, to give her that protection to her property rights which belong in common to all property owners. She certainly has as against third parties, and with equal reason and necessity, if not greater reason, she should have as against her husband, who so far forgets his marital obligations, as well as the rights of property, as to steal from her, taking advantage of his better opportunity therefor. In the case of *Beasley v. State*, 138 Ind. 552, 46 Am. St. Rep. 418, 38 N. E. 35, the court further said: "One who obtains money or goods by some fraudulent trick or artifice, and carries them away, is guilty of larceny." This was the manner in which the defendant obtained the money in this case. The evidence shows conclusively that it was a well-laid scheme on his part to procure the money, even before they married,—certainly before the delivery of the check to him by her. The beginning of the offense was the first conception of the design,—the intent to steal the money,—followed by the fraudulent artifices employed. The larceny of the money overshadowed and covered all the methods by which he sought to accomplish his purpose, and the intent was formed before he received the check; and the charge of larceny was properly made, tried, and sustained by the evidence. In *State v. Jones*, 132 N. C. 1043, 61 L. R. A. 777, 95 Am. St. Rep. 688, 43 S. E. 939,—a case much more favorable to the defendant than the case at bar, because it was a charge of trespass against the husband for persisting in living in his wife's house after being forbidden to do so by her,—the court held that, under the circumstances of the case, the charge could not be sustained, saying: "This case presents the novel feature of a wife seeking a judicial separation from her husband by the criminal action of trespass." In that case Chief Justice Clark delivered a dissenting opinion, which is most instructive and interesting for its research and reasoning on the subject.

The conclusion of the whole matter is that while modern civilization has greatly, if not entirely, relieved the personal unity of the husband and wife, and the superior control of the husband, of the disgraceful

cruelty practised in the early stages of the common law, yet the very letter of the law in that respect has not undergone very marked changes, but as to property rights that unity has been destroyed, so far as affects the question at issue, by positive enactments in this state; and we are of the opinion that the learned circuit judge committed no error in his instructions to the jury on the subject.

The wife in this case gave the check to the defendant, and by that instrument he could readily obtain the money it called for at the bank. It would be carrying technicality to a most dangerous extreme to hold that the proof of the mere instrumentalities of obtaining the money constituted a variance with the charge of obtaining the money itself, where the same evidence also showed the fact of obtaining the money itself. A check is a mere order for so much money to the credit of the drawer in the bank or drawee, which it is bound to honor when made in form and properly presented. The proof also showed the money was paid to the defendant. The giving of the check by the wife to the husband, and the committing of the money to be obtained thereon, were merely temporary in their effect. The evidence shows that the check for the money was given by her to procure the money to purchase an interest in certain business property for her, not for himself; and thus the title in the money never passed out of the wife to the defendant, and the same continued to be her property, even when he was attempting to appropriate it to his own use and purposes. The evidence tends to show that the intent to obtain and appropriate the money was conceived from the beginning, even before the marriage,—certainly before he obtained the check,—and that by fraudulent artifice he inveigled her into giving him the check therefor, as stated. This made the crime larceny, and not embezzlement, as contended by appellant's counsel. The learned circuit court committed no error in its instructions to the jury in this respect.

It is objected that the act entitled "An Act to Authorize Certain Parties to Testify in Certain Causes" (Acts 1903, p. 141) is invalid for the reason that the bill for the act was never properly approved, and did not become a law. The journals show that it was presented to the governor on the 13th of March, and was returned by him to the senate, in which it originated, on the 17th of March; making less than five days, Sundays excepted. The governor, however, on the last-named date, said this in his communication to the senate: "Senate Bill, No. 85, authorizing certain persons to testify in certain cases, became a law with-

out my signature." The five days allowed the governor for the consideration of bills presented to him for approval or disapproval is a matter of privilege with him, until the same shall lapse, when the bills become laws. He can, of course, waive the time, and notify the proper house, that the bill may become a law without his signature, and that is what he did in this case. The other objection to the law because of alleged irregularities in the entries to the journal during its passage show mere clerical errors, if anything; it sufficiently appearing what was evidently the intention of the legislature in the entire course of procedure in reference thereto.

Judgment affirmed.

C. C. KIRKLAND *et al.*, Appts.,

v.

STATE of Arkansas.

(.....Ark.....)

1. The legislature may provide for the destruction of intoxicating liquors kept for illegal sale, without granting their owner a jury trial.
2. A proceeding to condemn and destroy liquor alleged to be kept in a prohibited district for sale contrary to the law is not criminal, so as to require the proof of facts necessary to the condemnation beyond a reasonable doubt.

(January 30, 1904.)

APPEAL by defendants from a judgment of the Circuit Court for Jackson County condemning, for destruction, liquor alleged to have been illegally kept for sale. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. W. Stayton, J. M. Stayton, Stuckey & Stuckey, Gustave Jones, and Joseph W. Phillips, for appellants:

A day in court means that a day shall be fixed for hearing the cause, of which the defendant shall have notice, at which time he shall have the right to be heard, by himself or counsel, and the right to make defense. If any question of fact is presumed against him, this is not due process of law.

Zeigler v. South & North Ala. R. Co. 58 Ala. 599; *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794; *State v. Bates*, 14 Utah, 293, 43 L. R. A.

NOTE.—On the question whether the sale of intoxicating liquors constitutes a nuisance, see *notes to Dickinson v. Elchorn*, 6 L. R. A. 721, and *State v. Creeden*, 7 L. R. A. 298; also *State v. Chapman*, 10 L. R. A. 432; *Silvers v. Traverser*, 11 L. R. A. 804; *De Blanc v. New Iberia*, 56 L. R. A. 285; *Laugel v. Bushnell*, 58 L. R. A. 267; and *Lofton v. Collins*, 61 L. R. A. 150, 65 L. R. A.

33, 47 Pac. 78; *Ferguson v. Josey*, 70 Ark. 94, 66 S. W. 345.

Although the proceeding against the liquor is *in rem*, it is of a criminal nature, and the gravamen of the charge is, that they were intended for unlawful sale.

State v. Robinson, 49 Me. 285.

This is a question of fact, and, therefore, a question for a jury.

Black, Intoxicating Liquors, 365; *Ferguson v. Josey*, 70 Ark. 94, 66 S. W. 345.

To subject the liquor to forfeiture it is necessary to substantiate the allegations of an intent to sell contrary to law; and this, since the proceeding, in its nature, is criminal, must be proved beyond a reasonable doubt.

Black, Intoxicating Liquors, 366; *State v. Robinson*, 49 Me. 285; *State v. Intoxicating Liquors*, 80 Me. 91, 13 Atl. 403; *State v. Robinson*, 49 Me. 285; *State v. Intoxicating Liquors*, 80 Me. 57, 12 Atl. 794; *State v. Certain Intoxicating Liquors*, 40 Iowa, 95; *Weir v. Allen*, 47 Iowa, 482; *Fries v. Porch*, 49 Iowa, 351.

Criminal intent is within the province of a jury, exclusively.

Wells, Questions of Law and Fact, § 119; *Black, Intoxicating Liquors*, 365; 21 Am. & Eng. Enc. Law, p. 977; *State v. Arlen*, 71 Iowa, 216, 32 N. W. 267.

The very basis of the warrant is that the property is kept for an unlawful purpose. If, in fact, it was not kept for an unlawful purpose, it is not subject to forfeiture and destruction.

Ferguson v. Josey, 70 Ark. 94, 66 S. W. 345.

Then the question to be determined at "his day in court" is: Was the law being violated; was a crime being committed by keeping the property where it was found and seized?

Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; *State v. Robinson*, 49 Me. 285; *Com. v. Certain Intoxicating Liquors*, 105 Mass. 595; *Com. v. Certain Intoxicating Liquors*, 115 Mass. 142.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.

Ark. Const. art. 2, § 10; *Williams v. Citizens*, 40 Ark. 291; 6 Am. & Eng. Enc. Law, 2d ed. p. 975; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *Rison v. Farr*, 24 Ark. 175, 87 Am. Dec. 52; *Cincinnati v. Steinkamp*, 9 Ohio C. C. 178; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 397.

If we are entitled to a jury, we are entitled to have the whole question of fact submitted to them.

Const. art. 7, § 23; *Shinn v. Tucker*, 37

Ark. 581; *Fitzpatrick v. State*, 37 Ark. 239; *Keith v. State*, 49 Ark. 439, 5 S. W. 880; *Haley v. State*, 49 Ark. 148, 4 S. W. 746.

A circuit court cannot determine the sufficiency of evidence, and direct a jury what verdict it shall render, when there is any evidence to sustain the issue.

Little Rock & Ft. S. R. Co. v. Barker, 39 Ark. 491; *Little Rock & Ft. S. R. Co. v. Henson*, 39 Ark. 413; *Little Rock & Ft. S. R. Co. v. Perry*, 37 Ark. 165; *Overton v. Matthews*, 35 Ark. 147, 37 Am. Rep. 9.

The allegation must be proved beyond a reasonable doubt, and not by a mere preponderance of testimony.

21 Am. & Eng. Enc. Law, p. 978; *Black, Intoxicating Liquors*, 366; *State v. Intoxicating Liquors*, 80 Me. 57, 12 Atl. 794; *State v. Intoxicating Liquors*, 80 Me. 91, 13 Atl. 403; *State v. Robinson*, 49 Me. 285; *Com. v. Certain Intoxicating Liquors*, 105 Mass. 595.

Messrs. **G. W. Murphy**, Attorney General, **W. V. Thompkins**, **G. A. Hillhouse**, and **S. D. Campbell**, for appellee:

Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; *Sanio v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *St. Louis S. W. R. Co. v. Gans*, 69 Ark. 252, 62 S. W. 738; *Ferguson v. Josey*, 70 Ark. 94, 66 S. W. 345.

These statutes are not objectionable as depriving the parties of property without due process of law, nor as denying the defendant the right of trial by jury.

17 Am. & Eng. Enc. Law, 2d ed. p. 220; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; *Carleton v. Rugg*, 149 Mass. 550, 5 L. R. A. 193, 14 Am. St. Rep. 447, 22 N. E. 55; *State v. Jordan*, 72 Iowa, 377, 34 N. W. 285. See also 12 Enc. Pl. & Pr. p. 239.

The act is a statutory police measure, and provides for proceedings which do not belong to any class triable by a jury at common law.

Black, Intoxicating Liquors, § 352; *State v. One Bottle Brandy*, 43 Vt. 297; *State v. Barrels of Liquor*, 47 N. H. 369.

This proceeding is not a criminal action, for "no person shall be held to answer a criminal charge unless on presentment of indictment of the grand jury."

Const. art. 2, § 8; 12 Enc. Pl. & Pr. p. 239; *State v. Johnson*, 26 Ark. 291.

It was not necessary for the state to establish her case "beyond a reasonable doubt."

Armstrong v. State, 54 Ark. 369, 15 S. W. 1036; *Ellis v. Buzzell*, 60 Me. 209, 11 Am. Rep. 204; *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.* 37 Wis. 31, 19 Am. 65 L. R. A.

Rep. 747; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Jones v. Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752; *Bell v. McGinness*, 40 Ohio St. 204, 48 Am. Rep. 675; *Ætna Ins. Co. v. Johnson*, 11 Bush, 587, 21 Am. Rep. 223; *Kane v. Hibernia Ins. Co.* 39 N. J. L. 697, 23 Am. Rep. 239, 38 N. J. L. 441, 20 Am. Rep. 409; *Hills v. Goodyear*, 4 Lea, 233, 40 Am. Rep. 5; *Welch v. Jugenheimer*, 56 Iowa, 11, 41 Am. Rep. 77, 8 N. W. 673; *Mead v. Husted*, 52 Conn. 53, 52 Am. Rep. 554.

This proceeding is *in rem*, and the complaint is in the nature of a libel; not being a strictly criminal action, the issues are to be tried by the rules applied in the trials of civil cases as to the evidence sufficient to sustain the action.

Black, Intoxicating Liquors, § 352; *Waples, Proceedings in Rem*, §§ 24, 25; *State v. Barrels of Liquor*, 47 N. H. 369.

Statutes providing that certain facts shall make a *prima facie* case are constitutional.

17 Am. & Eng. Enc. Law, 2d ed. p. 225; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 511; *Excise Comrs. v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484; *State v. Thomas*, 47 Conn. 546, 36 Am. Rep. 98; *Edgar v. State*, 37 Ark. 222.

In jury trials, if the evidence is not conflicting, and there can be no conflicting inferences fairly drawn after the whole case is developed, it is the duty of the court so to declare the law, and direct a verdict for the party entitled thereto.

Catlett v. St. Louis, I. M. & S. R. Co. 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 661; *Wabash R. Co. v. Williamson*, 104 Ind. 162, 3 N. E. 816.

Battle, J., delivered the opinion of the court:

A proceeding was instituted under an act entitled "An Act to Suppress the Illegal Sale of Liquor and to Destroy the Same when Found in Prohibited Districts," approved February 13, 1899 (Acts 1899, p. 11), § 1 of which, so far as it is necessary to set it out in this opinion, is as follows: "It is hereby made and declared to be the duty of the chancellors, circuit judges, justices of the peace, mayors, and police judges, on information given or on their own knowledge, or when they have reasonable grounds to believe that alcohol, spirituous, ardent, vinous, malt, or fermented liquors, or any compound or preparation thereof commonly called tonics, bitters, or medicated liquors of any kind, are kept in any prohibited district to be sold contrary to law, or have been shipped into any prohibited district to be sold contrary to law, that they issue a

warrant, directed to some peace officer, directing in such warrant a search for such intoxicating liquors, specifying in such warrant the place to be searched, and directing such officer on finding any such liquors in any prohibited district to publicly destroy the same, together with the vessels, bottles, barrels, jugs, or kegs containing such liquors: . . . Provided, that any persons on whose premises or in whose custody any such liquor may be found under warrant of this act shall be entitled to his day in court before said property shall be destroyed."

The proceeding was commenced as follows: "On the 22d of March, 1901, J. E. Wilmans made an affidavit before the clerk of the Jackson circuit court that certain liquors were then kept in a building—No. 500 East First street—in the city of Newport, to be sold contrary to law, and the building was then used and controlled by C. C. Kirkland and OI Kirkland, and was in a prohibited district, and asked that the liquors be seized and destroyed according to law."

On the 23d of March, 1901, the prosecuting attorney filed an information based upon this affidavit, and prayed for a warrant commanding the seizure of the liquors, and for their condemnation.

A warrant for the seizure of the liquors, and a summons commanding the Kirklands to appear and show cause why the same should not be publicly destroyed, were issued. The warrant was executed.

On the 12th of July, 1901, at the term of the Jackson circuit court next ensuing, C. C. and OI Kirkland filed their answer, denying that the liquor was kept in the district to be illegally sold, and alleging that it was the property of the Kirkland Liquor Company, a firm composed of C. C. Kirkland, M. E. Kirkland, and H. O. Snyder, and that D. O. Kirkland was their manager.

"On the same day the Kirkland Liquor Company filed a claim for the liquor, in which they denied that it was kept in the prohibited district for illegal purposes, and alleged that they had been engaged in the retail liquor business in Newport during the year 1900, and, on failure to procure license, they transferred their business to Bald Knob, in White county, Arkansas, where they were licensed retail liquor dealers; that just before their removal the business portion of Bald Knob was destroyed by fire, and they were unable to procure a place to store their stock of liquor, but only such as was needed for immediate use, and they kept a part of it stored in the room formerly occupied by them as a saloon, and, having had the premises leased for a term of years, they used the room (No. 500) as a

warehouse until they could store it at Bald Knob."

"On the 15th of July the state filed an amendment to its complaint, in which it alleged at the time of the seizure of the liquor in controversy, and prior and subsequent thereto, liquor was illegally sold in and on premises No. 504 East First street, and said illegal business was conducted in the name of R. T. Simmons, as to the general public, under a license issued by the United States to J. O. Jameson & Co.; that premises No. 504 was a part of the same building in which was also No. 500, and was connected therewith, and that the whole of such premises was, at the time of the seizure, under the control of D. O. Kirkland, the manager of claimants; that the liquor in No. 500 was used in connection with the business in No. 504, and in collusion with Simmons, and with the knowledge, consent, connivance, and procurement of Kirkland and claimants,—and prayed as before."

Appellants and D. O. Kirkland answered, and denied all the allegations in the amendment.

A jury was impaneled to try the issues of fact in the case. The court and jury heard the evidence adduced by both parties. At the close of it the court ordered the jury to return a verdict in favor of the state, as follows: "We, the jury, find that the liquors seized under the said warrant, and in controversy in this case, were kept in a prohibited district, to be sold contrary to law, and find for the plaintiff;" and they did so. Thereupon the court rendered judgment in accordance therewith, and ordered the sheriff to publicly destroy the liquors, and the claimants appealed.

Appellants contend that issues in proceedings under the act of February 13, 1899, must be tried by a jury, and that the rule in criminal cases must be applied, and it must be proved beyond a reasonable doubt that the liquors are or were kept in or shipped into a prohibited district to be sold contrary to law, and that by the action of the court they were deprived of both these rights. Were they entitled to a jury?

The act of February 13, 1899, in every respect, treats, and virtually and in effect declares, the keeping and shipping intoxicating liquors in and into a prohibited district, to be sold contrary to law, to be a public nuisance.

It does not provide that a regular action or suit shall be instituted for the enforcement of its object. No complaint or writing of any kind need be filed, according to its terms. The warrant may be issued upon knowledge or reasonable belief, and by the judges of many courts of different jurisdiction and procedure. The sittings of three

of them—justices of the peace, mayors, and police judges—are frequent and at no stated times fixed by the statutes. One class of them—chancellors—are judges of courts of equity, in which issues of fact in proceedings to abate a nuisance, and in controversies of an equitable nature, can be tried by the chancellor without a jury; indicating thereby that juries are not required, for why should they not be required in one case, and made necessary in all others? Indeed, the act does not, unless it be inferentially, provide for a trial in any court. Without expressly vesting jurisdiction in any, it authorizes chancellors, circuit judges, justices of the peace, mayors, and police judges to issue the warrant. In fact, the whole act indicates that the legislature intended that the nuisance should be speedily abated by summary process. Section 3 of the act strengthens this conclusion, and is as follows: "That if any suit shall be brought against any officer or his bondsmen, or any other person, to recover for any liquors, vessels, barrels, bottles, jugs or kegs destroyed under the provisions of this act, it shall be a complete defense to such suit for such officer, bondsman, or other person to show to the satisfaction of the court or jury that such liquors so destroyed were being sold contrary to law, or were kept to be sold contrary to law, or had been shipped into any prohibited district to be sold contrary to law, or that any portion of the liquor so destroyed had been a part of any liquor so sold contrary to law, or kept to be sold contrary to law, and upon such showing being made, such officer, bondsman, or other person shall not be liable for the liquor, vessels, barrels, bottles, jugs, or kegs so destroyed."

The proceedings prescribed by the act are a warrant, directed to some peace officer, directing a search for the liquors, specifying the place to be searched, "and directing such officer on finding liquors kept for sale in any prohibited district to publicly destroy the same, together with the vessels, bottles, barrels, jugs, or kegs containing such liquors;" the seizure of the liquors; and return of the warrant. In addition to this, it further provides "that any person on whose premises or in whose custody any such liquor may be found under warrant of this act shall be entitled to his day in court before said property shall be destroyed." In *Ferguson v. Josey*, 70 Ark. 94, 98, 66 S. W. 345, 346, the court, in construing this proviso, said: "This clearly means that the owner of such liquor shall be entitled to a fair and legal trial, with all the usual incidents thereto, for the purpose of ascertaining and determining whether his property has been forfeited, before it shall be de-

stroyed; that he or his agent in legal custody shall have notice of the charge of the guilty purpose upon which his property is declared to be unlawfully held, a time and opportunity to prepare his defense, an opportunity to meet the witnesses against him face to face, and the benefit of the legal presumption of innocence." The latter clause of the sentence quoted enumerates usual incidents of a fair and legal trial. A jury is not mentioned, and it is not necessary to constitute a fair and legal trial. In no case is a trial by jury expressly or impliedly required, or necessary to a full and complete enforcement of the act.

But appellants contend that a trial by jury is a right guaranteed by the Constitution, and that it was not within the power of the legislature to deprive them of it in this case. It is true that the Constitution provides that "the right of trial by jury shall remain inviolate," and that no person shall "be deprived of life, liberty, or property without due process of law." But it is well settled that it is only to cases at common law in which the issues of fact were triable by jury, and perhaps such as are of similar or analogous nature, that the guaranty relied upon by the appellants extends. A jury trial is not necessary to constitute due process of law in every case. *Govan v. Jackson*, 32 Ark. 553; *Williams v. Citizens*, 40 Ark. 290.

Parties in the following cases and proceedings are not entitled to a trial by jury: Proceedings for contempt (*Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209); contested elections (*Govan v. Jackson*, 32 Ark. 553); actions for the possession of an office under the Code (*Wheat v. Smith*, 50 Ark. 266, 7 S. W. 161); exceptions to an account of a guardian in probate court (*Crow v. Reed*, 38 Ark. 482); proceedings to disbar an attorney (*Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569); proceedings to condemn land for right of way for railroads under the Constitution of 1836, which did not provide for trial by jury in such cases (*Cairo & F. R. Co. v. Trout*, 32 Ark. 17); suits in equity to abate a public nuisance (*Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Eilenbecker v. District Court*, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641); other suits of an equitable nature (*Hinkle v. Hinkle*, 55 Ark. 583, 18 S. W. 1049); and other cases.

Vagrants and drunkards "may be lawfully detained and deprived of liberty without jury. Such has been a lawful procedure in such cases time out of mind under the common law." Brannon on the Fourteenth Amendment, p. 309. Taxes can be imposed,

and property may be seized and sold for the purpose of collecting it, without suit, action, or jury trial. *Cooley*, Const. Lim. 6th ed. p. 587. A municipal corporation may summarily, without suit or warrant, in some cases, if not all, remove a public nuisance, without jury trial or legal proceeding other than the order of its council. *Gaines v. Waters*, 64 Ark. 609, 44 S. W. 353; *Waters v. Townsend*, 65 Ark. 613, 47 S. W. 1054.

Jury trials are not necessary in summary proceedings, unless the statute requires it. 4 Bl. Com. 280; 24 Am. & Eng. Enc. Law, p. 498; *Chambers v. Stringer*, 62 Ala. 596; *Francis v. Weaver*, 76 Md. 457, 25 Atl. 413. In *Govan v. Jackson*, 32 Ark. 553, it was held that "it is competent for the legislature to dispense with a jury in the case of a contested election, and a provision for the trial of such cases in a summary way has that effect."

We therefore conclude that it was within the power of the legislature to dispense with a jury trial in the summary abate-ments of public nuisances, and it has done so in this case.

Appellants contend that the proceedings prescribed by the act of February 13, 1899, are of a criminal nature, and that the allegation that the liquors in controversy were kept in a prohibited district, to be sold contrary to law, must be proved beyond a reasonable doubt. Are they criminal proceedings?

A similar question was discussed and decided in *State v. Barrels of Liquor*, 47 N. H. 374. In that case the court said: "This is a proceeding *in rem* for the condemnation of the liquor and vessels. No penalty or fine is to be imposed upon the person who keeps the liquor with intent to sell, under this proceeding. All that is done, or that can be done, under this complaint, is to settle the question whether the liquor, vessels, etc., shall be condemned as forfeited to the county, or shall be delivered to the claimants, or restored to the place from whence they were taken. It is a proceeding that cannot be commenced by indictment, and the complaint which is made in the first instance is in the nature of a libel, . . . and not in the nature of a criminal complaint against any person, but is simply a proceeding *in rem* against the liquor, etc., for their condemnation as forfeited property. . . . This class of cases are to be considered and tried as civil causes are tried. The question involved is only as to the title to property, like other questions in civil causes. It is only when some crime or misdemeanor is charged upon an individual that all reasonable doubt of the guilt of the accused must be removed. But here 65 L. R. A.

no one is accused of any crime. In fact, it is not a proceeding against any person. . . . All issues will be decided upon the preponderance of evidence."

Chief Justice Marshall, in a trial of an information to declare the forfeiture of a ship for having exported arms and ammunition in contravention of law, said: "We are unanimously of opinion that it is a civil cause. It is a process of the nature of a libel *in rem*. It does not, in any degree, touch the person of the offender." *United States v. La Vengeance*, 3 Dall. 297, 1 L. ed. 610.

"In a case declaring the forfeiture of gunpowder for having been kept in violation of law," Chief Justice Shaw, speaking for the court, said: "The court are of opinion that a libel sued as a process *in rem* for a forfeiture is in the nature of a civil action, and that either party may file exceptions in matter of law." *Barnacoat v. Six Quarter Casks of Gunpowder*, 1 Met. 230.

Mr. Justice Story said: "It is not true that informations *in rem* are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings." *Anonymous Case*, 1 Gall. 23, Fed. Cas. No. 444.

Mr. Waples, in his work on Proceedings in Rem, says: "Admiralty causes against vessels or goods for forfeiture, revenue cases, and all species of proceedings *in rem*, against things guilty, hostile, or indebted, are well settled to be civil, and not in any sense criminal, actions." Section 25, and cases cited.

So we think that the proceedings prescribed by the act of February 13, 1899, is civil, and that a preponderance of the evidence is sufficient to sustain it.

The evidence in this case is sufficient to sustain the finding of the court and the verdict of the jury.

Judgment affirmed.

T. H. BUNCH, *Appt.*,

v.

Sam WEIL *et al.*

(.....Ark.....)

1. The sale of flour in quantity by the barrel, to one who intends to resell it under a representation that it is of a certain quality, without opportunity of inspection on the part of the purchaser, gives him the right to rescind in case the flour proves to be of inferior quality.

2. One who purchases flour in quantities by the barrel for resale may, up-

NOTE.—As to implied warranty of quality in sales by description, see also, in this series, *Murchie v. Cornell*, 14 L. R. A. 492, and note.

on discovering that the quality is not as represented, tender back as much as is undisposed of, and recover back the purchase price, less what he has realized from the sales.

(April 9, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiffs, in an action brought to rescind a contract for the purchase of certain flour, and to recover back money which had been paid thereon. *Affirmed.*

The facts are stated in the opinion.

Mr. Morris M. Cohn, for appellant:

A purchaser takes the risk of the quality of a chattel sold to him, unless there is fraud or warranty in the sale; for, while there is an implied warranty of title, there is none of quality. Mere representation is not warranty.

James v. Bocage, 45 Ark. 284; *Turner v. Huggins*, 14 Ark. 21.

A person who professes to be an agent cannot, by any statement he makes, unknown to the alleged principal, thereby establish the fact of agency.

Turner v. Huff, 46 Ark. 222, 55 Am. Rep. 580; *Campbell v. Hastings*, 29 Ark. 512; *Berry v. Lathrop*, 24 Ark. 12; *Mechem, Agency*, § 100.

Plaintiffs had no right to rescind.

Berman v. Woods, 38 Ark. 351; 1 Benjamin, Sales, Corbin's ed. §§ 675, 676; *Campbell v. Fleming*, 1 Ad. & El. 40, 3 L. J. K. B. N. S. 136, 3 Nev. & M. 834.

Messrs. J. M. Moore and W. B. Smith, for appellees:

Upon an executory contract of sale, where goods are ordered for a particular use or purpose known to the seller, the latter impliedly undertakes that they shall be reasonably fit for the use or purpose for which they were intended.

Benjamin, Sales, § 851; *Gardiner v. Gray*, 4 Campb. 144, 16 Revised Rep. 764; *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; *Jones v. Just*, L. R. 3 Q. B. 197, 37 L. J. Q. B. N. S. 89, 18 L. T. N. S. 208, 16 Week. Rep. 643; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; *English v. Spokane Commission Co.* 6 C. C. A. 416, 15 U. S. App. 218, 57 Fed. 454; *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570, 5 Atl. 192; *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 773; *Gallagher v. Waring*, 9 Wend. 20; *MoClung v. Kelley*, 21 Iowa, 508; *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 323; *Fogel v. Brubaker*, 122 Pa. 7, 15 Atl. 692; *Merriam v. Field*, 24 Wis. 640; *Morehouse v. Comstock*, 42 Wis. 626; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Morse v. Union Stock Yards Co.* 21 Or. 289, 14 L. R. A. 157, 28 Pac. 2; *Murchie v. Cornell*, 155 65 L. R. A.

Mass. 60, 14 L. R. A. 492, 31 Am. St. Rep. 526, 19 N. E. 207; 10 Am. & Eng. Enc. Law. p. 91; *Story, Sales*, Perkins's ed. § 359; 1 *Parsons, Contr.* pp. 602, 603.

The rule that the law implies a warranty of quality in the case of a sale of articles by the manufacturer thereof has been recognized and enforced in this state in *Curtis & Co. Mfg. Co. v. Williams*, 48 Ark. 330, 3 S. W. 517, and *Weed v. Dyer*, 53 Ark. 160, 13 S. W. 592.

Where there is a breach of warranty, express or implied, in the sale of goods, the purchaser may, if the goods have been delivered to him, and he has been paid the price, upon discovering the breach of warranty, tender the goods back, or so much thereof as are undisposed of, and bring suit against the vendor for the purchase price paid by him, less such amount as he may have realized on the goods disposed of before he ascertained the breach.

Benjamin, Sales, 1st Am. ed. §§ 893-904.

Bunn, Ch. J., delivered the opinion of the court:

The appellees, a company of general merchants, doing business in the city of Alexandria in the state of Louisiana, brought this action in the second division of the Pulaski circuit court on the 11th day of June, 1899, against T. H. Bunch, a wholesale dealer, doing business in the city of Little Rock, Arkansas, to rescind the sale of 129 barrels of flour, and for the invoice price thereof, which had been paid the defendant by plaintiffs, said invoice price being the sum of \$709.50, or \$5.50 per barrel; and also the difference between said invoice price of 41 other barrels of same flour, which plaintiffs had been enabled to sell at a reduced price. This latter item of the claim was waived before the determination of the suit. Judgment in favor of plaintiff company for the said sum of \$709.50, and defendant excepted, and appealed to this court.

This litigation grew out of the following state of facts, to wit: The Ben Weil Commission Company of mercantile brokers, acting at the time and for some time previously as brokers for said T. H. Bunch, on the 11th day of May, 1899, sold to the plaintiffs, at Alexandria, 170 barrels of "Capital Brand" flour, warranted to grade as "extra fancy," which "extra fancy" graded as third-grade pure flour in the market, for the sum and price of \$935, or at the rate of \$5.50 per barrel, to be thereafter shipped from said city of Little Rock and delivered to plaintiffs at the city of Alexandria. The flour was shipped by Bunch to his said brokers, and draft for the said sum, with bill of lading, was forwarded, and on

direction of said brokers the plaintiffs paid the draft and took possession of the flour, and at once began to sell the same to their customers. As soon as these custom purchasers opened the same for use, it was discovered that the flour was not, as represented, "extra fancy," but was a blended flour; that is, flour mixed with corn meal about half and half, of a dark color, and of a peculiar odor. The flour thus sold was returned by plaintiffs' said customers to plaintiffs, and Bunch was notified of the same at once. In the meantime plaintiffs endeavored to sell the flour, and did sell some, but at a greatly reduced price from the invoice price, but could only dispose of 41 barrels in all, including the barrels they had sold before observing the defect, and then demanded a rescission of the sale of the remaining 129 barrels, and the difference between the invoice price and the price of sale of the 41 barrels, which was refused by Bunch.

The motion for a new trial was based on eleven separate grounds, but they all may be included in three propositions, as formulated in appellees' brief, to wit: "(1) Whether there is an implied warranty that goods sold to be delivered are merchantable, and reasonably fit for the purpose of trade for which they are purchased. (2) Whether the purchaser, having disposed of a part of the goods before discovering the inferior quality, may, upon making such discovery, rescind the contract of sale by tendering back the goods undisposed of. (3) Whether Bunch sold the goods to plaintiffs or their broker, the Ben Weil Commission Company." The first proposition involves the common-law doctrine of *caveat emptor*, or rather the consideration of some of the exceptions to the rule growing out of that doctrine, which is, stated generally: "When the purchaser has had no opportunity to inspect the goods purchased, to ascertain whether or not they be of the quality represented by the act of putting them in the trade, then the doctrine *caveat emptor* does not apply;" for, says Mr. Benjamin in his work on Sales, 7th ed. § 645: "But where a chattel is to be made or supplied to the order of the purchaser there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used." The purpose of plaintiffs' purchase of the flour in this case, and the use to which it was to be put, admit of no question. In the English case of *Gardiner v. Gray*, 4 Campb. 144, 16 Revised Rep. 764, cited in appellees' brief, in delivering his opinion, Lord Ellenborough said: "I think the plaintiff cannot recover on the count alleging that the silk should correspond with the sample. The written contract containing no such

stipulation, I cannot allow it to be super-added by parol testimony. This was not a sale by sample. The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity. I am of opinion, however, that under such circumstances the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. When there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question, then, is whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as waste silk. The witnesses describe it as unfit for the purposes of waste silk, and of such a quality that it cannot be sold under that denomination." So the witness in the case at bar describes the "blended flour" actually sold to plaintiffs by the defendant as unfit for the purposes of what was known in the trade as "Capital Brand" flour, or "Extra Fine" flour, and what was of the third grade of pure flour, and that it was of such a quality that it could not be sold under that denomination, but, on the contrary, it was, if flour at all, in the true sense, of a very inferior grade, and could not be sold except far below the invoice price at which it was sold to plaintiffs by defendant. The appellees' counsel cite a long list of cases applicable to the state of facts, which, without further comment, we cite for convenience of reference to those who may have occasion hereafter to refer to this opinion: *Benjamin*, Sales, cited above; *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; *English v. Spokane Commission Co.* 6 C. C. A. 416, 15 U. S. App. 218, 57 Fed. 454; *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570, 5 Atl. 192; *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 773; *Gallagher v. Waring*, 9 Wend. 20; *McClung v. Kelley*, 21 Iowa, 508; *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 323; *Fogel v. Brubaker*, 122 Pa. 7, 15 Atl. 692; *Merriam v. Field*, 24 Wis. 640; *Morehouse v. Comstock*, 42 Wis. 626; *Rabcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Morse v. Union Stock Yards Co.* 21 Or. 298, 14 L. R. A. 157, 28 Pac. 2; *Murchie v. Cornell*, 155 Mass. 60, 14 L. R.

A. 492, 31 Am. St. Rep. 526, 19 N. E. 207; 10 Am. & Eng. Enc. Law, p. 91, and note to *Implied Warranties*; *Curtis & Co. Mfg. Co. v. Williams*, 48 Ark. 330, 3 S. W. 517; *Weed v. Dyer*, 53 Ark. 160, 13 S. W. 592. The rule appears to be that, when there is a breach of warranty, express or implied, in the sale of goods, the purchaser may, if the goods have been delivered to him, and he has paid for them the price (as in this case), upon discovering the breach of warranty, tender the goods back, or so much thereof as are undisposed of, and bring his suit against the vendor for the purchase price paid by him, less such amount as he may have realized on the goods disposed of before he ascertained the breach. Benjamin, Sales, 7th ed. §§ 893-904 inclusive, and the cases heretofore cited in support of the implied warranty rule. The flour in question was sold and received by plaintiffs on the 28th of May, 1898, and none of it was disposed of by plaintiffs to their retail customers until some time in the first part of June following, when 41 barrels were disposed of, and these purchasers discovered the defect and were paid back the purchase price by the plaintiffs, except such as they bought at the greatly reduced price. The plaintiffs immediately notified defendant through his broker, which was the custom, for convenience sake, and demanded a rescission of the contract of sale. As to the effect of selling a portion of the goods after discovering the breach, see 1 Parsons on Contracts, pp. 591 to 594, inclusive, and note thereunder. It was necessary, under the circumstances, to sell the flour to the consumer before it could be reasonably asked that an inspection should be made; and, secondly, it was for the benefit of defendant, as for plaintiffs, to dispose of as much of the inferior goods as possible to prevent total loss. Whether Bunch sold the flour to plaintiffs or to their brokers was a question of fact for the jury under proper instructions of the court. The instructions given by the court were as follows: "The jury are instructed that in the sale of goods, wares, and merchandise to be delivered there is an implied warranty that the articles purchased will be reasonably merchantable and reasonably fit for the purpose for which they are sold, and, if you find from the evidence in this case that the flour delivered plaintiffs was not of a reasonably merchantable character, and not reasonably fit for the purpose of the sale, then plaintiffs, upon discovering that fact within a reasonable time, would have the right to rescind the contract, and, upon tender of the property or offer to return the same to the vendor, within a reasonable time, the plaintiffs could sue for and recover the purchase money, together with any loss sustained by 65 L. R. A.

them in the sale of flour prior to the discovery of its condition." "If the jury find, under the instructions given, that plaintiffs had a right to rescind the contract of the sale, then, if they find that the plaintiffs disposed of part of the flour in the ordinary course of trade, which was not returned to them, but for which they allowed the purchaser a reasonable reduction in the price on account of its inferior quality, and, being advised of such condition, plaintiffs held the remainder of the flour for defendant, and notified defendant of the fact of its rejection within a reasonable time after their knowledge thereof, then their measure of damage is the price which they paid for the flour which they have on hand, together with the cost of drayage, freight, and storage, if any, and such loss as you may find they sustained in the sale of flour not on hand by reason of its inferior quality." "You are instructed that a man can make a contract through an agent as well as the principal himself; and if you find in this case that Weil Bros. & Bauer purchased the flour in controversy from the Ben Weil Commission Company, believing them to be in the matter acting as the agent of Bunch, and dealing with him as such, and Bunch had held him out as his agent to sell flour in that territory, so that Weil Bros. & Bauer had a right, as reasonable persons, to regard him as agent for Bunch in this transaction, then the purchase is binding on Bunch as if he had sold it himself in person." "It is claimed by the plaintiffs in the case that the contract of purchase was made by them with the defendant Bunch through his agent, Ben Weil Commission Company, and defendant denies this, and claims that he sold the goods, not to plaintiffs, Weil Bros. & Bauer, but to Ben Weil Commission Company, direct." On the court's own motion: "Now, upon this issue the court instructs that an agent duly authorized to make sales may do this, and his principal is bound by the sale as his own; and it is for you, in view of all the circumstances in proof before you, to say whether the plaintiffs, Weil Bros. & Bauer, bought the goods from Bunch through the Ben Weil Commission Company as Bunch's agent, or whether they must be regarded as having bought from Ben Weil Commission Company directly." The admission of certain letters in evidence was not error for the purpose admitted by the court. We see no error in the instructions of the court, and there was evidence to sustain the verdict of the jury.

So the judgment must be affirmed, and it is so ordered.

Wood, J., did not participate in the consideration of this case.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

Ella M. WEISSHAAR, Admr., etc., of Louis
G. Weisshaar, Deceased, Appt.,
v.

KIMBALL STEAMSHIP COMPANY.

(128 Fed. 397.)

1. The owner of a steamship is liable for the death of a passenger drowned by the swamping of a boat sent to convey him from the shore to the vessel, where the officer in charge of the boat permits it to attempt the journey in an overloaded condition, although the passengers are themselves guilty of contributory negligence in failing to leave the boat when told that it is overloaded, and requested to do so.
2. The presence, in a boat sent to transfer passengers from shore to a steamboat, of the president of the steamboat company, and his knowledge of the overloaded condition of the boat when it attempts the voyage, will prevent the company from taking advantage of the statute permitting the limitation of liability of vessel owners for injuries caused by the negligence of those in charge of the vessel.

(March 1, 1904.)

APPEAL by plaintiff from a judgment of the District Court of the United States for the Northern District of California in favor of petitioner in a proceeding by the owner of the steamer Albion for limitation of its liability for the death of certain passengers. *Reversed.*

The facts are stated in the opinion.

Argued before *Gilbert and Ross*, Circuit Judges, and *Hawley*, District Judge.

Mr. H. M. Wright, for appellant:

Petitioner was not entitled to a decree limiting its liability because it has not been proved that the loss was incurred without the privity or knowledge of petitioner.

Quinlan v. Pew, 5 C. C. A. 438, 5 U. S. App. 382, 56 Fed. 111; *The Republic*, 9 C. C. A. 386, 20 U. S. App. 561, 61 Fed. 109; *The Annie Faxon*, 21 C. C. A. 386, 44 U. S. App. 591, 75 Fed. 312; *The Colima*, 82 Fed. 665; *Hughes*, Admiralty, pp. 313-319.

Contributory negligence was not available as a defense, since it was not pleaded.

5 Enc. Pl. & Pr. pp. 10-13; *Watkins v. Southern P. Co.* 14 Sawy. 30, 4 L. R. A. 239, 38 Fed. 713.

The burden of proof of contributory negligence was on appellee, and this burden was not satisfied, inasmuch as there is no evidence at all in the record that the decedent heard any warning.

NOTE.—For the similar question of duty of carrier permitting cars to become overcrowded, see, in this series, *Lynn v. Southern P. Co.* 24 L. R. A. 710, and *note*; also *Benedict v. Minneapolis & St. L. R. Co.* 57 L. R. A. 639, 65 L. R. A.

Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 557, 35 L. ed. 272, 11 Sup. Ct. Rep. 653; *Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co.* 9 C. C. A. 314, 22 U. S. App. 102, 60 Fed. 993; *The Steam Dredge No. 1*, 122 Fed. 687; *MacDougall v. Central R. Co.* 63 Cal. 431; *Pouppirt v. Elder Dempster Shipping*, 122 Fed. 989.

Even if he did hear the warning, Weisshaar was not guilty of negligence, since, in view of all the circumstances and of the character of the warning, he was under no duty to leave the boat. Even if Weisshaar was negligent, the officers of the steamship company were under a duty to avoid his negligence, and could have done so by the exercise of ordinary care.

Butterfield v. Forrester, 11 East, 60, 10 Revised Rep. 433; *Needham v. San Francisco & S. J. R. Co.* 37 Cal. 409; *Shearm. & Redf. Neg. § 63*; *Davies v. Mann*, 10 Mees. & W. 546, 12 L. J. Exch. N. S. 10, 6 Jur. 954; *Bogan v. Carolina C. R. Co.* 129 N. C. 154, 55 L. R. A. 418, 39 S. E. 808; *Tuff v. Warman*, 2 C. B. N. S. 740, 5 C. B. N. S. 573, 27 L. J. C. P. N. S. 322, 5 Jur. N. S. 222, 6 Week. Rep. 693; *Thomas v. Quatermaine*, L. R. 18 Q. B. Div. 688, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co.* 9 C. C. A. 314, 22 U. S. App. 102, 60 Fed. 993; *Harrington v. Los Angeles R. Co.* 140 Cal. 514, 63 L. R. A. 238, 98 Am. St. Rep. 85, 74 Pac. 15; *Lee v. Market Street R. Co.* 135 Cal. 293, 67 Pac. 765; *Fox v. Oakland Consol. Street R. Co.* 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25; *Esrey v. Southern P. Co.* 103 Cal. 541, 37 Pac. 500; *Cunningham v. Los Angeles R. Co.* 115 Cal. 561, 47 Pac. 452; *Abrahams v. Los Angeles Traction Co.* 124 Cal. 411, 57 Pac. 216; *Crowley v. City R. Co.* 60 Cal. 628; *Meeks v. Southern P. R. Co.* 56 Cal. 513, 38 Am. Rep. 67; *Needham v. San Francisco & S. J. R. Co.* 37 Cal. 409; *Meyer v. St. Louis, I. M. & S. R. Co.* 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 116; *Lynn v. Southern P. Co.* 103 Cal. 7, 24 L. R. A. 710, 36 Pac. 1018.

A carrier is legally bound to protect passengers against the acts or negligence of fellow passengers, using every means in his power to do so.

King v. Ohio & M. R. Co. 22 Fed. 413; *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Pittsburg & C. R. Co. v. Pillow*, 76 Pa. 510, 18 Am. Rep.

424; Hutchinson, Carr. 2d ed. §§ 548, 549, 551, 552.

Even if contributory negligence has been proved, claimant should not have been denied all recovery.

Cleirac, *Us et Coutumes de la Mer*, p. 68; *The Mas Morris*, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29.

Mr. Nathan H. Frank, for appellee:

The mere fact that one is president of a corporation does not make his acts the acts of the corporation.

Thomp. Corp. § 4613.

The question of contributory negligence is to be submitted to the jury, not only where there is sufficient testimony as to the actual facts to leave a reasonable doubt, but also where the inferences which might be fairly drawn from the facts are not certain and invariable, and might lead to different conclusions in different minds.

Where there is any evidence from which the inference of contributory negligence might reasonably be drawn, the court must instruct the jury that the plaintiff cannot recover if his negligence contributed to produce the injury.

1 Shearm. & Redf. Neg. 5th ed. § 114.

The doctrine of the "last clear chance" by its very terms excludes concurrent negligence.

Gilbert v. Erie R. Co. 38 C. C. A. 408, 97 Fed. 752; *Holmes v. Southern Pacific Coast R. Co.* 97 Cal. 161, 31 Pac. 834.

Rights of action arising in admiralty under Lord Campbell's act and similar acts are to be enforced according to the principles of the common law; and contributory negligence is a complete bar to a recovery.

Robinson v. Detroit & C. Steam Nav. Co. 20 C. C. A. 86, 43 U. S. App. 190, 73 Fed. 894.

Both parties were contemporaneously and actively in fault. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on the part of decedent. Without the latter, the former could not arise.

Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506.

Ross, Circuit Judge, delivered the opinion of the court:

In September, 1900, the steamer Albion, owned by the appellee, Kimball Steamship Company, was anchored in Golovin bay, Alaska, about 1½ miles from the beach; and, being ready to proceed on a voyage from that place to San Francisco, one of her small boats was sent, in charge of her second officer and two sailors, to the shore, to bring to the steamer such persons as intended to take passage on her. In returning, the boat capsized, and some of the pas-

sengers were drowned, among them, Louis G. Weisshaar. Of his estate Ella M. Weisshaar was afterwards appointed administratrix, and as such administratrix she commenced an action at law in the superior court of the city and county of San Francisco, state of California, against the appellee, for the recovery of damages in the sum of \$40,000 for the death of her husband. That action had not been tried, but was at issue, when the appellee filed in the court below its petition, by virtue of §§ 4283-4285 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 2943, 2944), for the purpose of contesting its liability for any damage or injury growing out of the accident, and for the purpose of limiting its liability in the event of being held responsible. In its petition the petitioner alleged that the overturning of the boat—"was in no way caused by fault or negligence on the part of the master or the crew of said steamer Albion, or any of them, and that the loss, damage, and injury, if any, thereby done, occasioned, or incurred, were without fault on the part of your petitioner, and without its privity or knowledge, but that the fault of the said swamping and overturning was due entirely to the acts and conduct of the passengers in said boat, in standing upon their seats in said boat and causing her to overturn, combined with inevitable accident occurring by reason of the condition of the wind and wave at the time of said swamping and overturning; that nevertheless certain persons have made claims against petitioner for losses arising out of said swamping and overturning, which said claims are for alleged loss of life of some of such passengers, and alleged loss of baggage so being transported as aforesaid; that among said claims is the claim of Ella M. Weisshaar, as administratrix of the estate of Louis G. Weisshaar, deceased, which said Louis G. Weisshaar is claimed by said claimant to have been one of the passengers so carried on said boat, and so drowned by reason of said swamping and overturning; that other claims have been asserted against your petitioner, and that other claimants have threatened to file libels against said steamer or to bring actions against your petitioner; and that your petitioner apprehends and is in fear that other claims in addition to those set forth will be presented against it, or said steamer Albion, by other parties who may have sustained loss, damage, or injury by reason of the matters and things hereinbefore set forth."

It is further averred in the petition that there was freight pending by reason of the trip on which the steamer was engaged at the time of the accident amounting to \$2,-

265; that the value of the steamer at the close of the voyage did not exceed \$15,000, and that the amount of the claims already presented, and as apprehended and threatened, far exceeds the value of the steamer and the pending freight; that there is no lien on the steamer prior or paramount to any lien that may have attached by reason of the matters alleged.

The value of the steamer and the freight pending were duly appraised, and the administratrix of the estate of the deceased, Weisshaar, answered the petition, putting in issue its material averments, and presenting a claim for damages for the drowning of her husband. In its opinion, the court below said: "It sufficiently appears from the evidence that Louis D. Weisshaar was one of the persons drowned. It also appears that the boat upon the occasion referred to carried a greater number of persons than allowed by law, and also some baggage; it was down by the head, and so much overloaded that it had but little freeboard, and, in consequence thereof, as soon as the rough water of the bay was encountered, filled with water and capsized. Before it left the beach, the second mate of the Albion, who was in command of the boat, notified those who were in it that it was overcrowded, and requested that some of them get out and wait until the boat should return for them. Some of them did go ashore, but, upon being assured by one of the passengers that there was room in the boat for more, most of them came back again, the officer still protesting that it was overcrowded. Such, in substance, is his testimony, and in this he is, to some extent, corroborated by Carvelle and De Lay, two witnesses whose depositions were offered in evidence by the claimant. The deceased had not actually engaged passage upon the steamer, but was going abroad for that purpose." 123 Fed. 838.

The court below very properly held that the petitioner, having undertaken to convey the deceased to the steamer for passage thereon, was under the same obligation to use proper care in transporting him as if he had paid for or engaged his passage in advance. The court below, however, further held that the deceased was guilty of contributory negligence in remaining in the boat after he and the other passengers therein were notified by the officer in command; that, "in so remaining, the deceased, as well as the other passengers in the boat, assumed the risk resulting from its overcrowded condition, and voluntarily encountered a danger which a prudent man with notice would have avoided." The court accordingly dismissed the claim of the administratrix of the estate of the deceased, 65 L. R. A.

Weisshaar, and entered a decree to the effect that the petitioner is not liable for damages growing out of the overturning of the boat.

The evidence shows that the capacity of the boat was fourteen persons, without baggage. At the time of the accident in question it contained eighteen persons, a trunk, two tool chests, and three or four sailors' bags. The boat was in charge of the second officer of the ship, who had under him two sailors, and, when ready to receive its passengers, was stranded, with its bow well up on the sands of the beach. The evidence shows that the deceased, Weisshaar, was the fifth man to enter the boat, and took his seat about amidship. He had been preceded by a Capt. Tyson, and by the president of the appellee steamship company, Mr. Marsden.

In his direct examination the ship's officer in command of the boat was questioned and answered as follows:

Q. State what happened at the shore before you left there, with respect to the passengers getting in, and your protesting, and whatever else happened.

A. The passengers crowded into the boat, and I told them that "this boat only holds fourteen passengers." After some talk, five or six passengers went out of the boat, and went on the beach again. I was just going to leave, when Mr. Tyson sang out: "There is lots of room. Come on, boys." He mentioned a few names. Joe Corbell was among them. He says, "There is lots of room." Those passengers had left the boat, and I heard them say, "I don't think we will lose our fresh-meat supper," and they rushed into the boat the second time.

Q. What did you do?

A. I told them it was risky. The boat was overloaded, and there were three men left on the beach. I said: "I have to go back to the beach and make another load. You might as well wait." They laughed at me and told me I was a coward; that I was scared. I said: "Well, boys, it is smooth water alongside the beach, but it will not be outside 20 or 30 yards. It will be rough. You had better do as I tell you." They just laughed at me, and said I was afraid, and pushed the boat out, and out they went.

At the end of his direct examination this witness was asked, "Did you have any means or power to prevent them?" to which question he answered: "I had no power whatever. I was powerless. They took the command away from me, and took control of the boat, and I could not do nothing."

A careful perusal of the entire testimony of this witness, of itself, shows that there

was no justification whatever for his statement that the boat was started on its perilous journey against his protest, or that the control of it was taken from him by the passengers. If powerless in the premises, it was only because he did not have the stamina to assert and exercise the authority with which he was clothed, and which the law and good seamanship made it his imperative duty to enforce. The evidence is overwhelming, not only that he made no objection to starting the boat with its overload, but that, according to his own testimony, one, at least, of his own sailors took an active part in shoving it off the sand and into a floating condition, which appears without conflict to have been a matter of considerable difficulty; so much so that several of the passengers had to assist the sailors in accomplishing it,—some by means of oars, and others, having high boots, by getting into the water and pushing the boat.

Let it be assumed that, when the officer announced that the boat was overloaded and that it was "risky," it became the duty of all the passengers to get out,—as well those who had entered when there was ample room as those who had caused the overloading,—and that everyone who remained thereupon became guilty of contributory negligence; such fact becomes immaterial, in the face of the further fact that the officer, with full knowledge of the overloading and consequent dangerous condition of the boat, subsequently not only started it on its perilous trip, but, after starting, and while it was yet in smooth water, and after observing that it was down by the head, and with but little freeboard, made no effort whatever to return to the shore to make the boat safe by discharging some of the passengers. It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boat's complement of men. According to his own testimony, he made nothing more than a milk and water protest against the entry of anyone; and even if there had been on the part of the passengers an effort to overpower the officer and force their way into the boat,—of which there is not the slightest evidence,—it still remained the imperative duty of the officer in command to refuse to start the boat until enough of the people had gotten out to make it safe. Not the slightest attempt appears to have been made by this officer to perform his duty in that regard, and for his gross negligence in that respect, as well as in failing to return to shore while he yet had sufficient opportunity, the ship is clearly liable, for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might, by the ex-

ercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co.* 9 C. C. A. 314, 22 U. S. App. 102, 60 Fed. 993; *Harrington v. Los Angeles R. Co.* 140 Cal. 514, 63 L. R. A. 238, 98 Am. St. Rep. 85, 74 Pac. 15.

This doctrine, which is well established, fits the present case exactly. The case of *Lynn v. Southern P. Co.* 103 Cal. 7, 24 L. R. A. 710, 36 Pac. 1018, is, in principle, also precisely in point. In that case the plaintiff passenger was unable to find room inside a car, and therefore stood upon the platform, from which he was thrown and injured; the evidence tending to show that the train was going at excessive speed. In affirming a judgment for the plaintiff, the supreme court of California said: "The defendant should not have allowed so many passengers to have gone upon its cars, and, if it was unable to prevent them from so doing, it had the right to refuse to move the train under such circumstances; but, if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platforms, it was under obligations to exercise the additional care commensurate with the perils and dangers surrounding the passengers by reason of the overcrowded condition of the cars."

So, here, as has already been said, if the officer in command of the boat had been unable to prevent its overloading (of which, however, there was no evidence), it was still his right and imperative duty to refuse to start the boat until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to. But speculation on that point is no answer to the gross neglect of duty on the part of the officer of the ship.

Moreover, the evidence shows that the negligence of the officer in command of the boat was committed in the personal presence and within the actual knowledge of the president of the appellee corporation, who, so far from seeking to enforce the performance of his duty by that officer, acquiesced in his neglect of duty, as affirmatively appears from the president's own testimony.

The limitation of liability provided for by the statute under which the present proceedings were had is, according to its express terms, to be allowed only when the loss, damage, or injury occurs "without the privity or knowledge" of the owner. In the case of *The Republic*, 9 C. C. A. 386, 20 U. S. App. 561, 61 Fed. 109, the privity or

knowledge of the corporation consisted in the negligence of its president, who, by his omission of proper care in his examination of the vessel, failed to discover her defective condition; and the circuit court of appeals for the second circuit there held that the injuries and death occasioned to the excursionist in that case could not be said to have occurred "without the privity or knowledge" of the owner. We think that decision directly in point here. "Privity and knowledge," said Judge Brown in *The Colima*, 82 Fed. 665, "are chargeable upon a corporation, when brought home to its principal officers or the superintendent, who

is its representative." See also *Quinlan v. Pew*, 5 C. C. A. 438, 5 U. S. App. 382, 56 Fed. 111; *Lord v. Goodall, N. & P. S. S. Co.* 4 Sawy. 292, Fed. Cas. No. 8,506.

The judgment is reversed and cause remanded, with directions to the court below to dismiss the petition at petitioner's cost, leaving the administratrix of the estate of the deceased, Weisshaar, at liberty to pursue her action for damages in the state court.

Petition for certiorari denied by Supreme Court of United States May 31, 1904.

CALIFORNIA SUPREME COURT.

G. RAHMEL, *Resp't.*,

v.

H. A. LEHNDORFF, *Appt.*

(142 Cal. 681.)

1. An employer of table waiters is not liable, as such, for an assault by one of them upon a guest at the table, since the assault is not an act which the servant is, under any circumstances, empowered to commit.
2. An innkeeper is not, in the absence of negligence on his own part, liable for injuries to a guest caused by an assault committed by a servant employed in the inn.

(April 2, 1904.)

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in plaintiff's favor in an action brought to recover damages for an assault alleged to have been committed upon him by defendant's servant. *Reversed.*

The facts are stated in the opinion.

Mr. Charles H. Mattingly, for appellant:

The master is liable for injuries inflicted by his servant only when the act is done in the prosecution of the business which the servant was employed by the master to do.

Stephenson v. Southern P. Co. 93 Cal. 558, 15 L. R. A. 475, 27 Am. St. Rep. 223, 29 Pac. 234; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373.

For wanton and malicious assault com-

mitted upon the person of a guest during his stay, an innkeeper is not necessarily responsible in damages, though the act be done by one about the inn; for his strict charge as innkeeper concerns only bailment and the guest's chattels.

Schouler, Bailments, § 323.

An innkeeper is not an insurer of a guest against injury, but is merely bound to exercise reasonable care that there be no injury through his neglect.

Weeks v. McNulty, 101 Tenn. 495, 43 L. R. A. 185, 70 Am. St. Rep. 693, 48 S. W. 810; 11 Am. & Eng. Enc. Law, p. 32.

Mr. Warren E. Lloyd, with Mr. George L. Keefer, for respondent.

Beatty, Ch. J., delivered the opinion of the court:

This is an action by a guest against an innkeeper, to recover damages for an assault and battery by a servant of defendant. The cause was tried in the superior court without a jury, and plaintiff had judgment. Defendant appeals from the judgment, and from a subsequent order denying his motion for the entry of a different judgment on the findings.

Respondent objects to any consideration of the appeal from the order upon the ground that it was not excepted to. But if it is an appealable order, it is deemed excepted to. Code Civ. Proc. § 647. And since it is a special order made after final judgment, it is appealable. Code Civ. Proc. §

NOTE.—As to liability of eating-house keeper for waiter's refusal to serve negroes, see, in this series, *Bryan v. Adler*, 41 L. R. A. 658.

As to liability of master for servant's tortious injury to third person in the absence of any contractual relation, see *Lynch v. Florida C. & P. R. Co.* 54 L. R. A. 810, and footnote thereto.

As to master's liability for assaults by servant on person having a contractual relation with the master, see *Davis v. Houghtelln*, 14 L. 65 L. R. A.

R. A. 737, and note; *Dickson v. Waldron*, 24 L. R. A. 483; *Baltimore & O. R. Co. v. Barger*, 26 L. R. A. 220; *Goodloe v. Memphis & C. R. Co.* 29 L. R. A. 729; *Krantz v. Rio Grande W. R. Co.* 30 L. R. A. 297; *St. Louis S. W. R. Co. v. Jones*, 39 L. R. A. 784; *Savannah, F. & W. R. Co. v. Quo*, 40 L. R. A. 483; *Haver v. Central R. Co.* 43 L. R. A. 84; and *Birmingham R. & Electric Co. v. Baird*, 54 L. R. A. 752.

963. It is, however, of no consequence whether the order is reviewable or not, for the appeal from the judgment presents the same questions on the same record (the judgment roll); and we could on that appeal, if the facts found and admitted justified such an order, not only reverse the judgment, but remand the cause, with directions to the superior court to enter judgment for the defendant. *Warder v. Enslin*, 73 Cal. 291, 14 Pac. 874.

The facts found and admitted are few and simple: The plaintiff was a guest in the defendant's hotel, and while seated at the dinner table was assaulted and beaten by a dining-room waiter. Damage, \$200. The question is whether, upon these facts, the defendant was liable for compensatory damages. The respondent's contention is that he was so liable, upon either of two grounds: First, under the general rule that a master is liable for the torts of his servant committed in the course of his employment, and within the real or supposed scope of his duties; and, second, upon the ground that an innkeeper is bound to protect his guests from acts of violence on the part of his servants, just as a common carrier is bound to protect his passengers, while in transit, from molestation by its servants.

We think it clear that the defendant incurred no liability on the first ground. By the general law of master and servant, the master is not liable for the malicious torts of the servant committed outside the scope of his employment. The wrongful act must be one which the servant is empowered under some circumstances to do. It must be something which his employment contemplated,—as, for instance, the ejection of a passenger or intruder from a railroad car. Conductors and brakemen have authority to eject disorderly passengers, or persons who refuse to pay their fare, and it is left to their discretion when such authority shall be exercised. In a proper case they may eject a passenger without incurring any liability themselves or imposing any liability upon their employer; but, if they eject him wrongfully and maliciously, the carrier is liable upon the general ground that the act is one which, if lawfully done, could be done in the employer's name, and justified by his authorization. The law on this point is very clearly stated in *Cooley on Torts*, **535 *et seq.*, and in none of the decisions of this court has a stricter rule been enforced than as above stated. Under that rule, the defendant cannot be held liable, because there is no finding and no reason to presume that defendant ever authorized his servants to assault his guests or any other person under any circumstances.

Neither do we think he was liable on the 65 L. R. A.

second ground. The law seems to be pretty well settled that a common carrier of passengers, whether a shipowner or a railway company, owes to a passenger while in transit the duty of protection, absolute as against its servants in charge of ship or train, and equally as against fellow passengers when, on account of intoxication or acts of violence, they should not have been admitted, or when they have been allowed to remain after such misbehavior as justifies their expulsion. But the industry of counsel and our own researches have not resulted in the discovery of more than a single case in which this rule of liability has been extended to innkeepers. In *Rommel v. Schambacher* [120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779] decided in 1887 by the court of common pleas of Philadelphia, it was said to be a plain matter of common law that, "where one enters a saloon or tavern opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults, as well of those who are in his employ, as of the drunken and vicious men whom he may choose to harbor." To sustain this conclusion but one case was cited in the opinion of the court, and that a case of carrier and passenger. So that in fact there was a complete begging of the question presented here, *viz.*, whether there is a rule as to protection of guests of an innkeeper equally stringent with the rule affecting common carriers. The fact that no case was then cited, or can now be found, in which an English or American court has sustained the conclusion stated in the Philadelphia case warrants more than a doubt of the correctness of that conclusion. But in truth the language above quoted, when construed and qualified by reference to the facts of the case, does not mean all that it seems broadly to assert. The facts of that case were that the defendant, the proprietor of a saloon, had himself supplied two or three young men with drinks at his bar, by which they were made intoxicated. While in that condition one of them, in plain view of the defendant, pinned a paper to the clothes of another (the plaintiff), and set fire to it. The fire was communicated to plaintiff's clothes, and he was severely burned. The gist of the decision holding the defendant liable for the injury is contained in these words at the close of the opinion: "If, then, a railroad company is liable for the conduct of drunken men who may chance to board its cars, much more the tavern keeper, who not only permits drunken men about his premises, but furnishes liquor to make them drunk, and who is thus instrumental in fitting them

for the accomplishment of just such an insane and brutal trick as that disclosed by the evidence of the case in hand." This, considering the facts, is in reality the whole of the decision. The proprietor was held liable for a tort in which he was personally a participant, and what else was said so far as it may seem to apply to a malicious assault by a servant, wholly unauthorized and unobserved by the master, may be regarded as *dictum*. An innkeeper is, no doubt, guilty of negligence if he admits to his hotel, or permits to remain there, whether as guest or servant, a person of known violent and disorderly propensities, who will probably assault or otherwise maltreat his guests; and for the consequence of such negligence he may be liable in damages. But the plain ground of his liability in such case would be his negligence in harboring persons dangerous to the peace and comfort of those for whose comfort he is bound to provide. And if, as in the Philadelphia case, he stands by while a guest is exposed to the violence of a person who has been made dangerous by his fault, and sees an injury inflicted without any effort to prevent it, he may be regarded as *particeps criminis*. This case, however, presents no such features. There is neither allegation nor finding that the defendant was negligent in employing or retaining the waiter who committed the assault. So that there is no ground upon which this judgment can be sustained unless we are prepared to hold that, to the same extent that a common carrier is an insurer of his passengers, an innkeeper is an insurer of his guests against the torts of his servants. We cannot discover any safe ground for such a conclusion. No statute of California imposes such a rule, and no evidence is to be found in the reports of decided cases that such was the rule at common law. Indeed, it was said in *Calye's Case*, decided in the King's bench in 26 Elizabeth (8 Coke, *33), that, "if the guest be beaten in the inn, the innkeeper shall not answer for it;" he being liable, as such, only for damages to the guest's goods and chattels. Since that time no other rule seems to have existed in England or in this country, unless the Philadelphia case is an instance to the contrary. We do not regard it as a case strictly in point, but one resting upon grounds peculiar to itself, and sufficient to sustain the conclusion of the court without reference to the proposition to which it has been cited here.

The judgment and order of the Superior Court are reversed.

We concur: **Angellotti, J.; Lorigan, J.; McFarland, J.; Henshaw, J.**
55 L. R. A.

**BANK OF YOLO, *Respt.*,
v.
SPERRY FLOUR COMPANY, *Appt.***

(141 Cal. 314.)

1. An agreement by a resident of one county, in response to a telephone call from a person residing in another county, that he would honor a draft for the amount in case the latter should advance money to a third person, is made in the former county, within the meaning of a constitutional provision that actions on contracts may be brought in the county where they are made.
2. An agreement by telephone, in response to an inquiry from a bank located in another county, to honor a draft for the amount if the bank will advance money for the purchase of produce, is to be performed where the bank is located, within the meaning of a constitutional provision that actions on contracts may be brought in the county where they are to be performed.

(December 11, 1903.)

A PPEAL by defendant from an order of the Superior Court for Yolo County refusing to transfer an action to recover damages for breach of contract to another county for trial. *Affirmed.*

The facts are stated in the opinion.

Messrs. Goodfellow & Eells, for appellant:

As appellant's residence in San Francisco was not disputed, it was *prima facie* entitled to the change.

Brady v. Times-Mirror Co. 106 Cal. 56, 39 Pac. 209; *Griffin & S. Co. v. Magnolia & H. Fruit Cannery Co.* 107 Cal. 378, 40 Pac. 495.

The contract was made in Sacramento at the telephone there. It was not by its terms to be performed in Yolo county; and, in the absence of such express agreement, the county of Sacramento would be the place for performance.

Eck v. Hoffman, 55 Cal. 501.

Mr. E. R. Bush, for respondent:

The language, "a corporation may be sued, etc.," necessarily implies that, if the facts are such that the case might be brought in any one of several different counties, the option of selecting the county in which to bring the suit rests with the plaintiff, and cannot be changed by the defendant.

Fresno Nat. Bank v. Superior Court, 83 Cal. 492, 24 Pac. 157.

NOTE.—For a case in this series holding that the place from which an interstate telegram is sent is the place of the contract made by the message, in the absence of anything therein to the contrary, see *Tillinghast v. Boston & P. R. Lumber Co.* 22 L. R. A. 49.

The option, by virtue of the constitutional provision, rests with the plaintiff.

Trezevant v. W. R. Strong Co. 102 Cal. 49, 36 Pac. 395; *Lewis v. South Pacific Coast R. Co.* 66 Cal. 209, 5 Pac. 79; *Fresno Nat. Bank v. Superior Court*, 83 Cal. 498, 24 Pac. 157; *Whitney v. Sellers' Commission Co.* 130 Cal. 188, 62 Pac. 472; *Last Chance Water Ditch Co. v. Emigrant Ditch Co.* 129 Cal. 277, 61 Pac. 960.

In an action against a corporation alone, the "residence" of the corporation is an entirely immaterial factor, the language used in the Constitution being, "in the county where the principal place of business of such corporation is situated."

Chase v. South Pacific Coast R. Co. 83 Cal. 468, 23 Pac. 532.

In cases like the one at bar any superior court in the state has jurisdiction, but subject to change of venue to the proper county, as prescribed in § 16, of art. 12, Cal. Const.

Section 16, art. 12, prescribes the proper court in which any action against a corporation may be brought; and, if the action falls within any one of the classes therein laid down, the option lies with the plaintiff to select the class, and the defendant cannot change the venue solely upon the ground that it has its principal place of business, or residence, in another county, or that it might fall within some other class; and the defendant must show affirmatively that the action is not brought in the proper county.

Trezevant v. W. R. Strong Co. 102 Cal. 47, 36 Pac. 395; *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157.

The evidence fails to show that the contract was not made in Yolo county.

Yore v. Bankers' & M. Mut. Life Asso. 88 Cal. 609, 26 Pac. 514.

The *locus contractus*, in any case, is the place with reference to which the contract is made, or is to be performed.

Young v. Pearson, 1 Cal. 448; *Ivey v. Kern County Land Co.* 115 Cal. 196, 46 Pac. 926; *Dow v. Gould & C. Silver Min. Co.* 31 Cal. 652.

Beatty, Ch. J., delivered the opinion of the court:

The defendant is a California corporation having its principal place of business in San Francisco. This action was commenced in the superior court of Yolo county to recover money alleged to have been advanced to the defendant at its request and upon its promise to repay the same on demand. The defendant, at the time of appearing in the action, demanded a change of the place of trial to the city and county of San Francisco, upon the ground that it

had not been sued in the proper county. The motion subsequently made in pursuance of this demand was overruled, and this is an appeal from that order.

The plaintiff had a right to commence the action in the county where the contract was made, or where it was to be performed. Const. art. 12, § 16. But appellant contends that the evidence upon which its motion was submitted clearly showed that the contract, if any contract was ever made, was neither made in Yolo county nor to be performed there. What the evidence does show is that the cashier of plaintiff at Woodland, in Yolo county, called up the agent of defendant at Sacramento by telephone, and in effect offered to advance a certain sum of money to the purchaser of a lot of wheat (said to have been purchased for account of defendant) if defendant would agree to honor his draft for \$1,400. To this proposition the agent of defendant answered by telephone that they would honor the draft. The plaintiff then advanced to the purchaser of the wheat the money which it seeks in this action to recover, and drew upon defendant for the \$1,400, which draft was duly honored. The question we have here to decide is not whether the evidence upon which the motion was submitted was sufficient to establish an agreement to repay to the bank the money advanced to the purchaser of the wheat. That is an issue which must await the trial of the cause. We have only to determine whether the contract alleged, if made at all, was made in Yolo county, or, if not made there, was to be performed there. We are inclined to hold, upon the facts stated, that in legal contemplation the contract was made in Sacramento county. A contract is supposed to be made at some place, and the place where it becomes complete is the place where it is made. If a contract is made by exchange of letters or telegrams, it is held to have been made at the place where the letter is mailed or telegram filed containing an unconditional acceptance by one party of the offer of the other. If the communications are oral, either with or without the telephone, between parties on opposite sides of a county line, the same principle would seem to require that the contract should be deemed to have been made in the county where the offer of one is accepted by the other,—in this case in Sacramento. But, if the contract was to be performed in Yolo county, the action was rightly commenced there, wherever it was made, and we think the place of performance was in Yolo county. The plaintiff is a banking corporation doing business at Woodland, the county seat of Yolo, and a promise to repay money advanced by

it—no other place of payment being stipulated—must be deemed a promise to pay at its bank, the only place where it can be found. This, we think, is a reasonable deduction from the provisions of the Civil Code (§§ 1488, 1489) in regard to the place where an offer of performance may be made; a conclusion not affected by the decisions construing the attachment law, in which it is held that a contract for the direct payment of money is not “payable in this state,” within the meaning of that law, unless made so payable in express terms. See *Eck v. Hoffman*, 55 Cal. 501; *Dulton v. Shelton*, 3 Cal. 207. In a suit

upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent Code provisions, indicate that the parties expected or intended it to be performed.

Upon these considerations, we think the order of the Superior Court should be affirmed, and it is so ordered.

We concur: **McFarland, J.; Angelotti, J.; Van Dyke, J.; Shaw, J.; Lorigan, J.**

CONNECTICUT SUPREME COURT OF ERRORS.

William F. LAHIFF

v.

SAINT JOSEPH'S TOTAL ABSTINENCE
& BENEVOLENT SOCIETY, *App't.*

(.....Conn.....)

1. A mutual benefit society cannot escape liability for damages for the illegal expulsion of a member on the ground that the meeting at which the expulsion occurred was not a lawful one, and that, therefore, its action was not binding on the society, where the society at a subsequent regular meeting approved the act.
2. The possibility of resorting to mandamus to compel reinstatement to his rights will not deprive a member wrongfully expelled from an unincorporated benefit society of the right to resort to an action for damages, where the circumstances are such that mandamus could not restore him to the full enjoyment of the privileges of membership.
3. A member who has been wrongfully expelled from an unincorporated benefit society may abandon all claims to reinstatement, and resort to an action for damages for the injury inflicted upon him by the expulsion.
4. The damages to be recovered by a member wrongfully expelled from an unincorporated benefit society may include the loss sustained by being deprived of the use and enjoyment of the property of the society and of the privileges of membership, and also the mental suffering caused by the wrongful expulsion and the manner in which it was effected.

(April 15, 1904.)

NOTE.—As to right of member of benefit society to action for damages for wrongful expulsion see also, in this series, *Lavalle v. Société St. Jean Baptiste*, 16 L. R. A. 392.

As to mandamus to compel restoration of member of mutual benefit society, see *note to Com. v. Union League*, 8 L. R. A. 195; also *Peplin v. Société St. Jean Baptiste*, 60 L. R. A. 626.

65 L. R. A.

APPEAL by defendant from a judgment of the Superior Court for Windham County in favor of plaintiff in an action brought to recover damages for alleged wrongful expulsion from the defendant society. *Affirmed.*

The facts are stated in the opinion.

Messrs. Henry H. Hunter and Samuel B. Harvey for appellant.

Messrs. Charles E. Searls and Thomas J. Kelley, for appellee:

Prima facie, membership is a valuable privilege, and is not to be taken away at the arbitrary and peremptory will of the society. The member whom it is desired to expel must, at least, have a chance to defend himself.

9 Am. & Eng. Enc. Law, 2d ed. p. 478.

No one can be expelled from any corporation, whatever its character, without notice of the charges preferred against him, and an opportunity to be heard in his own behalf.

9 Am. & Eng. Enc. Law, 2d ed. *Disfranchisement*, p. 482; *Evans v. Philadelphia Club*, 50 Pa. 107; *People ex rel. Page v. Board of Trade*, 45 Ill. 112; *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248; *Com. v. Pennsylvania Beneficial Inst.* 2 Serg. & R. 141; *Fuller v. Academic School*, 6 Conn. 532; *Connelly v. Masonic Mut. Ben. Asso.* 58 Conn. 553, 9 L. R. A. 428, 18 Am. St. Rep. 296, 20 Atl. 671; *Mead v. Stirling*, 62 Conn. 595, 23 L. R. A. 227, 27 Atl. 591.

By reason of such unlawful expulsion the plaintiff is entitled to recover damages of the defendant, based upon the value of its property, its membership, its standing, the purpose for which it is organized, and the mental distress suffered by the plaintiff on account of the indignity put upon him.

Merschlem v. Musical Mut. Protective Union, 24 Abb. N. C. 253, 8 N. Y. Supp. 702.

Mental suffering is an element of damages when it is the natural and proximate consequence of a recognized cause of action.

Swift v. Dickerman, 31 Conn. 295; *Gibney v. Lewis*, 68 Conn. 392, 36 Atl. 799; *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66, Fed. Cas. No. 10,003.

An injury that is a violation of the rights of another necessarily imports damages, and the party injured is entitled to an action for it, and to nominal damages at least.

Parker v. Griswold, 17 Conn. 303, 42 Am. Dec. 739; *Branch v. Doane*, 18 Conn. 241; *Peck v. Loyd*, 38 Conn. 572; *Howe v. Andrews*, 62 Conn. 402, 26 Atl. 394; *Water Comrs. v. Perry*, 69 Conn. 468, 37 Atl. 1059; *Watson v. New Milford Water Co.* 71 Conn. 450, 42 Atl. 265.

Hall, J., delivered the opinion of the court:

The defendant in this action is a voluntary unincorporated association, which, under § 588, Gen. Stat. 1902, may sue and be sued by its distinguishing name, and against which a suit may be brought by any individual member thereof. The plaintiff claims damages upon the ground that he has been unlawfully expelled from said association, and deprived of all the rights and privileges incident to membership thereof. By its answer in the trial court the defendant denied all the allegations of the complaint, excepting those describing the character and location of the defendant society. It appears by the finding of facts that at a special meeting of the society on the 1st of May, 1901, the plaintiff, who had long been a member of the society in good standing, and was then its vice president, and was acting as president at said meeting, was declared expelled from the society. It is found that the special meeting was not called for the purpose of acting upon the expulsion of the plaintiff; that the plaintiff had no notice of such proposed action; that no charges were preferred against him; that he was given no opportunity to be heard; that the motion for his expulsion was put by a member of the society, and declared carried, without the votes being called for; and that the plaintiff was thereupon compelled to withdraw from the rooms of the society. Afterwards, at a regular meeting of the society, the plaintiff demanded admission to the defendant's rooms, and to the privileges of membership of the society, but was refused, and he has ever since been debarred from all the rights and privileges of membership. In the trial court the defendant claimed, upon these facts, that the plaintiff was not entitled to recover, because he had failed to prove that

the acts complained of were in violation of the constitution and by-laws of the society, and that the plaintiff could recover, if at all, only to the extent of his pecuniary loss proved. The trial court overruled these claims, and rendered judgment for the plaintiff for \$200, basing said damages upon the injury sustained by the plaintiff in being deprived of his interest in the defendant's property, and of the rights and privileges of membership in the society, and upon the mental distress suffered by him "on account of the indignity put upon him." The overruling of the defendant's said claims in the trial court, and the rendering of a judgment for the plaintiff upon the facts found, are, in substance, the errors assigned in the appeal.

Upon this appeal the defendant abandons its claim, made at the trial court, that the plaintiff was not legally expelled, and concedes that the proceedings in the matter of expulsion were "in direct violation of law." We are now asked by the defendant to set aside the judgment of the superior court, first, upon the ground that the vote of expulsion at said special meeting was illegal and void, and not binding either upon the plaintiff or the defendant society, or its absent or dissenting members, not only because of the manner in which the proceedings of that meeting were conducted, but because no notice was given in the call for the meeting that action was proposed to be taken upon said matter of expulsion; and, second, upon the ground that mandamus is the only remedy for such illegal expulsion. Neither of these questions appears to have been so distinctly raised and decided in the trial court, nor to be so specifically stated in the reasons of appeal, as to meet the requirements of § 802 of the General Statutes of 1902, and to entitle the defendant to have them considered here. But, waiving the irregular manner in which these claims are presented in this court, they cannot be sustained upon the facts before us.

As to the first of these claims, if we assume, for the reasons stated by the defendant, that the special meeting of May 1, 1901, was not a lawful one, for the purpose of acting upon the matter of expelling the plaintiff, and that the action taken upon that matter at such meeting was unauthorized by, and not binding upon, the defendant, as an association, it still appears that the association is responsible for the illegal expulsion of the plaintiff, since the court finds that the defendant afterwards, at a regular meeting of the society, in effect, approved the action of the meeting of May 1, 1901, by refusing the plaintiff admission to its meeting, and that it has ever since de-

barred the plaintiff from all the rights and privileges of membership.

As to the second claim, we are not prepared to hold that a writ of mandamus to compel the association to readmit him to membership is the plaintiff's sole remedy for the illegal expulsion complained of, nor even that it is an available remedy to the plaintiff for such injury. The writ of mandamus is an extraordinary remedy, to be applied only under exceptional conditions, and is not to be extended beyond its well-established limits. *Duane v. McDonald*, 41 Conn. 517-522. It lies to compel the performance of a public duty, or one imposed by public authority, and for the nonperformance of which there is no other specific or adequate remedy at law, but not for the enforcement of merely private obligations, such as those arising from contracts. *Hartford v. Hartford Street R. Co.* 74 Conn. 194-196, 50 Atl. 393; *Bassett v. Atwater*, 65 Conn. 355-360, 32 L. R. A. 575, 32 Atl. 937; *Tobey v. Hakes*, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551; *Parrott v. Bridgeport*, 44 Conn. 180-182, 26 Am. Rep. 439; *American Asylum v. Phoenix Bank*, 4 Conn. 172-178, 10 Am. Dec. 112. It is often an appropriate remedy for the reinstatement of a member of an incorporated benevolent or social society, who has been unlawfully and unreasonably deprived of the enjoyment of the rights and privileges of membership in such societies. 1 Morawetz, Priv. Corp. 2d ed. § 277; 2 Spelling, Extr. Rem. 2d ed. § 1606; *Com. ex rel. Burt v. Union League*, 135 Pa. 301, 8 L. R. A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030, and note on same case in 8 L. R. A. 195. Such associations, although private corporations, are chartered by the state, and enjoy privileges and exercise powers expressly granted by the state; and for that reason the duties devolving upon them are regarded as of a public character, the performance of which may properly be compelled by writ of mandamus. *State ex rel. Cappel v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760; *Burt v. Grand Lodge, F. & A. M.* 66 Mich. 85, 33 N. W. 13; *Tobey v. Hakes*, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551. *Otto v. Journeymen Tailors' Protective & Benev. Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217, and *Von Arx v. San Francisco Gruetli Verein*, 113 Cal. 377, 45 Pac. 685, are cited by the defendant as cases where writs of mandamus were issued against unincorporated associations to compel the reinstatement of members wrongfully expelled. Our attention has not been called to any other authorities holding that mandamus is an appropriate remedy against unincorporated societies for the restoration of an expelled member. It seems generally to

have been held that writs of mandamus will be denied in such cases. *People ex rel. Rice v. Board of Trade*, 80 Ill. 134; *Burt v. Grand Lodge, F. & A. M.* 66 Mich. 85, 33 N. W. 13; *Lamphere v. Grand Lodge, A. O. U. W.* 47 Mich. 429, 11 N. W. 268. But whether or not a person might be expelled from an unincorporated society under such circumstances as to warrant the granting of a writ of mandamus to compel his restoration to membership, and what effect the granting of such writ might have upon one's right to recover damages for such illegal expulsion, are questions which we are not called upon to decide in this case. No writ of mandamus has been issued or asked for in the present case. The circumstances of his expulsion were, perhaps, such that the plaintiff could not thereafter have enjoyed the privileges of membership, had his reinstatement been ordered. Mandamus might for that reason have been but a partial remedy for the injury sustained by his wrongful expulsion, and an action for damages a more complete remedy.

Upon the facts before us, the plaintiff had the right to abandon all claims to reinstatement in the society, and resort to an action for damages for the injury sustained by reason of the illegal expulsion. *Burt v. Grand Lodge, F. & A. M.* 66 Mich. 85, 33 N. W. 13; *Lamphere v. Grand Lodge, A. O. U. W.* 47 Mich. 429, 11 N. W. 268; *Washington Beneficial Soc. v. Bacher*, 20 Pa. 425; *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 N. Y. 101, 23 N. E. 129; *People ex rel. Dilcher v. German United E. St. S. Church*, 53 N. Y. 103; *Ludowski v. Polish Roman Catholic St. S. K. Benev. Soc.* 29 Mo. App. 337; *State ex rel. Koppstein v. Lipa*, 28 Ohio St. 665; *Fraternal Mystic Circle v. State*, 61 Ohio St. 628, 76 Am. St. Rep. 446, 48 N. E. 940; *Fisher v. Board of Trade*, 80 Ill. 85. We cannot adopt the view which seems to be expressed in *Lavalle v. Société St. Jean Baptiste*, 17 R. I. 680, 16 L. R. A. 392, 24 Atl. 467, that the bringing of an action for damages in such a case is a waiver by the plaintiff of the illegality of his expulsion. The loss sustained by the plaintiff in being deprived of the use and enjoyment of the property of the society and the privileges of membership were proper elements of damages, as was also the mental suffering of the plaintiff caused by his wrongful expulsion and the manner in which it was effected. *People ex rel. Dilcher v. German United E. St. S. Church*, 53 N. Y. 103; *Maisentracker v. Society Concordia*, 71 Conn. 369-376, 71 Am. St. Rep. 213, 42 Atl. 67; *Gibney v. Lewis*, 68 Conn. 392-396, 36 Atl. 799.

There is no error.

NEW YORK COURT OF APPEALS.

Re Probate of WILL OF Robert E. HOPKINS, Deceased.

(172 N. Y. 360.)

1. Finding a will in testator's desk with the signature canceled raises the presumption that the cancellation was done by him with the intention of revoking the will.
2. Perpendicular marks across the signature of a will, made apparently to cancel it, are not writings, within the meaning of a statute permitting the comparison of writings, by experts so as to admit opinion evidence of their origin.

(November 11, 1902.)

NOTE.—Comparison of marks and spelling.

- I. Comparison of marks, 95.
- II. Comparison of spelling, 97.

I. Comparison of marks.

The cases having a near relation to *RE HOPKINS' WILL* are very few in number, and there seems to be no decision exactly in point with it, although there are several decisions between which and the principal case it will be found to be very difficult to distinguish, and harder to say where the line of distinction should be drawn.

The decision in *RE HOPKINS' WILL*, denying the propriety of a comparison by an expert witness of the signature to the will with the perpendicular marks drawn through it, is based upon two grounds: First, that the marks so made were not "writings," within the meaning of chapter 36 of the New York Laws of 1880, and chapter 555 of the Laws of 1888, both of which permitted a comparison by experts of a disputed "writing" with "any writing proved to the satisfaction of the court to be genuine;" second, that these disputed marks had no prevailing characteristic which would enable an expert or any person to speak with any degree of certainty as to the identity of the person who made them; so that a comparison of them with any other marks or writing would be improper.

As to the first ground, involving the construction of the New York statute, there would seem to be some reason for doubting its soundness; certainly a contrary result has been reached in Georgia and Oregon in similar cases under similarly worded statutes, as will be seen below.

But even if such marks were not within the meaning of the statute, that would seem not to be conclusive of the matter, for the New York statute merely amplified and broadened the rule of the common law on the subject of comparison of handwritings, extending this method of proof, which before the statute was limited to a comparison with proved writings which were already in evidence in the case, to comparison with "any" writings proved to be genuine. In this statute there is no exclusion, express or implied, of comparison of marks which are not "writings;" and, even if they were "writings," the marks in question and the signature with which they were compared were both in evidence in the case, being upon the same document; so that there was apparently no necessity, on either hy-

A PPEAL by contestants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a decree of the Surrogate's Court for Westchester County admitting to probate a paper propounded as the last will of Robert E. Hopkins, deceased. *Reversed.*

The facts are stated in the opinion.

Mr. Joseph W. Middlebrook, for appellant:

The testimony of the witness Carvalho should have been excluded, being altogether incompetent, and the witness himself being unqualified.

Dougherty v. Milliken, 163 N. Y. 527, 57

pothesis, for invoking the aid of the statute to authorize the comparison which was allowed upon the trial, and which was permissible, at least in the case of "writings," before the statute was enacted.

And, in connection with this point, it should be noticed that the court in this case, or the jury in the ordinary case, would surely and inevitably compare the marks with the signature when both were before them; and, this comparison being certain to be made, it would seem to be in the interest of truth, and in accordance with the development of the law of evidence generally in regard to the testimony of experts, that the comparison should be aided and made more intelligent by the comparison of experts, who would point out and explain differences and similarities.

In such a case it is clear that the comparison of the genuine signature of a very old person, accompanied by its consequent tremor of age or weakness, with lines which, even though perfectly straight, showed considerable firmness and strength, would be of very great probative force, as showing the improbability of the same person having executed both. This is the effect of the decision, quoted in *RE HOPKINS' WILL*, of Chancellor Walworth, in *Lansing v. Russell* (1848) 3 Barb. Ch. 325; although in that case comparison was not involved, the experts testifying merely to the general appearance of the marks in question.

As to the question whether such marks would be comparable at common law, there are several analogous cases.

In the matter of comparison (without regard to comparison by experts) of seals, which, however, have an unvarying characteristic greater than is ever the case with any handwriting, however uniform, we find that, from the very earliest times, at common law seals were the subject of comparison. "If a man denied a charter that was produced against him, and the witnesses named in it were dead, the seal on it would be compared with the seals on instruments the genuineness of which he admitted, and thus he might be convicted of a false plea." 2 Pollock & Maitland, *History of English Law*, 2d ed. 224. And this trial by collation of seals was illustrated from Bracton's *Note Book*, pl. 1, 51, 102, 234, 237, etc.

So in the case of comparison of types. In an action for libel against the owner of a newspaper the plaintiff offered to prove authorship

N. E. 757; *People v. Molineux*, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286.

The cancelation marks are not writing.

29 Am. & Eng. Enc. Law, p. 996; *Olason v. Bailey*, 14 Johns. 484; *Jackson ex dem. Van Dusen v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330.

There is scarcely ever a case in which an expert is put upon the stand, but the fact that he is really acting in a dual capacity, both as witness and attorney for the side on which he is called, readily appears.

Taylor, Ev. § 1,877; *Taylor Will Case*, 10 Abb. Pr. N. S. 300; *Taylor v. Crowninshield*, 5 N. Y. Legal Obs. 224; *Sarvent v. Hedra*, 5 Redf. 47; *Green v. Terwilliger*, 56 Fed. 384; *Winaus v. New York & E. R. Co.* 21 How. 101, 16 L. ed. 71; *Roberts v. New York*

Elevated R. Co. 128 N. Y. 455, 13 L. R. A. 499, 28 N. E. 486.

This witness made no proper qualification as an expert witness, either as regards handwriting, or as to inks; and his entire testimony is, therefore, utterly incompetent, and should have been excluded.

Harris v. Panama R. Co. 3 Bosw. 7; *Clark v. Bruce*, 12 Hun, 274; *Curtis v. Gano*, 26 N. Y. 426; *Nelson v. Sun Mut. Ins. Co.* 71 N. Y. 455; *People v. Rice*, 159 N. Y. 400, 54 N. E. 48; *Gregory v. Fichtner*, 27 Abb. N. C. 86, 14 N. Y. Supp. 891; *Slater v. Wilcox*, 57 Barb. 604.

Even if the court is personally satisfied or acquainted with any fact, it cannot take judicial notice of any fact which is required to be proved.

of the libelous issues which had been only partially proved, by introducing in evidence another paper of the same date as one of them proved to have been purchased from the defendant's shop, for comparisons by the jury of the types and devices; and, against the defendant's contention that this method of proof was wrong because proof by comparison of handwriting was not legal, and, *a fortiori*, proof by comparison of types, etc., was not, the court (Tilghman, Ch. J.) said: "After evidence has been given in support of a writing, it may be corroborated by comparing the writing in question with other writing concerning which there is no doubt;" and, on the same principle, the foundation being first laid, the jury might be permitted to compare types, etc., of newspapers. In general such evidence would not be very strong, but cases might occur in which a comparison would be decisive. *M'Corkle v. Binns* (1812) 5 Binn. 340, 6 Am. Dec. 420.

And so in a libel action in New York proof that a publication was made from the types in the defendant's printing office was held to be proper. *Southwick v. Stevens* (1813) 10 Johns. 443.

The inference to be drawn from these analogous cases seems to be, therefore, that some comparison between the marks in question in *RE HOPKINS' WILL*, and the signature which they canceled, would have been permissible at common law; but there is in this no indication of any inclusion of comparison by experts.

In the case of comparison of cross-marks made, instead of signatures, by illiterate persons, is found the closest approach to *RE HOPKINS' WILL*, and here the authorities are conflicting.

In some cases this kind of mark has been held to be incapable of identification. So, it was held in *Carrier v. Hampton* (1850) 33 N. C. (11 Fred. L.) 307, that, although the mark of an illiterate person may become so well known as to be susceptible of proof, like handwriting, yet generally a mere cross cannot be identified, and, therefore, where such an illiterate person has witnessed an instrument the case is the same as where a party, after due inquiry, has been unable to prove the signature of a person who appears to have written his name as subscribing witness, in which case the instrument may be read upon proof of the handwriting of the party.

Evidence that the mark of a witness to a will, consisting of initials, was similar to another

mark which had been made by the same attesting witness in the presence of the witness many years before, and then in his possession, was admitted over the objection that it was an attempt to prove the handwriting by a "comparison of hands," which, it was contended, according to the settled law, was not competent testimony; but it was held that the ordinary mark made by the testator on the will could not be proved by any evidence of handwriting. *Jackson ex dem. Van Dusen v. Van Dusen* (1809) 5 Johns. 144, 4 Am. Dec. 330.

But in a later North Carolina case it was held that, "while generally a mere cross-mark employed by a person who cannot write as evidence that he executed a paper writing to which it is affixed cannot be proved, yet a person may have a mark so peculiar, and so uniformly used by him for such purpose, as that it may become well known as his mark, and may be proved just as the signature of one who writes may be proved to be in his own handwriting." *State v. Byrd* (1885) 93 N. C. 624.

When the question of comparison of cross-marks has been squarely presented, the decisions are in conflict upon the point.

Travers v. Snyder (1890) 38 Ill. App. 379, relied upon in the opinion in *RE HOPKINS' WILL*, although decided under the common-law rule as to handwritings and without the assistance of a statute, as in *RE HOPKINS' WILL*, is undoubtedly an authority to support that case, being based upon the second ground of the New York decision. It declares that there can properly be no comparison between a signature which is merely a cross-mark and another and similar mark, the signature of the same person to a plea in the cause, without special proof of the fact of some particular characteristic by which the mark in question can be distinguished; the court saying that the mere fact that one mark is like another proves nothing.

Another case which would seem to afford support to *RE HOPKINS' WILL* is *Shank v. Butsch* (1867) 28 Ind. 19. But a close examination of the case will show that by implication the decision is opposed directly to that case, in that it is assumed that the straight lines involved in *RE HOPKINS' WILL* are subject to the same rules as the cross-mark intended for a signature. On an issue as to the genuineness of the defendant's signature to a note made simply by his mark, other notes purporting to have been signed by him, together with proof that they were signed

Wheeler v. Webster, 1 E. D. Smith, 1; *Wilkie v. Bolster*, 3 E. D. Smith, 327.

The burden of proof rested upon the proponent, and was not shifted.

It is the duty of the person having the affirmative of an issue to adduce the proof thereof.

Delafield v. Parish, 25 N. Y. 29; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Re Kellum*, 52 N. Y. 517; *Heinemann v. Heard*, 62 N. Y. 448; *Re Cottrell*, 95 N. Y. 329; *Tingue v. Port Chester*, 101 N. Y. 294, 4 N. E. 625; *Meagley v. Hoyt*, 125 N. Y. 771, 26 N. E. 719; *Farmers' Loan & T. Co. v. Siefke*, 144 N. Y. 354, 39 N. E. 358.

It is the duty of him who produces an instrument, and who claims under it, to prove its genuineness, and that the alterations

made upon it were honestly and properly made.

1 Greenl. Ev. 564, 565; Taylor, Ev. §§ 1819, 1820; *Henman v. Dickinson*, 5 Bing. 183; *Bishop v. Chambre*, Moody & M. 116; *Knight v. Clements*, 8 Ad. & El. 213; *Oliford v. Parker*, 2 Mann. & G. 909; *Davidson v. Cooper*, 11 Mees. & W. 795; *Morris v. Vanderen*, 1 Dall. 67, 1 L. ed. 40; *Prevost v. Gratz*, 1 Pet. C. C. 364, Fed. Cas. No. 11,406; *Coa v. Palmer*, 1 McCrary, 431, 3 Fed. 16; *United States v. Linn*, 1 How. 104, 11 L. ed. 64; *Smith v. United States*, 2 Wall. 219, 17 L. ed. 788; *Simpson v. Davis*, 119 Mass. 269, 20 Am. Rep. 324; *Miller v. Gilleland*, 19 Pa. 119; *Neff v. Horner*, 63 Pa. 327, 3 Am. Rep. 555; *Burgwin v. Bishop*, 91 Pa. 336; *Hartley v. Corboy*, 150 Pa. 23, 24 Atl. 295; *Lew-*

in the usual course of business, offered for the purpose of showing that he uniformly signed such instruments with one mark or cross and for the purpose of comparing his marks thereto with that to the note in controversy, were held not to be admissible in evidence for the jury to make the comparison and draw their inference therefrom. From so much *Shank v. Butsch* would seem to support *RE HOPKINS' WILL*, but the ground of the decision gives it a different complexion in this regard. The court deliberately treats the cross-mark in question as a "handwriting," and declares that the case of cross-marks is subject to the rule laid down in *Clark v. Wyatt* (1860) 15 Ind. 271, 77 Am. Dec. 90, to the effect that evidence founded on a mere comparison of hands will not be allowed. This will be seen to conflict with the first ground of the decision in *RE HOPKINS' WILL*—that the marks in question there were not "writings" under the New York statute. Further, by treating the case as subject to the rule (prevailing in Indiana) as to the comparison of handwritings, which permitted comparison with writings already in the case, the court makes it plain that its decision in such a case as *RE HOPKINS' WILL* would permit the comparison, the standard for comparison in that case being already in evidence.

The other two cases upon the question of comparison of cross-marks as signatures will be found to be contrary to the decision in *RE HOPKINS' WILL*.

The report of the case of *Little v. Rogers* (1895) 90 Ga. 95, 24 S. E. 856, decided, as was *RE HOPKINS' WILL*, under a statute permitting the comparison of "handwriting" (Ga. Code 1895, § 5247), is as follows: Promissory notes found among the papers of an illiterate deceased person, purporting to have been signed by him with his mark and paid by him are, on the trial of an action against his administrator upon another promissory note also purporting to have been signed by the intestate with his mark, admissible in evidence for the purpose of comparing the marks on these notes with that affixed to the note in suit, the defense to the action being that this latter note was a forgery. The genuineness of the marks upon the notes offered for this purpose might be inferred from the facts above recited, and it was not absolutely essential to show by direct proof that they were actually made by the deceased. In other words, the execution of the notes by making marks to 65 L. R. A.

them could be proved by circumstantial, as well as direct, evidence.

And in Oregon a similar decision has been made. In *State v. Tice* (1897) 30 Or. 457, 43 Pac. 867, the defendant was indicted for forging the signature, made by a mark, to a will, and a genuine will was offered and admitted in evidence for the purpose of affording a standard of comparison of the alleged forged mark with the signature mark subscribed to it. It was held that this will was improperly admitted in evidence for comparison under the Oregon statute (Hill's Anno. Codes & Statutes, § 765), providing that comparison of "handwriting" may be made with "writings admitted or treated as genuine" by the other party; but the decision upon this point was merely because it did not appear from the record that the defendant had "admitted or treated" the will as genuine; and the section of the same statute (Hill's Anno. Codes & Statutes, § 764) providing for the means of proof of "handwriting" was expressly held to extend to the cross-mark in question in the case. The opinion says: "Considering the manner in which marks of persons incapable of writing their own signatures are usually made, by merely touching the pen while the scrivener forms the character, it is a matter of doubtful propriety whether any persons ought to be allowed, as a matter of evidence, to identify such a mark as a handwriting; but the mark of some persons, by reason of methods of their own adoption in its formation, and its inherent peculiarities, might be capable of identification, and we are of the opinion that such evidence ought to be permitted to go to the jury, but the attending circumstances touching the habits of the person whose mark is in the balance, his accustomed manner of making the same, and the peculiarities attending it which render it capable of identification, should be carefully considered and scrutinized in determining the weight to be ascribed thereto."

From this it appears that *State v. Tice* may be said to be opposed to *RE HOPKINS' WILL*, upon both grounds of the decision in that case.

II. Comparison of spelling.

Where the origin of a writing whose authorship is disputed is sought to be proved by means of the differences or similarities in its spelling, observed upon comparison with writings proved to have been made by the person alleged to have

is v. *Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Jackson v. Osborn*, 2 Wend. 555, 20 Am. Dec. 649; *Harrick v. Malin*, 22 Wend. 388; *Waring v. Smyth*, 2 Barb. Ch. 119; *Tillou v. Clinton & E. Mut. Ins. Co.* 7 Barb. 564; *Acker v. Ledyard*, 8 Barb. 514; *Van Buren v. Cookburn*, 14 Barb. 118; *Small v. Sloan*, 1 Bosw. 350; *O'Donnell v. Harmon*, 3 Daly, 424; *Taylor v. Crowninshield*, 5 N. Y. Legal Obs. 209; *Pease v. Barnett*, 27 Hun, 378; *Gowdey v. Robbins*, 3 App. Div. 353, 38 N. Y. Supp. 280; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 123, 21 N. E. 168; *National Ulster County Bank v. Madden*, 114 N. Y. 280, 21 N. E. 408; *Gleason v. Hamilton*, 138 N. Y. 353, 21 L. R. A. 210, 34 N. E. 283.

Alterations in a will complete without them are presumed to have been made after execution. The burden of proof is on those seeking to establish a will containing apparent defects to overcome such presumption by proof direct and positive.

Taylor v. Crowninshield, 5 N. Y. Legal Obs. 209; *Re Tonnele*, 5 N. Y. Legal Obs. 254; *Re Carver*, 3 Misc. 567, 23 N. Y. Supp. 753; *Re Wetmore*, 5 Redf. 544; *Dyer v. Erving*, 2 Dem. 160; *Re Lang*, 9 Misc. 521, 30

N. Y. Supp. 388; *Re Barber*, 92 Hun, 489, 37 N. Y. Supp. 235; *Re Wilcox*, 131 N. Y. 610, 30 N. E. 101; *Cooper v. Bockett*, 4 Moore P. C. C. 419; *Doe ex dem. Shailcross v. Palmer*, 15 Jur. 836, 16 Q. B. 747; *Williams v. Ashton*, Johns. & H. 115; *Greville v. Tylee*, 7 Moore P. C. C. 320; *Christmas v. Whinyates*, 3 Swabey & T. 81; *Simmons v. Rudall*, 1 Sim. N. S. 115; *Burgoyne v. Shouler*, 1 Rob. Eccl. Rep. 5, 3 Notes of Cases, 201; *Baptist Church v. Robbarts*, 2 Pa. 110; *Evan's Appeal*, 58 Pa. 238; *Tomlinson's Estate*, 133 Pa. 245, 19 Atl. 482; *Glasen's Estate*, 13 W. N. C. 79; *Underhill, Wills*, § 268; *Page, Wills*, 432; *Jarman, Wills*, 117.

The presumption was that the cancelation was done by Robert E. Hopkins, the testator, and it was necessary that that presumption be either repelled or rebutted.

Lewis's Goods, 1 Swabey & T. 31; *Morton's Goods*, L. R. 12 Prob. Div. 141; *Hobbs v. Knight*, 1 Curt. Eccl. Rep. 768; *Muh's Succession*, 35 La. Ann. 394, 48 Am. Rep. 242; *Re Cook*, 5 Clark (Pa.) 1; *Harris's Goods*, 3 Swabey & T. 485; *Williams v. Tyley, Johns. V. C. (Eng.)* 530; *Semmes v.*

written the disputed writing, a problem is met which is closely related to that of the comparison of handwritings, which is concerned with the character of the handwriting itself; that is to say, with the formation of the letters and figures themselves, as distinguished from the choice of the letters and figures and the succession in which they are used.

There are several clear distinctions to be observed in this method of proof of handwriting by the comparison of the spelling. In the first place, there is no occasion for the use of expert or opinion witnesses of any kind, since the habit of spelling a certain word in a particular way is capable of proof as a fact; without the necessity for the opinion of anyone to establish it, as is the case where proof of the writing is attempted by means of the character of the handwriting itself; and as a result of this difference another follows, namely, that the comparison of spelling is wholly a matter for the jury. And, again, the spelling having in itself no relation to the character of the handwriting, proof may be made by comparison of printed documents, or by comparison of documents otherwise copied by indifferent persons.

But in spite of these distinctions between the two kinds of comparisons, the question of comparison of spelling is almost always embarrassed by the presence of the other question of handwriting comparison, since, when the spelling of a manuscript is compared with that of another, the character of the respective handwritings will inevitably be compared, and the latter consideration has generally been considered to be the more important one, and prevails in the decision of the two questions together. But it seems that, where the question of spelling alone has been involved, the evidence has been considered competent and of great weight.

Many of the cases are upon the border line of the two methods of proof, and it is difficult to draw the line between what is to be consid-

ered simply a matter of spelling and what of writing; and so we find, in *Da Costa v. Pym*, *Norris's Peake, Ev.*, Appx. xxvi., the misuse of capitals and small letters treated as a matter of "the comparison of handwriting."

In *Smith v. Fenner* (1812) 1 Gall. 170, Fed. Cas. No. 13,046, where the alteration of a will by a devisee was in question, the plaintiff's counsel offered witnesses acquainted with the handwriting of the scribe who drafted the will to prove that the altered word was not in his handwriting, and the witnesses mainly relied on the manner of forming the letter "t," and the use of double hyphens. To rebut this evidence, the defendant offered witnesses who also were well acquainted with the scribe's handwriting, and swore that certain deeds then in their possession, which they produced to the jury, were the handwriting of the scribe, and contained the peculiarity as to the "t" and the hyphens observable in the will, and that they had frequently known the scribe to write in that manner. The plaintiff's counsel objected to the production of these deeds to the jury, because it was a mere comparison of handwriting. But Story, J., overruled the objection, and said: "Nothing is clearer than that this is not a mere comparison of hands. The witnesses swear as to facts and peculiarities of handwriting, and produce the best possible proof of their own accuracy."

But in *Jackson ex dem. Parker v. Phillips* (1828) 9 Cow. 94, a signature, "Abraham Barnes," which was offered for comparison with a deed signed "Abraham Barnes," was rejected by the court on the ground that the result would be a comparison of handwriting, which he held inadmissible, under the prevailing rule limiting comparison of handwriting to writings in evidence in the case.

Brookes v. Tichborne (1850) 5 Exch. 929, 14 Jur. 1122, is the leading English case. The defendant in an action for a libel, committed in charging the plaintiff with having libeled the

Semmes, 7 Harr. & J. 388; *Re Kirkpatrick*, 22 N. J. Eq. 463; *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; *Woodfill v. Patton*, 76 Ind. 575, 40 Am. Rep. 269; *Re Olmstead*, 122 Cal. 224, 54 Pac. 745; *Baptist Church v. Robbarts*, 2 Pa. 110; *Evans's Appeal*, 58 Pa. 238; *Re Brookman*, 11 Misc. 675, 33 N. Y. Supp. 575; *Re Clark*, 1 Tucker, 445; *Re Philp*, 46 N. Y. S. R. 356, 19 N. Y. Supp. 13.

Every presumption was against the theory of cancelation by any person other than testator, and such theory could be maintained only by positive proof.

Hard v. Ashley, 88 Hun, 107, 34 N. Y. Supp. 583; *Timon v. Claffy*, 45 Barb. 438; *Rickards v. Mumford*, 2 Phillim. Eccl. Rep. 23; *Moore v. De La Torre*, 1 Phillim. Eccl. Rep. 375; *Stephens*, Dig. Ev. art. 94; *Shultz v. Hoagland*, 85 N. Y. 464; *Morris v. Talcott*, 96 N. Y. 100; *People ex rel. Edison General Electric Co. v. Barker*, 141 N. Y. 251, 36 N. E. 196; *Bernheimer v. Rindskopf*, 116 N. Y. 428, 22 N. E. 1074; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Shultz v. Hoagland*, 85 N. Y. 465; *McIntyre v. Buell*, 132 N. Y. 192, 30 N. E. 396; *Re Mahstedt*, 67 App. Div. 176, 73 N. Y. Supp. 818; *Henry v.*

Henry, 8 Barb. 588; *Bank of Silver Creek v. Talcott*, 22 Barb. 550; 1 Greenl. Ev. §§ 34, 35, 80.

Messrs. Alexander & Magill, with *Mr. Clarence S. Davison*, for respondent *Fanny W. Hopkins*:

The will was not found in such a place and under such circumstances as raise the presumption of cancelation by the testator.

Throckmorton v. Holt, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. Rep. 474; *Hitchings v. Wood*, 2 Moore P. C. C. 355.

The testimony produced before the court overwhelmingly outweighs the presumption that testator canceled his signature *animo revocandi*, and justifies the probate.

Presumptions of this sort weigh lightly, and they may be rebutted by: Proof of the actual facts; declarations and conduct of the testator himself; the conduct and admissions of custodians of the will.

Schouler, Wills, § 401.

Presumptions are resorted to for the purpose of supplying the want of positive proof.

Grier v. Pennsylvania Coal Co. 128 Pa. 98, 18 Atl. 480.

The presumption, if any, that the will of

defendant, pleaded justification, and to support his plea, and to show that the letter containing the libel upon him was written by the plaintiff, relied upon the fact that upon several occasions the plaintiff had been in the habit of mis-spelling the defendant's name by improperly adding a second "t," spelling it Titchborne; and, for the purpose of showing this peculiarity, offered in evidence several letters, which he proved to have been written by the plaintiff, but which, not being in evidence in the cause, would not have been proper for comparison of handwriting under the English rule existing at that time. This evidence was objected to and rejected, and, in making absolute a rule for a new trial, the court of exchequer (Parke, B.) said: "On showing cause it was hardly disputed that, if a habit of the plaintiff so to spell the word was proved it was some evidence against the plaintiff to show that he wrote the libel. Indeed, we think that proposition cannot be disputed, the value of such evidence depending on the degree of peculiarity in the mode of spelling, and the number of occasions in which the plaintiff had used it. But it was objected that the mode of proof of that habit was improper, and that the habit should be proved, as the character of handwriting is, not by producing one or more specimens and comparing them, but by some witness who is acquainted with it from having seen the party write, or corresponded with him. But we think this is not like the case of the general style and character of handwriting. The object is not to show similarity of the form of the letters and mode of writing of a particular word or words, but to prove a peculiar mode of spelling a word, which might be evidenced by the plaintiff having orally spelled it in a different way, or written it in that way once or oftener in any sort of characters, the more frequently the greater the value of the evidence. For that purpose, one or more specimens written by him

with that peculiar orthography would be admissible."

In a prosecution for depositing scurrilous postal cards in the mail, the cards, when put in evidence showed certain peculiarities of spelling, and it was held to be competent to introduce and prove other writings of the defendant containing identical errors in spelling, for the purpose of connecting the defendant with the cards which formed the subject of the charge. This was notwithstanding the rule prevailing in the United States courts, limiting comparison to writings already in the case. *United States v. Chamberlain* (1874) 12 Blatchf. 390, Fed. Cas. No. 14,778.

And in a jurisdiction where the same general rule prevails it has been held that, after a witness has sworn that a signature in dispute is genuine, he may properly be shown, on cross-examination, other and genuine signatures of the same person, and asked whether they were the signatures upon which he has based his opinion, and whether the spelling in them is not different from the spelling in the disputed writing. *Bevan v. Atlantic Nat. Bank* (1892) 142 Ill. 302, 31 N. E. 679. The court said in this case: "No reason is perceived why it was not competent to establish such fact on cross-examination, for the purpose of testing the soundness of the opinion given by the witnesses that the signature to the note in question was genuine. In many cases, in order to ascertain the truth, and arrive at a correct result, it is necessary that considerable latitude be given in the cross-examination of witnesses in order to test the accuracy of their evidence. The genuineness of the signature of the several notes to which the attestation of the witnesses was called was not in controversy, and the purpose was not to prove a signature by comparison, but, as was done in *Melvin v. Hodges* (1874) 71 Ill. 425, to test the accuracy of the witness's opinion or judgment."

Robert E. Hopkins was canceled by himself would have been much stronger had the will been found canceled on his person or locked up with his other private papers in his box at the Produce Exchange Safe Deposit Company's.

The doctrine of presumption of revocation by a testator does not arise under such facts as are presented in this case.

Throckmorton v. Holt, 180 U. S. 552, 584, 45 L. ed. 663, 678, 21 Sup. Ct. Rep. 474.

In its final analysis, "writing" is an expression of ideas by means of visible letters, signs, symbols, characters, or marks.

Whether the disputed writing be simulated, disguised, or in cipher, or a mark made by one able or unable to write, the rule is well settled at common law that the opinion of experts is admissible, provided the comparison is made with a standard proved to the satisfaction of the court to be genuine.

Lansing v. Russell, 3 Barb. Ch. 325; *Kowling v. Manly*, 49 N. Y. 192, 10 Am. Rep. 346; *Jackson ex dem. Van Dusen v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330; *Com. v. Webster*, 5 Cush. 301, 52 Am. Dec. 711; *Com. v. Nefus*, 135 Mass. 533; *Lyman v. Lyman*, 9 Conn. 55; *Gervais v. Baird*, 2 Brev. 37; *Paisley v. Snipes*, 2 Brev. 200; *Strong v. Brewer*, 17 Ala. 706; *King, Jackson, Prosecutor v. Cator*, 4 Esp. 117; *George v. Sur-*

rey, Moody & M. 516; *Dubois v. Baker*, 30 N. Y. 381.

In order to secure the probate of the will of Robert E. Hopkins it was not necessary for the proponent to fully establish by evidence, to the satisfaction of the surrogate, that the will was not canceled by the testator, or that it was actually canceled by a stranger to the will.

Collister v. Fassitt, 163 N. Y. 286, 57 N. E. 490.

Mr. James MacGregor Smith, for respondents American Board of Foreign Missions *et al.*:

There was no error committed in receiving the testimony of Mr. Carvalho, the handwriting expert.

People v. Molineux, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286; *Jackson ex dem. Van Dusen v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330; *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470; *McKay v. Lasher*, 42 Hun. 270; *Dresler v. Hard*, 127 N. Y. 235, 12 L. R. A. 456, 27 N. E. 823.

Messrs. Edgcomb & Rafferty, for respondents Pompey Congregational Church *et al.*:

The marks in question do not of themselves constitute a revocation of the will.

Jackson ex dem. Howard v. Holloway, 7 Johns. 394; *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395.

Under the facts and circumstances of this

And after the prosecuting witness in a trial for forgery had denied the authorship of the forged papers, and had pointed out instances wherein the style of writing and spelling differed from his own, and the prisoner, to contradict him, introduced other papers written by the witness which corresponded in these particulars with the documents alleged to have been forged, the prosecution then had the right to show that the papers introduced by the prisoner had been made to resemble the forged writings by alterations and erasures. *Pate v. People* (1846) 8 Ill. 644.

But in some courts in which comparison of handwriting with extraneous writings is not allowed, comparison of spelling has been excluded as an incident of the comparison of the character of the handwriting. To this effect are *State v. Miller* (1870) 47 Wis. 530, 3 N. W. 31, and *Matlock v. Glover* (1885) 63 Tex. 231.

On the probate of a will, the execution of which was denied, it was held that a party might prove that the deceased always, in writing, contracted the words "it is" so as to make them "its," but might not put the letters of the deceased into the hands of the jury for comparison, although admitted in evidence for other purposes. This ruling, however, in excluding the standards from the jury is owing solely to the unique North Carolina rule by which the jury are not allowed to see any written evidence, but the evidence must be only read to them. *Outlaw v. Hurdle* (1853) 46 N. C. (1 Jones L.) 150.

In Virginia, proof that the defendant in a trial for forgery had, upon being requested to do so by the mayor before arrest, written the

name of the person whose name was alleged to have been forged, and had misspelled it in the same way in which it was misspelled in the forgery, was admissible. *Sprouse v. Com.* (1886) 81 Va. 374. And it may be assumed that now, under the rule in Virginia which allows comparison with any writings proved to be genuine, the writing itself would be admissible to go to the jury for comparison.

And where proof was admitted that a party wrote "hit" for "it" in the disputed document, and also in a document which a witness, called to testify to his handwriting, had seen him write, the court said: "And slightly as counsel treat the identity of orthography, writing 'hit' for 'it' in both documents, it is a pretty decided *hit* after all." *Reld v. State* (1856) 20 Ga. 681.

In *Bradford v. People* (1896) 22 Colo. 157, 43 Pac. 1013, where one accused of forgery was compelled to write before the jury upon cross-examination, the court declared: "The benefit of this kind of cross-examination is well illustrated in this case. The check alleged to have been forged was for the sum of \$24.60, the word 'four' in the check having been written 'fourre,' and in the writing executed by the defendant upon the witness stand the same orthography is used."

Cases in courts in which comparison, generally speaking, has been allowed, where spelling has been compared as an inevitable incident to the comparison of the character of the handwriting, are *Machin v. Grindon* (1756) 2 Ad. d. 100, *Eccl. Rep.* 53, note, and *Caldwell v. State* (1890) 28 Tex. App. 506, 14 S. W. 122.

L. B. R.

case, there is no presumption of revocation by the testator; the burden is on the contestant to show that the marks in question were made by the testator, with the intent and for the purpose of revoking the will.

Throokmorton v. Holt, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. Rep. 474; *Hitchings v. Wood*, 2 Moore P. C. C. 355; *Johnston v. Johnston*, 1 Phillim. Eccl. Rep. 447; *Bennett v. Sherrod*, 25 N. C. (3 Ired. L.) 303, 40 Am. Dec. 410.

No error was committed in admitting the evidence of the witness Carvalho.

Lawson, Ev. 2d ed. p. 350; *State v. Tice*, 30 Or. 457, 48 Pac. 367; *Strong v. Brewer*, 17 Ala. 706; *George v. Surrey*, Moody & M. 516; *Lansing v. Russell*, 3 Barb. Ch. 325.

Haight, J., delivered the opinion of the court:

Robert E. Hopkins died at Tarrytown, in this state, on the 9th day of May, 1901. He was possessed of a large estate, and left, him surviving, Fanny W. Hopkins, his widow, and Robert E. Hopkins, Jr., his son, of the age of thirteen years, his only heirs at law and next of kin. He, in company with other gentlemen, organized the Tide Water Oil Company and the Tide Water Pipe Company, and the greater portion of his time was occupied in attending to the business of those companies. His desk and office was in a room of the building in the city of New York in which the business of the companies was chiefly transacted. He had two safe deposit vaults,—one in the city of New York, and the other at Tarrytown,—and it was his custom to keep his valuable papers in one of those vaults. After his death a search was made for his will. It was not found in either of the safe deposit vaults, but the paper now propounded as his will was finally found, the second or third day after his funeral, in a little drawer under his roller-top desk in his office. When found, his signature was canceled by 14 nearly perpendicular marks with pen and ink, drawn across the letters of his signature. The paper is dated the 14th day of November, 1891, and undoubtedly it was executed as his last will and testament at that date. And the only question of fact presented for the determination of the court is as to whether his signature thereto was canceled by him with the intention of revoking the will.

The finding of the will in the testator's desk, with his signature canceled, raised the presumption that the cancelation was done by him with the intention of revoking it. Williams on executors (vol. 1, p. 85) says: "If a testament was in the custody of the testator, and upon his death it is found among his repositories, canceled or defaced,

the testator himself is to be presumed to have done the act; and the law presumed that he did it *animo revocandi*." In Redfield on Wills (p. 307) it is said: "The rule of evidence in the ecclesiastical courts in regard to presumptive revocations, from the absence or mutilation of the will, seems to be that if the will is traced into the testator's possession and custody, and is there found mutilated in any of the modes pointed out in the statute for revocation, or is not found at all, it will be presumed the testator destroyed or mutilated it *animo revocandi*; but, if it was last in the custody of another, it is incumbent upon the party asserting revocation to show the will again in the testator's custody, or that it was destroyed or mutilated by his direction." See also 1 Jarman, Wills, p. 119, to the same effect.

Upon the trial the presumption that the will was revoked by the testator was sought to be overcome by showing that a previous search of the desk was made for the purpose of discovering the will, and that it was not then found, from which the claim is made that the will must have been in the possession of some other person than the testator, and that it was subsequently placed in the desk, with the signature canceled. It appears that two searches of the desk were made,—the first by opening the drawers and looking in, but not by carefully taking out the papers and examining them. The next day a more careful search was made, after looking through the deposit vaults. At this time the papers were taken out and examined, but the will was not found. This examination was made by Mr. Warren, who occupied a desk in the same room with the decedent, and who had been connected with him in business for twenty-five years. It was made in the presence of the widow and her brother, and was concluded between 1 and 2 o'clock in the afternoon. About 4 o'clock the same afternoon Mr. Warren went again to the desk to do some writing, and, he says, mechanically he put his hand on the little drawer, and, on pulling it open, saw the blue envelope, which he took out, and found to contain the will. The drawer appears to have been in little use, for it contained only a few pens and an ink eraser, besides the envelope containing the will. It was not shown that any person had possession of the instrument, or had any motive to cancel it, other than the son, who became chiefly benefited by its cancelation. It is not pretended that it was done by him, as he was only thirteen years of age, and he was not shown to have been at the office of his father after his death and before the instrument was found. It is therefore claimed upon the part of the guardian *ad litem* that

the will was overlooked during the previous examinations of the desk, and that the presumption in law that the will was canceled by the testator was not overcome by the evidence.

This brings us to the consideration of the other evidence given on behalf of the proponent to establish that the cancelation was not done by the testator. This evidence was given by the witness Carvalho, an expert in inks and handwriting. He was asked the following questions: "In your opinion, as an expert, were those perpendicular marks made by the same person as wrote the signature on that will?" This was objected to by the guardian *ad litem*, and the objection was overruled, and an exception taken. He answered: "Judging from the material at hand,—the signature of the will,—I say not. Q. Judging from the signature 'R. E. Hopkins,' as appears on the first page, and the signature 'Robt. E. Hopkins,' as it is signed opposite the seal on the instrument, have you an opinion as to whether the marks—the fourteen marks—are written by the same hand?" To this the guardian *ad litem* also objected, and the same was overruled, and exception taken. He answered, "I have an opinion." He was then asked, "What is that opinion?" Same objection, ruling, and exception. He answered, "That they were not." The will was drawn by a lawyer, and was not in the handwriting of the testator. The signature appears upon the instrument at the end thereof, opposite the seal, and in the margin under the words "to the effect that an erasure was made before signing it." These signatures were written in a plain, bold hand ten years before the testator's death, and were the only writings which the expert had before him with which to compare the cancelation marks. Were these marks "writings," within the meaning of chapter 36 of the Laws of 1880, and chapter 555 of the Laws of 1888, which permit the comparison of writings by experts? The appellate division appears to have been of the opinion that they were. But we do not understand that such was the purpose or intent of these statutes. These enactments were considered by this court in the case of *People v. Molineux*, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286, in which the purpose of these statutes was pointed out. Prior to their enactment, comparison was permitted only with writings in evidence which were material upon some of the issues of the case. The expert was therefore limited in his investigation to an examination,—in many instances, to but one or two specimens. The purpose of these statutes was to give him a broader field for his investigation, by permitting other writings, which were not material upon the issues of the case, to be in-

troduced in evidence solely for the purpose of comparison. The statutes do not purport, nor were they intended, to change the meaning of the word "writing," as it had theretofore been used and understood, or to authorize comparison with anything that was not previously regarded to be the subject of comparison.

The chief case relied upon in support of the admissibility of the testimony of the expert is that of *Lansing v. Russell*, 3 Barb. Ch. 325. In that case the action was brought to set aside two conveyances of real estate executed by C. Lansing shortly before his death, he then being ninety years of age. The deeds were executed by his making his cross opposite the seal. The crosses were proved by a witness who saw the deeds executed. To rebut this, the complainant produced upon the trial several witnesses, who were cashiers of banks and experts in detecting forgeries and counterfeits, to testify that in their opinion the marks made to these deeds were not the marks of a person of the age of Mr. Lansing. The chancellor said with reference thereto: "I think the testimony of the experts, who had been in the habit of examining signatures and marks of young persons as well as of aged ones, to prove that the marks to these deeds could not have been the genuine marks of the unaided hand of old age and decrepitude, was properly received, upon the trial, as legal evidence to establish that fact." The testimony of these experts, however, was rendered unimportant for the reason that the witness who testified to the execution of the deed stated that Mr. Lansing, in making his mark, asked his son, who was standing by, to steady his hand, and thereupon his son took hold of his hand and assisted him in making the mark. It is true that this case is cited in the case of *Kovsing v. Manly*, 49 N. Y. 192-203, 10 Am. Rep. 346, as is also that of *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317, but not with approval, as is claimed, but for the purpose of showing that the question then under consideration was not controlled by those cases. It is apparent that the case of *Lansing v. Russell* does not cover the question now presented. It is quite possible that an expert can determine whether a cross was made by a person in the prime of life, with a steady hand, or by a person of advanced age, with a feeble, trembling, or shaking hand. Such testimony is not based upon the comparison of writings, but is based upon the condition of the individual, and therefore the case is not decisive of that which we now have under review.

An expert may doubtless be able to determine whether one mark is made over another, whether a mark is made by a trem-

bling or steady hand, and, if familiar with inks, he may also be able to determine nearly the age or the time that the writing was made. It has also been held that the mark of an individual to an instrument may be proved by those who have seen him make his mark to other instruments, where the mark contains some peculiarity which they have noticed and observed, thus enabling them to distinguish it from other marks. *Strong v. Brewer*, 17 Ala. 706; *Paisley v. Snipes*, 2 Brev. 200; *George v. Surrey*, Moody & M. 516. But this class of evidence is dependent upon the familiarity of the witnesses with the peculiarities of the persons making the cross, and is not the subject of the opinion of experts whose only knowledge or familiarity of writings is obtained by comparison. In the case of *Jackson ex dem. Van Dusen v. Van Dusen*, 5 Johns. 144-155, 4 Am. Dec. 330, Van Ness, J., in delivering the opinion of the court, says: "The testator having made his mark, no evidence, of course, could be given or expected to prove his handwriting." In that case one of the witnesses to the will, Samuel Wheeler, signed the same by making his initials, "S. W." The signing of the will as a witness by Wheeler was proved by one Van Dyck, who had seen him sign the initial letters of his name, and described the peculiarities of the characters as made by him. In this way he identified the letters as having been made by Wheeler. This, the judge said, was not the proof of Wheeler's signature by comparison of hands. In *Jackson v. Jackson*, 39 N. Y. 153-160, Woodruff, J., says that, "when it is necessary to prove the execution of an instrument by a 'marksman,' the proof is evidence of the making of the mark; the writing of the name around it is no essential part of the evidence." In the case of *Shinkle v. Crook*, 17 Pa. 159, the will of Susan Crook was executed by making her mark. A witness who was not present at the execution of the will was permitted to testify to his belief that the mark was genuine. His belief was founded upon his acquaintance with the mark, claiming that it had certain peculiarities which distinguished it from others. The judgment was reversed upon this ground. Lewis, J., who delivered the opinion of the court, says: "We have gone far enough in receiving the bare belief of a witness, founded upon a comparison of the writing in dispute, with some specimen of which he may have but a faint recollection. Where a mark, on inspection, appears to have nothing in its construction to distinguish it from the ordinary marks used by illiterate persons to authenticate their contracts, it is not the subject of this description of evidence." In the case of *Gilliam v. Perkinson*, 4 Rand. (Va.) 325, Carr, J., 65 L. R. A.

says: "In the case before us, the witness has made his mark. Now, I ask, how could this be proved? There is a distinct individual character in the handwriting of every man who can write; and, with those who have written much, that character is so fixed and striking that persons acquainted with it will feel no more difficulty in recognizing it than in knowing the face of the writer. Where the name of a witness is written by himself, therefore, it may generally be proved with something like certainty. But here there was no writing. The name of the witness is written by another, and he makes a cross-mark,—perhaps the first and the last he ever made in his life. To attempt to prove such a signature as this would be a mockery of justice." In the case of *Jones v. Hough*, 77 Ala. 437, the remarks of the judge in *Gilliam v. Perkinson*, are quoted with approval, as is also the case of *Watts v. Kilburn*, 7 Ga. 356, in which it is said that "where the name of a person is written by another, and he makes a cross-mark, there is nothing distinctive to fix its identity." In *Travers v. Snyder*, 38 Ill. App. 382, the question was whether there can be a comparison between cross-marks or a mere mark and another. With reference thereto the court said: "How can simply a mark be recognized as that of any particular person, without any proof of any particular characteristic by which it can be distinguished? . . . It seems to us that it would be very unsafe, and lead to dangerous results, to allow such comparison to be made and taken as evidence, unless at least some proof were made that the defendant's mark had some established characteristics, like a handwriting, that would enable it to be recognized. A mere cross or mark cannot be identified, and it therefore stands for itself alone."

In the early period of the English law, expert testimony was unknown; but, as the world advanced in education, the courts commenced to avail themselves of the knowledge of others pertaining to scientific matters which was not possessed by ordinary individuals. From this beginning expert testimony has continued to grow in importance and in use until the present time. It, however, has met with much criticism on the part of the courts, and it has been denounced as misleading and unsatisfactory in numerous cases. It is, however, useful in a variety of cases, and, within reasonable bounds, should be encouraged. But we have now reached a case where it is sought to establish that mere marks made over the signature were not made by the person who wrote the signature, by the opinion of an expert. This is carrying the use of the opinions of experts beyond any reported case to

which our attention has been called, and we now think that the time has come in which a limitation should be placed upon this class of evidence. The general rule which admits of the proof of the handwriting of a party by experts who have compared the writing with other writings of the person is founded on the reason that in every person's writings there is a peculiar prevailing characteristic which distinguishes it from the handwritings of every other person, and therefore an expert, by studying characteristics as they appear in the writings of the person, may be able to determine with some degree of certainty as to whether a writing sought to be proved contains any of the characteristics of that of which he has examined and studied. But mere perpendicular marks or scratches, used either perpendicularly or horizontally over a signature for the purpose of canceling it, do not contain the characteristics necessary in the formation of letters to enable an expert or any person to speak with any degree of certainty with reference to the identity of the person who made the marks. In the case before us it is quite probable that the signature was canceled by the perpendicular marks ten years, or thereabouts, after the signature was written. The expert concedes this in giving the age of the ink marks over the signature, and yet, looking at the letters forming the signature, made ten years before, he was allowed to give his opinion to the effect that the marks were not made by the same person who wrote the signature. This, we think, is carrying the privileges of an expert too far, and that the testimony is too dangerous and uncertain to be received as evidence and considered by either the court or jury.

The judgment of the Appellate Division and the decree of the Surrogate's Court should be reversed, and the proceedings remitted to Westchester County for a trial before a jury in the Supreme Court to determine whether the will in question was revoked by the testator; costs in all of the courts to abide the final award of costs.

Parker, Ch. J., and O'Brien, Bartlett, Vann, Cullen, and Werner, JJ., concur.

*Re Application of Roland B. MOLINEUX, Aptt.,
for Mandamus to
Cornelius V. Collins, Superintendent of
State Prisons, Respt.*

(177 N. Y. 395.)

1. One convicted of murder, and re-

NOTE.—This case seems to be the first of its kind. No precedents have been found for it. 65 L. R. A.

manded to the warden of the state prison to be kept in solitary confinement awaiting execution, is within the operation of a statute requiring prisoners received under sentence in the state prison to be measured and described in accordance with the Bertillon system for the identification of criminals.

2. The photograph, description, and measurement of one sentenced to a state prison, which the law requires the superintendent of prisons to secure and preserve, are a part of the public records which the superintendent has no power to remove or destroy, even though the prisoner's sentence is afterwards reversed, and he is subsequently acquitted of the charge against him.

3. Mandamus will not lie to compel a public official to surrender or destroy a record which his official duty requires him to preserve.

(February 16, 1904.)

A PPEAL by petitioner from an order of the Appellate Division of the Supreme Court, Third Department, affirming an order of a Special Term for Albany County refusing to require defendant to surrender records in his possession. *Affirmed.*

The facts are stated in the opinion.

Messrs. Scherer & Downs, for appellant:

There is no authority of law for taking the photograph of, or measuring, a person condemned to death.

Statutes should be so construed as to give effect to the purpose of the lawmakers.

Delafield v. Brady, 106 N. Y. 524, 15 N. E. 428; *Lake Shore & M. S. R. Co. v. Roach*, 80 N. Y. 339.

A person is never referred to as a convict or a criminal, unless he has been tried and convicted of crime and judgment of conviction has not been reversed or set aside, and the person has actually served a term of imprisonment in a prison because of such a judgment of conviction.

Parker v. Elmira, C. & N. R. Co. 165 N. Y. 279, 59 N. E. 81; *People ex rel. Olcott v. House of Refuge*, 22 App. Div. 254, 47 N. Y. Supp. 767; *People v. Koening*, 9 App. Div. 436, 41 N. Y. Supp. 283; *People v. Sheridan*, 15 N. Y. S. R. 938, 1 N. Y. Supp. 61; *People v. Burleigh*, 1 N. Y. Crim. Rep. 522; *People v. Quigg*, 59 N. Y. 88; *Caster-ton v. Vienna*, 163 N. Y. 368, 57 N. E. 622.

Appellant must have some remedy, and mandamus is the proper one.

An injunction would not lie.

Martin Fire Arms Co. v. Shields, 171 N. Y. 384, 59 L. R. A. 310, 64 N. E. 163; *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L. R. A. 478, 89 Am. St. Rep. 828, 64 N. E. 442; *People ex rel. Moulton v. New York*, 10 Wend. 395.

An action for damages would be inadequate.

People ex rel. Moulton v. New York, 10 Wend. 395.

High, Extr. Legal Rem. § 20; *People ex rel. Frost v. New York C. & H. R. R. Co.* 168 N. Y. 187, 61 N. E. 172; *People ex rel. Beck v. Coler*, 34 App. Div. 167, 54 N. Y. Supp. 639.

The writ of mandamus has been used to compel public officials to strike from the records under their control matters that do not properly belong therein.

People ex rel. Nostrand v. Wilson, 119 N. Y. 515, 23 N. E. 1064; *People ex rel. Lincoln v. Barton*, 44 Barb. 148; *People ex rel. Livingston v. Taylor*, 1 Abb. Pr. N. S. 200.

Messrs. John Cunnane, Attorney General, and *Sanford T. Church*, for respondent:

Mandamus is not the proper remedy for the relief sought.

People v. Parmerter, 158 N. Y. 390, 53 N. E. 40; *People ex rel. Harris v. Land Office Comrs.* 149 N. Y. 30, 43 N. E. 418; *People ex rel. McMackin v. Board of Police*, 107 N. Y. 235, 13 N. E. 920; *People ex rel. Hoffman v. Rupp*, 90 Hun, 145, 35 N. Y. Supp. 349, 749; *People ex rel. Sims v. Collier*, 175 N. Y. 196, 67 N. E. 309.

It devolved upon the relator to show, affirmatively, that there was a duty resting upon the Superintendent of Prisons to do the act sought to be compelled by the writ.

People ex rel. Joyce v. York, 27 Misc. 658, 59 N. Y. Supp. 418.

Vann, J., delivered the opinion of the court:

On the 16th of February, 1900, the appellant, Roland B. Molineux, was adjudged guilty of murder in the first degree, and sentence of death was pronounced against him. A warrant was at once issued to the warden of the state prison at Sing Sing commanding him to keep the said Molineux in solitary confinement until the time appointed for his execution, and to then put him to death in the manner provided by law. Before that time arrived enforcement of the sentence was stayed by the service of a notice of appeal to this court, which afterward reversed the judgment of conviction and ordered a new trial. The second trial resulted in an acquittal. During his imprisonment at Sing Sing a photograph was taken of Molineux, and he was measured according to the Bertillon system under the direction of the warden, who forwarded the negative, photograph, and measurements to the Superintendent of State Prisons at Albany, in whose office they have ever since remained as part of a collection

which embraces similar data relating to criminals who have been lawfully convicted under the laws of the state. Upon an affidavit setting forth these facts and alleging that said Molineux was unlawfully convicted, that the photograph was taken and measurements made against his wishes and without his consent, and that he is thus held out as a lawfully convicted criminal, a motion was made at special term for a peremptory writ of mandamus commanding the Superintendent of State Prisons "to remove the plates, photographs, and measurements . . . from the records of his office and deliver the same to the said Roland B. Molineux." The motion was denied, and upon appeal to the appellate division the order was unanimously affirmed "as a matter of law, and not in the exercise of discretion." By an appeal to this court from the order of the appellate division, the question of power to issue the writ is now before us for decision.

The Code of Criminal Procedure provides that when a death warrant is delivered to the agent and warden of a state prison he is required to keep the defendant named therein "in solitary confinement at the said state prison" until the infliction of the punishment of death upon him, or he is lawfully discharged. § 491. By the prison law the Superintendent of State Prisons is authorized to "make rules and regulations for a record of photographs and other means of identifying each convict received into said prisons." Laws 1889, p. 511, chap. 382, § 40. By an act passed in 1896, "to Facilitate the Identification of Criminals," the Superintendent of State Prisons is required to "cause the prisoners in the state prisons therein confined at the time this act takes effect, and all prisoners thereafter received under sentence, to be measured and described in accordance with the system commonly known as the Bertillon system for the identification of criminals." He is also required to "prescribe rules and regulations for keeping accurate records of such measurements at such prisons and in duplicate at his office in Albany and for classifying and indexing the same." Laws 1896, p. 401, chap. 440, § 1. The appellant claims that neither of the acts authorizing these methods of identification applied to him, because he was not a "convict" within the meaning of the earlier, nor a prisoner "received under sentence" within the meaning of the later. The Criminal Code, however, expressly refers to a prisoner confined in state prison under sentence of death as a "convict," and requires the warden to keep him "in solitary confinement at said state prison" during the definite period which must elapse before execution, and, in case

an appeal is taken, during the indefinite period which may elapse until it is decided. Code Crim. Proc. §§ 491, 507, 508. The object of the legislature, as expressed in the title of the act of 1896, was "to Facilitate the Identification of Criminals," so as to aid in retaking a prisoner after an escape. A prisoner under sentence of death is a criminal in the eye of the law so long as the sentence remains in force, because he has been adjudged guilty of a crime. As he may escape, the same as a convict whose only sentence is to imprisonment, he comes within the spirit of the law. He also comes within the letter, because he is "received under sentence," and "solitary confinement at said state prison" is a part of the sentence imposed by command of the statute. The legislature did not intend that those imprisoned for the most serious crime known to the law, even for safe-keeping and during a short period, should be exempt from the general rule designed to facilitate the recapture of escaped prisoners. The measurements and record, therefore, were made by authority of law, and became the property of the state, which paid "the necessary expenses incurred" for the purpose. Laws 1896, p. 402, chap. 440, § 2. They were public records, and were beyond the control of the Superintendent of Prisons, except for preservation and use. He had no power to destroy them, or give them away, or surrender them, even to one who, although under judgment of death when they were made, was finally adjudged not guilty. The custodian of a public record cannot deface it or give it up without authority from the same source which required it to be made. The statute directed the Superintendent to make the record, and when he made it the state made it, and it has not authorized him to destroy it under any circumstances, not even to relieve a citizen from an unjust reflection upon his character. It would be usurpation of power for him to surrender the record, or for the court to direct him to do so. If the position of the defendant is sound, where is the destruction of public records to end? What may become of the

indictment, the minutes of the clerk recording the verdict of guilty, and the judgment of conviction? May the death warrant be withdrawn from the custody of the warden, although it is the only authority he had for the imprisonment of Molineux while he was awaiting execution? Even the courts, which have control of their own records, do not direct one made through error to be physically destroyed, although they vacate it and direct that it shall be held for naught. Our order of reversal and the judgment acquitting the defendant are public records, open to the inspection of all, which neutralize every legal presumption against him arising from the judgment of conviction.

While the courts can command the Superintendent of Prisons to do his duty, it is not his duty to give up a record made under the authority of a statute, and, until the legislature makes it his duty to surrender the record in question, it should remain in his custody, because the state put it there, and has not authorized its removal. An innocent man accused of crime is sometimes compelled to make sacrifice and undergo suffering for the benefit of society. Like payment of taxes and service upon juries, it is part of the price paid for the privilege of living in a country governed by law. One, for the good of all, may be required to submit to imprisonment, incur expense, and endure mental distress, because the state cannot exist without the preservation of order, and order cannot be preserved without the punishment of the guilty, which necessarily involves, sometimes, the trial of the innocent. There is no relief for this apparent injustice except through the legislature, and to that body alone the appellant should look for relief from the annoyance of which he now complains.

The order appealed from should be affirmed, with costs.

Parker, Ch. J., and Gray, O'Brien, Haight, Martin, and Cullen, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

Ruth E. MACDONALD, *Petitioner*,
v.
TEFFT-WELLER COMPANY *et al.*, *Respts.*
(128 Fed. 381.)

**The obligation of a married woman,
not a free trader, to pay for goods**

which form part of a stock in trade with which she is carrying on business, which may, in equity, be enforced against her separate estate, is a "debt" within the meaning of the clause of the bankruptcy act relating to involuntary bankruptcy proceedings.

(March 1, 1904.)

NOTE.—As to what constitutes a debt provable in proceedings in bankruptcy, see also, in this series, *Noyes v. Hubbard*, 15 L. R. A. 394; *Barclay v. Barclay*, 51 L. R. A. 351; *Fite* 65 L. R. A.

v. Fite, 53 L. R. A. 265; *Atkins v. Wilcox*, 53 L. R. A. 118; *Cobb v. Overman*, 54 L. R. A. 369; *Colwell v. Tinker*, 58 L. R. A. 765; and *McKittick v. Cahoon*, 62 L. R. A. 757.

PETITION by defendant for a revision of bankruptcy proceedings instituted against a married woman who was carrying on business as a merchant. *Denied.*

Statement by **Pardee**, Circuit Judge:

Involuntary proceedings were commenced in the court below by filing the following petition:

"To the Honorable James W. Locke, Judge of the District Court of the United States for the Southern District of Florida: The petition of the Tefft-Weller Company, a corporation organized and existing under the laws of the state of New York, and Frederick A. Constable, Alfred G. Evans, and the estate of Hicks Arnold, partners doing business as Arnold, Constable, & Company, and John T. Sherman and Charles A. Sherman and Aaron L. Reid, partners doing business as Sherman, Reid, & Company, all of the city of New York and state of New York, respectively shows that Ruth E. MacDonald is a married woman, who, with her husband, M. G. MacDonald, has for many years resided in the city of Jacksonville, Duval county, Florida, and is a citizen and resident of said city, county, and state; that the said Ruth E. MacDonald for several years preceding the filing of this petition has been engaged in the business of buying, selling, and trading in dry goods, millinery, notions, bric-a-brac, and other goods, wares, and merchandise in the city of Jacksonville, Duval county, Florida, and has conducted said business in her own name, under the style of Mrs. M. G. MacDonald; that the said business, and said goods, wares, and merchandise, store, and office fixtures and furniture and store accounts are her separate personal property, and that the amounts due by said Ruth E. MacDonald in the conduct of said business to petitioners, hereinafter referred to, were incurred by her for the purchase price of the personal property, to wit, stock of goods in the store and business of said Ruth E. MacDonald, and went to the increase of her separate personal property; and that she therefore charged her separate property with the payment of the same; that the said Ruth E. MacDonald has for the greater portion of six months next preceding the date of filing this petition had her principal place of business and resided in the city of Jacksonville, Duval county, Florida, and the district aforesaid, and owes debts to the amount of \$1,000; that your petitioners are creditors of said Ruth E. MacDonald, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500; that the nature and amount of your petitioners' claim are as follows: That the 65 L. R. A.

claim of the Tefft-Weller Company consists of an open account for the sum of two hundred and thirty-seven and 21/100 dollars (237.21), and is for goods, wares, and merchandise sold and delivered by said the Tefft-Weller Company to said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald; that said goods, wares, and merchandise, so sold and delivered by said the Tefft-Weller Company to said Ruth E. MacDonald, went to the increase of her separate personal property, and she thereby charged her separate property with the payment of the same; that the claim of Frederick A. Constable, Alfred G. Evans, and the estate of Hicks Arnold, partners doing business as Arnold, Constable, & Company, consists of an open account for the sum of three hundred and thirteen and 12/100 dollars (\$313.12), and is for goods, wares, and merchandise sold and delivered by said Arnold, Constable, & Company to said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald; that said goods, wares, and merchandise, so sold and delivered by said Arnold, Constable, & Company to said Ruth E. MacDonald, went to the increase of her separate personal property, and she thereby charged her separate property with the payment of the same; that the claim of John T. Sherman and Charles A. Sherman and Aaron L. Reid, partners doing business as Sherman, Reid, & Company, consists of an open account for the sum of one hundred and eighty-one and 1/100 dollars (\$181.01), and is for goods, wares, and merchandise sold and delivered by said Sherman, Reid, & Company to said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald; that said goods, wares, and merchandise, so sold and delivered by said Sherman, Reid, & Company to said Ruth E. MacDonald, went to the increase of her separate personal property, and she thereby charged her separate property with the payment of the same. And your petitioners further represent that the said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald, is insolvent, and that within four months next preceding the date of filing this petition the said Ruth E. MacDonald committed an act of bankruptcy, in that she did heretofore, to wit, on the 26th day of May, 1903, while insolvent, execute and deliver to the Mercantile Exchange Bank, a corporation organized and existing under the laws of the state of Florida, and a creditor of the said Ruth E. MacDonald, doing business as Mrs. M. G. MacDonald, a chattel mortgage for forty-four hundred dollars (\$4,400.00), on the lease of Ruth E. MacDonald, in the name of Mrs. M. G. MacDonald, to store number 102 West Forsyth street, in the city of Jacksonville, Duval county, Florida,

and all of the personal property of said Ruth E. MacDonald, under the name of Mrs. M. G. MacDonald, therein contained, consisting, among other things, of dry goods, millinery, notions, bric-a-brac, vases, art household furnishings, and other merchandise and stock in trade, kept and exposed for sale in said storeroom, and also all office and store fixtures and furniture, safe, shelves, show cases, and furnishings, and also all such other personal property in said storeroom contained, said property being described in said mortgage as 'being the separate statutory property of the said Ruth E. MacDonald,' and that thereafter, to wit, on the 27th day of May, 1903, the said mortgage was recorded in the public records of Duval county, Florida, in Mortgage Book 11, at page 273; that said mortgage was given for the purpose and with the intent of securing and preferring the said Mercantile Exchange Bank over other creditors of the same class of the said Ruth E. MacDonald; that the effect of the enforcement of such mortgage will be to enable the said Mercantile Exchange Bank, one of the creditors of the said Ruth E. MacDonald, to obtain a greater percentage of its debt than any other of such creditors of the same class. Wherefore," etc.

Mrs. MacDonald appeared by counsel, and filed demurrer to the foregoing petition on the following grounds: "(1) There are not three or more citizens of the alleged bankrupt petitioners in the above-entitled petition; (2) that there are not three petitioners, creditors of the alleged bankrupt, parties to the above-mentioned petition; (3) that the 'Estate of Hicks Arnold' cannot be a party to this cause in such words; (4) that a partnership consisting partly of the 'Estate of Hicks Arnold' cannot be one of the three petitioners required by law in a petition for an involuntary adjudication in bankruptcy; (5) that a married woman residing in Florida cannot be adjudicated a bankrupt; (6) that there is no personal liability for her obligations resting upon a married woman residing and doing business within the state of Florida, which obligations would be enforceable against her, and that a married woman cannot be adjudicated a bankrupt; (7) that in this court a married woman not a free dealer cannot be adjudicated a bankrupt."

The court below overruled the demurrer, and this court is asked to revise the proceedings on the following grounds: "That a married woman residing in Florida cannot be adjudicated a bankrupt; that there is no personal liability for her obligations resting upon a married woman residing and doing business within the state of Florida, which obligations would be enforceable against

her, and that a married woman cannot be adjudicated a bankrupt; that in this court a married woman not a free dealer cannot be adjudicated a bankrupt."

Argued before *Pardee*, Circuit Judge, and *Speer* and *Newman*, District Judges.

Messrs. Francis P. Fleming, Francis P. Fleming, Jr., and William B. Owen, for petitioner:

Under the common law, a married woman cannot contract a debt for which she has a personal liability. The laws of Florida have not changed such disability, except in the case of a married woman who has been granted a license to manage her estate and become a free dealer.

Dollner v. Snow, 16 Fla. 86; *First Nat. Bank v. Hirschkovitz* (Fla.) 35 So. 22; *Lewis v. Yale*, 4 Fla. 418; *Re Goodman*, 5 Biss. 401, Fed. Cas. No. 5,540; *Re Howland*, 2 Nat. Bankr. Reg. 357, Fed. Cas. No. 6,791; *Scott v. Morley*, L. R. 20 Q. B. Div. 120, 57 L. J. Q. B. N. S. 43, 57 L. T. N. S. 919, 36 Week. Rep. 67, 4 Morrell, 286, 52 J. P. 230; *Re Gardiner*, L. R. 20 Q. B. Div. 249, 57 L. J. Q. B. N. S. 149, 58 L. T. N. S. 119, 36 Week. Rep. 142, 5 Morrell, 1; *Ex parte Jones*, L. R. 12 Ch. Div. 484, 48 L. J. Bankr. N. S. 109, 40 L. T. N. S. 790, 28 Week. Rep. 287, 44 J. P. 55.

Where, as in Florida, the law points out the method whereby a married woman may manage her estate, contract, sue, and be sued, and bind herself as if unmarried, a failure to pursue the law in that regard leaves her within the common-law disability which that statute provides the means of removing.

Re Slichter, 2 Nat. Bankr. Reg. 336, Fed. Cas. No. 12,943; *Re Kinkead*, 3 Biss. 405, Fed. Cas. No. 7,824; *Re Lyons*, 2 Sawy. 524, Fed. Cas. No. 8,649.

Messrs. Charles M. Cooper and John C. Cooper, for respondents:

Wherever, and to whatever extent, a married woman may incur debts and charge her separate property or estate in the carrying on of such business as is subject to the bankruptcy act, she may be put into involuntary bankruptcy.

Bradenburg, Bankr. p. 80, § 11; *Re Kinkead*, 3 Biss. 405, Fed. Cas. No. 7,824; *Las-trapes v. Blanc*, 3 Woods, 134, Fed. Cas. No. 8,100; *Re Goodman*, 5 Biss. 401, Fed. Cas. No. 5,540; *Re Howland*, 2 Nat. Bankr. Reg. 357, Fed. Cas. No. 6,791; *Re Collins*, 3 Biss. 415, Fed. Cas. No. 3,006.

Under the Constitution and laws of Florida a married woman may acquire separate property of her own, real and personal, by purchase or otherwise; and her personal property may be charged in equity, and

sold for debts incurred by her for the price of any property purchased by her.

Fla. Const. art. 11, §§ 1, 2; Fla. Rev. Stat. § 2070.

A married woman may conduct a mercantile business and incur debts in the purchase of goods. Such obligations of a married woman are debts.

Halle v. Einstein, 34 Fla. 589, 16 So. 554; *Halle v. Meinhard Bros.* 34 Fla. 607, 16 So. 559.

Proceedings in bankruptcy are regarded as proceedings in equity, and are to be governed by the rules and analogies of equity jurisprudence.

Re Schuyler, 3 Ben. 200, Fed. Cas. No. 12,494.

Pardee, Circuit Judge, delivered the opinion of the court:

The question presented is whether, under the facts alleged in the petition in this case, a married woman in the state of Florida, having separate statutory property, and engaging in trade, buying, and selling on her own account, but not a free dealer, can be adjudicated a bankrupt under the bankrupt law of 1898.

Under §§ 1505-1509, Fla. Rev. Stat. 1892, a married woman may have her disabilities removed, and she may have a license as a free dealer authorized to contract, sue, and be sued, and in all respects to bind herself as if she were unmarried. See *Martinez v. Ward*, 19 Fla. 175.

By article 2 of the Constitution of the state of Florida of 1885 it is provided:

"Sec. 1. All property, real and personal, of a wife, owned by her before marriage, or lawfully acquired afterward by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women.

"Sec. 2. A married woman's separate real or personal property may be charged in equity and sold, or the uses, rents, and profits thereof sequestered for the purchase money thereof; or for money or things due upon any agreement made by her in writing for the benefit of her separate property; or for the price of any property purchased by her, or for labor and material used with her knowledge or assent in the construction of buildings, or repairs, or improvements upon her property, or for agricultural or other labor bestowed thereon, with her knowledge and consent.

"Sec. 3. The legislature shall enact such laws as shall be necessary to carry into effect this article."

It does not appear that there has been 65 L. R. A.

any legislation under § 3 of said article, but "it is well settled," says the Florida supreme court in *First Nat. Bank v. Hirschowitz* (Fla.) 35 So. 22. "In an unbroken line of decisions, beginning with *Lucas v. Yale*, 4 Fla. 418, down to the present time, this court has held that 'a *feme covert* is not competent to enter into contracts so as to give a personal remedy against her.' As was said in *Dollner v. Snow*, 16 Fla. 86: 'At common law the promissory note of a married woman is void. The Constitution and statute of this state make no change in this respect. Neither at law, nor in equity, can she bind herself so as to authorize a personal judgment against her.' Under the rule laid down in these decisions, appellants could not have proceeded at law against the said married woman, Dora Hirschowitz, and hence could not have reduced their claims to judgment. Also see *Crawford v. Feder*, 34 Fla. 397, 16 So. 287."

In the headnotes to this report, which in Florida are prepared by the judges, No. 1 reads as follows: "At common law the promissory note of a married woman is void. The Constitution and statutes of this state make no change in this respect, unless said married woman shall have been made a free dealer. Neither at law nor in equity can she bind herself so as to authorize a personal judgment against her."

The court further says: "It is also the settled law of this state that 'where a married woman carries on business in her own name, having property employed in such business, and purchases goods upon her sole credit for the purpose of such business, her separate property may be subjected in equity to the payment of claims for money due for such purchases.' *Blumer v. Pollak*, 18 Fla. 707. See also *Staley v. Hamilton*, 19 Fla. 275; *Garvin v. Watkins*, 29 Fla. 151, 10 So. 818; *Halle v. Einstein*, 34 Fla. 589, 16 So. 554. In *Crawford v. Gamble*, 22 Fla. 487, it was held that 'merchandise purchased by a married woman who is conducting a mercantile business in her own name is her separate statutory property.'"

From these references to the law in Florida it appears that a married woman having separate statutory property, although not a free dealer, can lawfully carry on business, buy and sell upon her sole credit, and thus contract obligations binding upon her property in all respects as if she were a *feme sole*, except that she cannot be held personally liable at law; the creditors' legal remedy upon her contracts being in equity, under which all her separate property may be taken. That is to say, that such married woman may contract a debt which she morally owes,—owes in equity and good con-

science, lawfully owes,—but which she cannot be personally adjudged to pay.

Is the limited obligation thus resulting a "debt," within the meaning of the word as used in § 4 of the bankrupt law of 1898? Clause "a," § 4, bankr. law, July 1, 1898? chap. 541 (30 Stat. at L. 547, U. S. Comp. Stat. 1901, p. 3423), provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." Clause "b" provides that "any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of \$1,000 or over, may be adjudged an involuntary bankrupt upon default, or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act." Blackstone defines a "debt" as follows: "A sum of money due by certain and express agreement, as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it." 3 Bl. Com. 154. Again: "Any contract, in short, whereby a determinate sum of money becomes due to any person and is not paid, but remains in action merely, is a contract of debt." 2 Bl. Com. 464. "The word 'debt' is of large import, including not only debts of record or judgments and debts by specialty, but also obligations arising under simple contract to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise." *Gray v. Bennett*, 3 Met. 522, 526; *Shane v. Francis*, 30 Ind. 93. "A 'debt' signifies whatever one owes. There is always some obligation that it shall be paid, but the manner in which, or the condition upon which, it is to be paid, or the means of recovering payment, do not enter into the definition." *Rodman v. Munson*, 13 Barb. 197. "A debt is a sum of money due by contract, express or implied." *Perry v. Washburn*, 20 Cal. 350. Section 1 of the bankrupt law of July 1, 1898, chap. 541, which gives the meaning of words and phrases used in the act, provides in paragraph 11 (30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3419), "'debt' shall include any debt, demand, or claim provable in bankruptcy," and § 63 (30 Stat. at L. 562, U. S. Comp. Stat. 1901, p. 3447), relating to debts which may be proved, provides as follows: "Debts of the bankrupt may be proved and allowed against his estate which are . . . (4) founded upon an open account or upon a contract express or implied."

65 L. R. A.

These broad definitions of "debt" from the text-books, adjudicated cases, and the bankrupt law all clearly include the obligation lawfully contracted by a married woman, not a free dealer, in the state of Florida, dealing with her separate estate.

We are referred to no adjudicated cases on the question as to whether a married woman can be adjudicated a bankrupt under the present law,—all the cases cited are under other and former laws.

The English cases cited, and much relied on by counsel for petitioner (*Ex parte Jones*, L. R. 12 Ch. Div. 484, 48 L. J. Bankr. N. S. 109, 40 L. T. N. S. 790, 28 Week. Rep. 287, 44 J. P. 55, and *Re Gardner*, L. R. 20 Q. B. Div. 249, 57 L. J. Q. B. N. S. 149, 58 L. T. N. S. 119, 36 Week. Rep. 142, 5 Morrell, 1), lose much of their force here, because the married women's property act (45 & 46 Vict.) provides: "Every woman carrying on a trade separately from her husband should in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*." And § 152 of the bankruptcy act provides: "Nothing in this act shall affect the provisions of the married women's property act 1882."

Re Kinkaid, 3 Biss. 405, Fed. Cas. No. 7,824, a case decided under the law of 1867, wherein it was held that a married woman residing in Illinois could be adjudicated a bankrupt, seems to have turned upon the laws of Illinois with regard to the rights of married women. In the note by the learned reporter in that case many of the current decisions in this country and in England are reviewed, and the reporter sums up as follows: "Impossible as it may be to reconcile the decisions on the general question of the rights and liabilities of married women, the duty of the Federal courts in administering the bankrupt act would seem to be simply to determine the status of a married woman under the existing laws of the state where the jurisdiction is to be exercised, and administer the act upon the basis of the principles thus discovered. The foundation of bankruptcy proceedings is indebtedness; but the bankrupt act does not make any new standard of liability,—it simply operates upon those already existing. The application of the act to married women depends, clearly, not upon their rights, but their liabilities, and those liabilities are determined by the law of the forum where the jurisdiction is invoked."

From what has been said, it follows that we do not agree with the learned counsel, whose able oral argument and exhaustive brief have received our close attention, that the test is whether the contracts of an alleged bankrupt can be enforced by judg-

ment *in personam*, but rather is whether the said contracts constitute an existing indebtedness.

The object of the bankrupt law is twofold,—the benefit of the creditors and the relief of the bankrupt. Mr. Justice Story describes a bankrupt law as “a law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts.” 2 Story, Const. § 1113, note 2. Mr. Stephen speaks of it as “a system of law of a peculiar and anomalous character, intended to afford to the creditors of persons engaged in trade a greater security for the collection of their debts than they enjoyed at common law under the ordinary remedy by action.” 2 Stephen, Com. 189. It cannot be necessary that both objects shall be attainable in order to warrant proceedings in bankruptcy. In many, perhaps a majority, of cases, the relief to the bankrupt is the only question, for there are no assets to distribute, and in many other cases the benefit and relief of creditors is the only object. A bankrupt may, through fraud, have lost his right to a discharge. An insolvent corporation whose property, including all franchises, has been distributed to creditors in involuntary proceedings in bankruptcy, takes little, if anything, by a discharge.

But this can be said for the petitioner, that, if she is discharged in bankruptcy, and

thereafter she is sued at law or in equity, she can plead the discharge in bankruptcy as well as coverture, and, with regard to after-acquired separate property, she will be relieved from all her present obligations. The legal, as well as the general, trend of the day is towards emancipating women, married or single, from all legal and other disabilities not bearing on the other sex, and particularly in all directions wherein she is thought to be handicapped in earning a living, taking care of her property, or carrying on business. And if a married woman is encouraged and permitted to carry on business, buy and sell,—in short, be a trader, as she is in Florida,—why, when she is unfortunate in business and burdened with debts, shall she not, like the married man, be entitled to claim and have her debts wiped from the slate under the more or less wise provisions of the bankrupt law?

On the whole matter, we conclude that neither the terms nor the policy of the bankrupt law of 1898, nor any outside public policy, preclude, because of coverture, a woman owing debts exigible against her property from being adjudicated a bankrupt; and it follows that the question stated at the beginning of this opinion must be answered in the affirmative, and that this *petition for revision be denied*.

And it is so ordered.

INDIANA SUPREME COURT.

John KRAUSE *et al.*, *Appts.*,
v.

CROTHERSVILLE SCHOOL TRUSTEES.

(.....Ind.....)

1. A covenant to repair a standing building and construct an annex thereto which shall become an integral part of it is discharged by a destruction by lightning of the main building when the work is practically completed, so as to render the repair and completion of the annex impossible without the reconstruction of the main building.
2. Failure to complete the repair of a building and the construction of an annex thereto as soon as possible, so that the main building is destroyed by lightning before the work is completed but after

it might have been done does not deprive the one undertaking the work of the benefit of the rule that relieves him from his covenant in case the building upon which his work is to be done is destroyed without his fault.

3. Failure to complete construction work as soon as possible, if a breach of the covenant for its performance, is waived by proceeding against the covenantor for failure to replace and complete the work after the building has been destroyed by fire.
4. The offer by the owner of a building which another has contracted to repair and add to, to restore it after it has been destroyed by lightning when the work was nearly completed, will not require the contractor to comply with his covenant and reconstruct and complete the work according to the original contract.
5. Where one who has undertaken to

NOTE.—As to effect of destruction of building during performance of contract to move it, see, in this series, *Angus v. Scully*, 49 L. R. A. 562.

As to effect on building contract of destruction of building by accident, see *Butterfield v. Byron*, 12 L. R. A. 571, and *note*.

As to effect of intervening impossibility to perform contract generally, see *Stewart v. 65 L. R. A.*

Stone, 14 L. R. A. 215, and *note*; *Parker v. Macomber*, 16 L. R. A. 858; *Anderson v. L. L. May & Co.* 17 L. R. A. 555; *Remy v. Olds*, 21 L. R. A. 645; *Pengra v. Wheeler*, 21 L. R. A. 726; *Flasher v. Walsh*, 43 L. R. A. 810; *Smith v. North American Transp. & Trading Co.* 44 L. R. A. 557; and *Board of Education v. Townsend*, 52 L. R. A. 868.

repair and add to a building has paid out; in the execution of his contract, more than he has received at the time of the destruction of the building by lightning, such payments which have entered into the value of the property must be treated as an execution of the contract *pro tanto*.

6. Provision in a contract for the repair of, and addition to, a building, that the owner "shall not be in any manner responsible for any loss or damage that shall, or may, happen to said work or any part thereof," does not throw the loss caused by the accidental destruction of the building by lightning after the work is nearly completed upon the contractor.
7. The question of the right of the owner to insure a building which another has contracted to repair and enlarge has no bearing upon the question of the liability of the contractor to comply with his contract after the building has been destroyed by lightning.
8. One who has contracted to repair a house for an entire consideration cannot, in case the house is destroyed by lightning when the work is nearly completed, so that he is not entitled to enforce payment under the contract, recover the value of the work done under a *quantum meruit*.

(March 9, 1904.)

A PPEAL by defendants from a judgment of the Circuit Court for Bartholomew County in favor of plaintiffs in an action brought to recover upon a bond executed for the faithful performance of a building contract. *Reversed*.

The facts are stated in the opinion.

Messrs. **William T. Branaman, Marshall Hacker, and O. H. Montgomery**, for appellants:

The complaint proceeds upon the theory that appellants covenanted to repay or refund money; whereas, the obligation of their bond was to perform work, and the measure of damages in case of a breach is the difference between the contract price and the actual or reasonable cost of causing the work to be done by others, which appellants agreed, but failed to perform.

Lawton v. Fitchburg R. Co. 8 Cush. 230, 54 Am. Dec. 753; *Chicago & R. I. R. Co. v. Ward*, 16 Ill. 522; *Indiana, B. & W. R. Co. v. Koons*, 105 Ind. 509, 5 N. E. 549; *Indiana, B. & W. R. Co. v. Adams*, 112 Ind. 305, 14 N. E. 80.

When a contract is made with reference to the continued existence of some person or thing, and that person or thing ceases to exist, the contract is discharged.

Butterfield v. Byron, 153 Mass. 517, 12 L. R. A. 571, 25 Am. St. Rep. 654, 27 N. E. 667; *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507; *Siegel, C. & Co. v. Eaton & P. Co.* 165 Ill. 550, 46 N. E. 449.

A contract is apportionable when the amount of consideration to be paid by the 65 L. R. A.

one party depends upon the extent of performance by the other.

2 Addison, Contr. 869; 2 Parsons, Contr. 520; *Schwartz v. Saunders*, 46 Ill. 18; *Siegel, C. & Co. v. Eaton & P. Co.* 165 Ill. 550, 46 N. E. 449; *Richardson v. Shaw*, 1 Mo. App. 234.

Where a contract is apportionable in case of loss, the contractor may recover *pro rata* on *quantum meruit*.

Hollis v. Chapman, 36 Tex. 1; *Siegel, C. & Co. v. Eaton & P. Co.* 165 Ill. 550, 46 N. E. 449; *Bailey v. Brown*, 9 Ohio C. C. 455; *Clark v. Busse*, 82 Ill. 515; *Gleason v. United States*, 33 Ct. Cl. 65; *Schwartz v. Saunders*, 46 Ill. 18; *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413.

An extension of time of performance by consent or mutual agreement will not defeat recovery by the contractor for the value of work done and destroyed.

Gilbert & B. Mfg. Co. v. Butler, 146 Mass. 82, 15 N. E. 76; *Angus v. Scully*, 176 Mass. 357, 49 L. R. A. 562, 79 Am. St. Rep. 318, 57 N. E. 674.

Where parties themselves, by their acts, give their contract a construction, they will be held to such construction by the courts.

Flagg v. Dryden, 7 Pick. 52; *Dillon v. Masterson*, 10 Jones & S. 176; *Dunn v. Steubing*, 120 N. Y. 232, 24 N. E. 315; *Eyster v. Parrott*, 83 Ill. 517; *Frazier v. Myers*, 132 Ind. 71, 31 N. E. 536; *Reissner v. Oxley*, 80 Ind. 584; *Toledo, St. L. & K. C. R. Co. v. Burgan*, 9 Ind. App. 604, 37 N. E. 31; *Childers v. First Nat. Bank*, 147 Ind. 430, 46 N. E. 825; *Lyles v. Lescher*, 108 Ind. 385, 9 N. E. 365.

A request by the employer for performance of the contract after the lapse of the time fixed in the contract for full performance is a waiver of the time stipulated.

Jordan v. Rhodes, 24 Ga. 478; *Close v. Clark*, 16 Daly, 91, 9 N. Y. Supp. 538; *Cummings v. Pence*, 1 Ind. App. 317, 27 N. E. 631.

The completion of work to the amount of \$3,853 upon a contract for work of the total value of \$3,853.35 was and is a substantial performance of the contract; and the court cannot, as a matter of law, say that there was not a substantial performance.

McLaughlin v. Child, 62 Ind. 412; *Rose v. O'Riley*, 111 Mass. 57; *Johnson v. DePeyster*, 50 N. Y. 666; *Highton v. Dessau*, 46 N. Y. S. R. 922, 19 N. Y. Supp. 395; *D'Andre v. Zimmerman*, 17 Misc. 357, 39 N. Y. Supp. 1086; *Bradford v. Whitcomb*, 11 Tex. Civ. App. 221, 32 S. W. 571; *Nolan v. Whitney*, 88 N. Y. 648; *Kane v. Stone Co.* 39 Ohio St. 1; *Morrow v. Huntoon*, 25 Vt. 9.

Where one person has partly performed a contract on property of another, which

property is destroyed without the fault of either party, the contractor may recover as upon a *quantum meruit* for the labor and materials performed and furnished by him under such contract, and especially so where the contract is severable.

Griggs v. Austin, 3 Pick. 22, 15 Am. Dec. 175; *Brown v. Harris*, 2 Gray, 359; *Butterfield v. Byron*, 153 Mass. 517, 12 L. R. A. 571, 25 Am. St. Rep. 654, 27 N. E. 667; *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507; *Clark v. Franklin*, 7 Leigh, 1; *Hollis v. Chapman*, 36 Tex. 1; *Siegel, C. & Co. v. Eaton & P. Co.* 165 Ill. 550, 46 N. E. 449; *Schwartz v. Saunders*, 46 Ill. 18; *Rawson v. Clark*, 70 Ill. 656; *Cleary v. Sohler*, 120 Mass. 210; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Deater v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415.

The contract having been made upon the implied condition that the old school building would continue to exist, and it having been destroyed without appellant's fault, the contract was absolved, and performance excused.

Lord v. Wheeler, 1 Gray, 282; *Butterfield v. Byron*, 153 Mass. 517, 12 L. R. A. 571, 25 Am. St. Rep. 654, 27 N. E. 667; *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507; *Angus v. Souilly*, 176 Mass. 357, 49 L. R. A. 562, 79 Am. St. Rep. 318, 57 N. E. 674; *Siegel, C. & Co. v. Eaton & P. Co.* 165 Ill. 550, 46 N. E. 449.

Defendants, having performed work under the contract as found, of the value of \$3,853, and received thereon \$3,069.50, when the contract was absolved without their fault, are entitled to recover of appellee upon their cross-complaint the sum of \$783.50.

Hollis v. Chapman, 36 Tex. 1; *Siegel, C. & Co. v. Eaton & P. Co.* 165 Ill. 550, 46 N. E. 449; *Bailey v. Brown*, 9 Ohio C. C. 455.

Messrs. Stansifer & Baker and Seba A. Barnes, for appellees:

When one undertakes by an express contract to do a given act he is not absolved from liability for nonperformance, even though he is prevented from doing the same by an act of God. In that class of cases, if a person desired to absolve himself from liability for nonperformance under any circumstances, he should so stipulate in his contract.

1 Beach, Contr. § 218; 3 Am. & Eng. Enc. Law, p. 900; 1 Am. & Eng. Enc. Law, 2d ed. p. 588; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Brumby v. Smith*, 3 Ala. 123; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 137; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. 65 L. R. A.

Dec. 142; *Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Stees v. Leonard*, 20 Minn. 494, Gil. 448; *Fildeno v. Besley*, 42 Mich. 100, 36 Am. Rep. 433, 3 N. W. 278; *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507; *Butterfield v. Byron*, 153 Mass. 517, 12 L. R. A. 571, 25 Am. St. Rep. 654, 27 N. E. 667; *Wainscott v. Silvers*, 13 Ind. 497; *Wood v. Long*, 28 Ind. 314; *Smith v. Dallas*, 35 Ind. 255; *Goddard v. Debout*, 40 Ind. 114; *Skillen v. Waterworks Co.* 49 Ind. 193.

Performance is said in such case to be excused where there is an implied stipulation that the thing contracted about shall continue to exist until the time for performance has expired.

Taylor v. Caldwell, 3 Best & S. 826, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week. Rep. 726; *Middlesex Water Co. v. Knappmann Whiting Co.* 64 N. J. L. 240, 49 L. R. A. 572, 51 Am. St. Rep. 467, 45 Atl. 692; *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413; *Butterfield v. Byron*, 153 Mass. 517, 12 L. R. A. 571, 25 Am. St. Rep. 654, 27 N. E. 668; *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507.

Performance will not be excused where the defendant has unreasonably delayed fulfillment of his contract beyond the time for performance.

1 Beach, Contr. § 237, p. 296.

Where there was an offer to restore the old building, substantial performance might still have been had notwithstanding the inevitable accident.

7 Am. & Eng. Enc. Law, 2d ed. p. 148; 1 Am. & Eng. Enc. Law, 2d ed. p. 592, note 3; *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507; *Drake v. Goree*, 22 Ala. 409; 3 Am. & Eng. Enc. Law, pp. 898, 899, and note 1.

Waiver, to be binding, must operate by way of estoppel, or be supported by a valuable consideration.

28 Am. & Eng. Enc. Law, p. 531.

It is essential of an estoppel that the request should have been relied upon.

First Nat. Bank v. Williams, 126 Ind. 429, 26 N. E. 75.

The inferential fact was that the time for the performance of the contract had expired.

2 Woollen, Trial Procedure, § 4331; *Louisville, N. A. & C. R. Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3; *Rowley v. Sanns*, 141 Ind. 179, 40 N. E. 674; *Relender v. State*, 149 Ind. 283, 49 N. E. 30.

When the contractor is not excused by inevitable accident, and refuses to perform his contract, he is liable to refund all money advanced to him, and is also liable for damages for its nonperformance.

1 Beach, Contr. § 232; 1 Estee, Pl. § 1228; 29 Am. & Eng. Enc. Law, pp. 906, 907; Hudson, Bldg. Contr. p. 217; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 137; *Stees v. Leonard*, 20 Minn. 494, Gil. 448.

When the action is upon the contract or bond, or upon both, the employer may at least recover damages which may, in effect, equal the amount of instalments paid.

Hudson, Bldg. Contr. 217; *Child v. Swain*, 69 Ind. 230; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 137.

The contract in this case is entire, and not apportionable; the payments are mere advances on account of the entire sum.

26 Am. & Eng. Enc. Law, p. 907, note 1; 3 Am. & Eng. Enc. Law, pp. 916-920; 7 Am. & Eng. Enc. Law, 2d ed. p. 95; *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55; *Briggs v. A Light Boat*, 7 Allen, 287; *Clarkson v. Stevens*, 106 U. S. 505, 27 L. ed. 139, 1 Sup. Ct. Rep. 200; *Reany Engineers & Ship Building Works' Estate*, 9 Phila. 620; *Barton v. Hermann*, 11 Abb. Pr. N. S. 378; *McNamara v. Harrison*, 81 Iowa, 486, 46 N. W. 976; *Hanley v. Walker*, 79 Mich. 607, 8 L. R. A. 207, 45 N. W. 57; *Morrison v. Cummings*, 26 Vt. 486; *Quigley v. DeHaas*, 82 Pa. 267; *Cox v. Western P. R. Co.* 44 Cal. 18; *Laucing v. Rintles*, 97 N. C. 350, 2 S. E. 252; *Stokes v. Baars*, 18 Fla. 656; *Dibol v. Minott*, 9 Iowa, 404; *Clark v. Collier*, 100 Cal. 256, 34 Pac. 677.

No benefit having been received by appellee, whether the contract is entire or apportionable, Krause & Company can recover nothing on *quantum meruit*.

2 Parsons, Contr. pp. 520, 523; 1 Beach, Contr. § 111; 7 Am. & Eng. Enc. Law, 2d ed. p. 152; *McClure v. Secrist*, 5 Ind. 31; *Adams v. Cosby*, 48 Ind. 153; *Everroad v. Schwartzkopf*, 123 Ind. 35, 23 N. E. 969; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797.

Gillett, Ch. J., delivered the opinion of the court:

This suit was instituted by appellees to recover on a bond executed by appellants for the faithful performance of a building contract. Certain of the appellants, constituting the firm of John Krause & Company, filed a cross-complaint to recover for a balance unpaid under the contract, and to this they added a paragraph on a *quan-*

tum meruit. Issues were joined on the pleadings mentioned, and a trial resulted in a judgment in favor of appellee upon its complaint, and against said cross-complaint, on the issues tendered by them. Pursuant to request, the court found the facts specially. The findings are very long, and in the statement of the facts so found we shall not only summarize many of the findings, but shall omit matters which, for the purposes of this opinion, are irrelevant.

In October, 1898, appellee entered into a contract in writing with said John Krause & Company, whereby the latter agreed to furnish the materials for, and to erect and finish, an annex to a school building belonging to appellees, and to make certain improvements upon the latter building, for the sum of \$3,853.35, "to be paid upon the completion of the work." Appellees agreed in said contract, in consideration of the agreements of said firm being strictly kept, that they would pay said sum to said firm; but provision was made in said instrument that, as the work progressed, estimates were to be furnished by the architect of materials provided and labor performed, on which 80 per cent of the value of said material and labor would be paid on the presentation of said estimates, the amount so paid to be deducted from the final estimate which the contract provided for. The fifth subdivision of said contract was as follows: "The party of the first part (the school town) shall not be in any manner answerable, accountable, or responsible for any loss or damage that shall or may happen to said work or any part thereof, or for any of the materials or anything used or employed in finishing the same." Appellees reserved the right in said contract to place in position the heating apparatus and furniture at such times as they saw fit. The specifications attached to the contract provided that all the work, when finished, was to be turned over perfect, complete, and undamaged in every particular; that the whole work was to be inspected as it went on, and was to be accepted by the owner and architect before a final settlement was made. The character of the bond is indicated above. The building to which said annex was to be attached was a two-story brick structure, and the annex was of the same height. For a distance of 42 feet the west wall of the old building was to be the east wall of the new structure. The annex was to be so compactly and substantially joined to the old building as to constitute one building. One end of the lower sill or cord of the roof trusses was required to rest on said old wall, and the roof plates of the new building were to be fastened to the roof plates of the other building. The

halls of the two buildings were to be arranged so that they would be continuous. Krause & Company were also required, under their contract, to do considerable work on the old building, such as excavating, putting in underpinning, building a concrete floor, raising the tower, and doing the mason work in connection with the installing of the heating apparatus. On July 24, 1899, said firm had progressed with its work until it would have cost but \$35 to complete the same, there being but one coat of paint and varnish necessary to finish such undertaking; the value of the work done and materials furnished at that time, the court found to be but \$35 less than the contract price. On the day aforesaid the old building was struck by lightning and thereby set fire to, and everything inflammable in both buildings was destroyed by such fire. As a result of the fire said common wall partially fell, and was so weakened that it had to be taken down. The remaining walls of the old building were also seriously injured. The court found that all that could have been done upon the old building after the fire, under said contract, was to build up the retaining walls in the furnace rooms to the floor line. It was further found that it would have been impossible for said contractors to build the roof of the annex, as provided for in the contract, without said common wall, and that without it the remainder of said structure, if built, would have been weak. With the exception of a few days' work done by two men during the week before the fire, no work had been done by said firm on said contract, according to the findings, after May 26, 1899. The court found that said firm could have completed its contract by June 15, 1899, and that it unreasonably and without excuse delayed the completion of said work. It is shown that appellees had advanced to said firm, prior to said fire, approximately 80 per cent of the contract price. No estimates had been made or demanded. The concluding findings of the court show that after the fire appellees requested said firm to complete its contract; that the firm refused to do so, for the assigned reason that the old building was not in such condition as to make such work possible; that appellees then offered to restore the old building, so that the firm might complete its contract, but that the firm refused to agree to do so; that appellees then demanded that said firm pay back the money advanced on the work, which demand was refused.

The questions involved in this case are in many respects quite novel, at least so far as this court is concerned. The ancient case of *Paradine v. Jane*, Aleyn, 26, is often 65 L. R. A.

referred to in the discussion of the question as to whether a covenant will be discharged by a subsequent event happening, without the default of the covenantor, which renders performance impossible. That case was an action of debt to recover rent. The defendant answered that he had been dispossessed by an alien army, which had occupied the premises until after the lease expired. There was no answer as to one quarter. The court said: "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, . . . there the law will excuse him; . . . but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." It will be seen that that case did not involve a question as to a covenant which it had become impossible to perform, since the defendant could pay rent, *modo et forma* as he had covenanted, notwithstanding the eviction. We regard it as thoroughly settled that the words of a mere general covenant will not be construed as an undertaking to answer for a subsequent event happening, without the fault of the covenantor, which renders performance of the covenant itself not merely difficult or relatively impossible, but absolutely impossible, owing to the act of God, the act of the law, or the loss or destruction of the subject-matter of the contract. Where performance is thus rendered impossible, the inquiry naturally arises as to whether there was a purpose to covenant against such an extraordinary, and therefore presumably unapprehended, event, the happening of which it was not within the power of the covenantor to prevent. The tempest, for instance, may destroy that which must exist if performance of the covenant is to remain possible, and it would seem evident in such a case that it was not within the contemplation of the parties that the maker of the covenant should answer in damages for what he could in no wise control. But, on the other hand, a person entering into a charter party might be answerable for delay caused by adverse winds, since it would be presumed that the parties contracted with such a possibility in mind. *Shubrick v. Salmond*, 3 Burr. 1637. A well-known English writer on the law of contracts says: "By the modern understanding of the law, we are not bound to seek for a general definition of 'the act of God' or *vis major*, but only to ascertain what kind of events were within the contemplation of the parties;" and he further says upon the same point: "We cannot arrive, then, at any more distinct conception than this: An

event which, as between the parties and for the purpose of the matter in hand, cannot be definitely foreseen or controlled. In other words, we are thrown back upon the nature and construction of the particular contract." Pollock, *Principles of Contract*, 362. In *Hayes v. Bickerstaff*, Vaughan, 118, 122, it was declared that a man's covenant shall not be strained so as to be unreasonable, or that it was improbable to be so intended, without necessary words to make it such; for it is unreasonable to suppose a man should covenant against the tortious acts of strangers, impossible for him to prevent, or, probably, to attempt preventing.

The leading case upon the subject of subsequent events rendering performance of covenants impossible is *Baily v. DeCrespigny*, L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494. In that case a lessor had covenanted that neither he nor his heirs or assigns would allow any building on a piece of land of the lessor's fronting the demised premises. A railway company purchased this land under the compulsory powers of a subsequent act of Parliament, and erected a station upon it. It was held that the railway company, coming in under compulsory powers, whom the covenantor could not bind by any stipulation, was "a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into," and that therefore the covenantor was discharged. In the course of the opinion the court said: "There can be no doubt that a man may, by an absolute contract, bind himself to perform things which subsequently become impossible, or to pay damages for the nonperformance; and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is, in fact, an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as 65 L. R. A.

is observed by Maule, J., in *Canham v. Barry*, 15 C. B. 619, 24 L. J. C. P. N. S. 106, 1 Jur. N. S. 402, a man might by apt words bind himself that it shall rain tomorrow or that he will pay damage. This is the explanation of the case put by Lord Coke in *Shelley's Case*, 1 Coke, 98a: 'If a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempests, he is discharged of his covenant' because it was thought that the covenant was intended to relate only to the tenant's own acts, and not to an event beyond his control, producing effects not in his power to remedy. See *Shep. Touch.* 173. It is on this principle that it has been held that an impossibility, arising from an act of the legislature subsequent to the contract, discharges the contractor from liability."

In *Singleton v. Carroll*, 6 J. J. Marsh. 527, 22 Am. Dec. 95, it was held that the defendant was not liable upon his covenant to return a slave who, without the fault of the defendant, had run away. It was there said: "The true ground, however, generally, upon which in such cases to rest the defense of the covenantor, is that the loss is not to be considered as provided against by a general covenant." See also *Pollard v. Shaffer*, 1 Dall. 210, 1 L. ed. 104, 1 Am. Dec. 239.

It has been questioned whether a fire caused by lightning is "an act of God," since fire can be prevented and also extinguished, but we need not consider this point. As to a general covenant, it is the law that the destruction of the subject-matter of the contract, thereby creating a physical or natural impossibility inherent in the nature of the thing to be performed, whether occasioned by *vis major* or otherwise, will discharge the covenant, provided the event occurred without the fault of the covenantor.

The destruction before completion of a house which a contractor had covenanted to furnish materials for, and to erect and complete, will not relieve him, for performance is not thereby rendered impossible, since he may build a new house; but if the contract is to bestow labor and materials upon a particular building or chattel, it is obvious that its destruction prevents a compliance with the undertaking. Pollock states that it is the admitted rule of English law that, if a chattel perish without the vendor's fault, performance is excused, although the promise is in words positive. *Principles of Contract*, 263. Chitty says: "But in contracts from the nature of which it is apparent that the parties contracted on the basis of the continued existence of a given person or

thing, a condition is implied that if the performance become impossible from the perishing of the person or thing, that shall excuse such performance." *Contracts*, vol. 2 (11th Am. ed.) 1076.

In *Taylor v. Caldwell*, 3 Best & S. 826, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week. Rep. 726, where a music hall engaged for concerts had been accidentally destroyed by fire, it was held that both parties were thereby excused from the contract, because the general rule requiring absolute performance "is only applicable when the contract is positive and absolute, and not subject to any condition, expressed or implied." It was there also held that "where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." See also *Womaack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L. R. A. 652, 3 Inter. Com. Rep. 613, 28 N. E. 76; *Lord v. Wheeler*, 1 Gray, 282; *Schwartz v. Saunders*, 46 Ill. 18; *Walker v. Tucker*, 70 Ill. 527; *Lorillard v. Clyde*, 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489; *Niblo v. Binsse*, 1 Keyes, 476; *Brumby v. Smith*, 3 Ala. 123; *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507; *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413; *Hall v. School Dist. No. 10*, 24 Mo. App. 213; *Anglo-Egyptian Nav. Co. v. Rennie*, L. R. 10 C. P. 271, 44 L. J. C. P. N. S. 130, 32 L. T. N. S. 467, 23 Week. Rep. 626; *Platt, Covenants*, 582; 9 Cyc. Law & Proc. 631, and cases cited.

The case of *Butterfield v. Byron*, 153 Mass. 517, 12 L. R. A. 571, 25 Am. St. Rep. 654, 27 N. E. 667, is quite in point. The court in that case, by Knowlton, J., said: "The fundamental question in the present case is, What is the true interpretation of the contract? Was the house, while in the process of erection, to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest as the builder of a part of it? Was the defendant's undertaking to go on and build and deliver such a house as the contract called for, even

if he should be obliged again and again to begin anew on account of the repeated destruction again and again of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house, on land of the plaintiff, towards the erection of which the plaintiff himself was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stonework, brickwork, painting, and plumbing were to be done by the plaintiff. Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract."

Counsel for appellees attach much importance to the fact that, under the findings of the trial court, the firm of John Krause & Company had full opportunity to perform its contract before the fire occurred. It is insisted that this case does not fall within the general rule, because some of the authorities proceed on the supposition that the reason for nonliability upon the part of the covenantor rests on the fact that the other party impliedly covenants that the premises shall remain in condition for a sufficient length of time to permit the promisor to perform his contract. It may well be said, as we have seen that Mr. Chitty states, that a condition is implied that, if the performance becomes impossible from the perishing of the person or thing, that shall excuse performance. Such a construction would be a fair example of the doctrine, laid down by one of the old writers, that "constructions are to be with equity and moderation, to moderate the rigor of the law." *Grounds of Law and Equity*, 38 Ca. 49. We think the case is one for the

application of the rule declared by Lord Bacon, that "general words are restrained according to the nature of the thing or person." Max. Reg. 10; Wharton, Maxims, 207. We fail to perceive why the covenantor should be charged with a breach that had nothing to do with the impossibility, and we cannot understand how the covenantor can be relieved upon performance becoming impossible before breach, on the theory that the covenantee had violated his implied undertaking that the premises should continue in a fit condition, where it was impossible for him to prevent the happening of the event. The view that what is made an excuse for the covenantor is to be treated as a breach by the covenantee has been exploded by *Appleby v. Myers*, L. R. 2 C. P. 651, 36 L. J. C. P. N. S. 331, 16 L. T. N. S. 669.

The breach of contract on the part of the firm, set out in the trial court's findings, had nothing to do with the burning of the building. As observed in *Pollard v. Shaffer*, 1 Dall. 210, 1 L. ed. 104, 1 Am. Dec. 239, the property would have alike perished in the hands of the other party. The firm had proceeded to a point where the undertaking lacked but little of completion, and after the fire, when a demand to restore the work was made, the answer that performance was impossible was as sufficient, since the firm was not to blame for the destruction of the building, as it would have been had the fire occurred before the breach relied on. Appellees' complaint does not proceed upon the theory that the prior delay was a breach. The theory of that pleading is that the breach lay in the failure to proceed with the execution of the contract after the fire. The pursuit of said firm on the latter ground was a waiver of the prior breach, since the two theories are diametrically opposed to each other. If the position were taken that the delay was a breach which appellees had taken advantage of to terminate the right of performance and to seek damages on the contract, the very assuming of that position involves the view that appellees had devolved upon them the ownership of the building in its then state, together with the responsibility of ownership under the rule *res perit domino*, thus limiting the damages to the cost of completion, or \$35. But this breach had to be passed over, in order that it might be asserted that said firm should have proceeded with the work after the fire, and with the assumption of the latter position the prior breach ceases to be a factor in the case.

We do not think that the rights of the parties were changed by the offer of appellees to restore the old building. The offer was made for the purpose of changing

legal rights. There is no equity in a case of this kind, where the contractors have expended more money than they received in the execution of the contract. There must be a loss to someone. As observed by Lord Ellenborough, in *Barker v. Hodgson*, 3 Maule & S. 267, 15 Revised Rep. 485: "The question is, on which side the burden is to fall." When said firm entered into the original contract, the old building was standing, and it had a right to proceed presently with its contract. Appellees have no equity to demand that said firm carry out its contract after waiting until the old building can be restored, or that said firm accommodate itself to a new undertaking which would be different from the particular work which it obligated itself to do.

There have been decisions to the effect that substantial performance of covenants will be required where exact performance has become impossible. This proposition is no doubt true, as a general rule, especially in equity. *Eaton v. Lyon*, 3 Ves. Jr. 690. If the essence of an undertaking can be performed, that will be required. Thus, if a man covenants to build and complete a house by a certain day, the existence of the plague will excuse him, but he will be required to perform his undertaking afterwards. Bacon, *Abr. Conditions* (2). But the particular class of cases to which our inquiries relate seems to be distinguishable in that such cases proceed on the theory that the covenantor did not, presumptively, by his general words, contract against that which afterwards rendered performance impossible, if caused by the *vis major* or the loss or destruction of the subject-matter. If he did not covenant against such possibilities, there is no basis for requiring him to perform as near as may be. Lord Coke states, in his note to *Shelley's Case*, 1 Coke, 98a, that if a lessee covenants to leave a wood in as good a plight as it was at the time of the lease, and the trees are blown down by tempests, "he is discharged [our italics] of his covenant, *quia impotentia excusat legem*;" and this was said, as pointed out in *Pollard v. Shaffer*, 1 Dall. 210, 1 L. ed. 104, 1 Am. Dec. 239, although it was obvious that the lessee might have planted new trees, or rendered damages in lieu of those which had fallen. It seems to us that if the covenantee has any remedy, where a particular building is accidentally destroyed, it must be in assumpsit, to recover, *ex æquo et bono*, for advancements in excess of expenditures, if any; but where, as here, the contractor had paid out more than he has received, we think that the payments made, which have gone into the property, must be treated as an execution of the contract *pro tanto*, leaving the rule to pre-

vail. *Kes perit domino*. See *Anglo-Egyptian Nav. Co. v. Rennie*, L. R. 10 C. P. 271, 44 L. J. C. P. N. S. 130, 32 L. T. N. S. 467, 23 Week. Rep. 626.

Another consideration must be borne in mind with reference to the asserted obligation of the firm to rebuild if appellees restored the old building, and that is that appellees were not under a corresponding obligation to rebuild for the accommodation of said firm. Suppose that the fire had occurred before the work on the annex had progressed to any considerable extent; would the school town have been required to restore its building, that the firm might avail itself of its contract? Obviously not. The occurrence of a fire which practically destroyed the original building put such a different aspect on the face of things that it could not be said that it was within the contemplation of the parties, when they entered into the contract, that, if a fire occurred, the old building should be restored. The observations of the court in *Butterfield v. Byron*, 153 Mass. 521, 12 L. R. A. 572, 25 Am. St. Rep. 656, 27 N. E. 668, are quite to the point upon the matter now under consideration. "It seems very clear," said the court in that case, "that after the building was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stonework, brickwork, painting, and plumbing for another house of the same kind. The plaintiff might have answered, 'I do not desire to build another house, which cannot be completed until long after the date at which I wish to use my house. My contract related to one house. Since that has been destroyed without my fault, I am under no further obligation.' If the plaintiff could successfully have made this answer to a demand by the defendant that he should do his part towards the erection of a second building, then, certainly, the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials, required of him by the specifications, for more than one house, and, if that was destroyed by an inevitable accident just before its completion, he was not bound to build another, or to do anything further under his contract. If the plaintiff was not obliged to make his contribution of work and materials towards the building of a second house, neither was the defendant. The agreement of each to complete the performance of the contract after a building, the product of their joint contributions, had been partly erected, was on an implied condition that the building

should continue in existence. Neither can recover anything of the other under the contract, for neither has performed the contract so that its stipulations can be availed of." See also *Crawford County v. Louisville, N. A. & St. L. Air Line R. Co.* 39 Ind. 192, 200.

It is contended by counsel for appellees that the provision of the contract that the school town "shall not be in any manner answerable, accountable, or responsible for any loss or damage that shall or may happen to said work or any part thereof," amounted to a special provision which guarded against any implication that would leave appellee to bear any part of the loss or damage. We fail to apprehend how this provision, designed as a shield, can be converted into a sword. So far as the principal action is concerned, no one is endeavoring to hold appellees "answerable, accountable, or responsible for any loss or damage." In any event, it cannot fairly be contended that this provision made said firm responsible for the integrity of the old building. As it was the destruction of the building which belonged to appellees that made performance impossible, the special provision under consideration did not extend to such a case. As against such a contingency, the contract wholly failed to provide.

There is even less of merit in the contention that, if said firm had completed its contract without delay, appellees might have insured against fire. The latter had an increasing measure of risk during the progress of the work, and it was entirely optional with them whether they would insure against such risk. We cannot, however, admit that the mere right or privilege of entering into a collateral contract of indemnity can have anything to do with the construction of the original covenant to build.

We now address ourselves to a consideration of appellants' cross-complaint. The contract provided for the performance of a specific and entire work, for a consideration, as to the portion thereof now in dispute, which was to be paid upon the completion of the building. The firm had reached a point where it was not entitled to any further money until it had completed its contract. To this extent, at least, the contract was unapportionable, and the performance of the whole work was a condition precedent to a recovery upon the special contract. 1 Addison, Contr. 400. There could be no recovery upon this contract, because it was unperformed, and the question as to the right to recover on a common count must depend upon where the loss must fall. In respect to a substantially like agreement relative to chattels, Judge

Story says: "Suppose there is a contract to do work on a thing by the job (as, for example, repairs on a ship), for a stipulated price for the whole work, and the thing should accidentally perish, or be destroyed, without any default on either side, before the job is completed, the question would then arise, whether the workman would be entitled to compensation *pro tanto* for his work and labor done, and materials applied, up to the time of the loss or destruction. It would seem that by the common law in such a case (independent of any usage of trade) the workman would not be entitled to any compensation, and that the rule would apply that the thing should perish to the employer and the work to the mechanic." Story, Bailments, § 426b.

The subject under consideration received an exhaustive consideration in *Appleby v. Myers*, L. R. 2 C. P. 651, 36 L. J. C. P. N. S. 331, 16 L. T. N. S. 669. That was a case stated, by consent, without pleadings. The contract was to install a steam boiler, engine, etc., in a building belonging to defendant, for a consideration to be paid on the completion of the work. The building was burned. The court said: "Where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither." It was also pointed out by the court that there was nothing, illogical in holding that the plaintiffs were not entitled to pay, since, if the accidental fire had left the defendant's premises untouched, and had only injured a part of the work of plaintiffs, they would have been required to do that part over again to fulfil their contract to complete the whole.

Pollard v. Shaffer, 1 Dall. 210, 1 L. ed. 104, 1 Am. Dec. 239, was a suit on a covenant to deliver up demised premises at the end of the term in good order and repair. Plea, that the British Army had forcibly taken possession of the premises and held the same until the term had expired, and

that during said time said Army had committed the waste complained of. M'Kean, Ch. J., in concluding an opinion well worth the perusal in connection with this case, said: "I am of opinion that the defendant is excused from his covenant to deliver up the premises in good repair on the 1st of March, 1778: (1) Because a covenant to do this, against an act of God or an enemy, ought to be special and express, and so clear that no other meaning could be put upon it; (2) because the defendant had no consideration, no premium for this risk, and it was not in the contemplation of either party; and, lastly, because equality is equity, and the loss should be divided,—he who had the term will lose the temporary profits of the premises, and he who hath the reversion will bear the loss done to the permanent buildings."

The rule *res perit domino* is very influential in all cases of this general character, and the only question is as to the application of the rule. See Story on Bailments, §§ 426, 426a. The following authorities support the view that the members of said firm cannot recover on their cross-complaint: *Brumby v. Smith*, 3 Ala. 123; *Siegel, C. & Co. v. Eaton & P. Co.* 165 Ill. 550, 48 N. E. 449; *Newman Lumber Co. v. Purdum*, 41 Ohio St. 373; *Fildew v. Besley*, 42 Mich. 100, 36 Am. Rep. 433, 3 N. W. 278; Bishop, Contr. § 588. As applied to this case, we may well adopt the following, which we take from 15 Am. & Eng. Enc. Law, 2d ed. p. 1090: "In a case of this nature, the defendant [owner] receives no benefit, and, if he is equally blameless and irresponsible for the accident by which the property is destroyed, why should not the law leave the parties as it finds them, and let each suffer his own loss?" We think that neither said firm nor the appellees were entitled to recover in this case.

Judgment reversed, with directions to the trial court to restate its conclusions of law and to render judgment in accordance with this opinion.

KENTUCKY COURT OF APPEALS.

GERMAN GYMNASIAC ASSOCIATION,
Appt.,
v.

City of LOUISVILLE.

(.....Ky.....)

An institution for the teaching of

physical culture is within a constitutional provision exempting from taxation institutions of education.

(Burnham, Ch. J., and Hobson, J., dissent.)

(April 15, 1904.)

NOTE.—For other cases in this series as to exemption of educational institutions from taxation, see *Catlin v. Trinity College*, 3 L. R. A. 206; *Detroit Home & Day School v. Detroit*, 6 65 L. R. A.

L. R. A. 97; *Auditor-General v. University of Michigan*, 10 L. R. A. 376, and *note*; *Philadelphia v. Overseers of Public Schools*, 29 L. R. A. 600; *Brown University v. Granger*, 36 L. R.

A PPEAL by defendant from a judgment of the Chancery Branch, First Division, of the Jefferson Circuit Court in favor of plaintiff in an action brought to enforce payment of certain tax bills. *Reversed.*

The facts are stated in the opinion.

Messrs. Ernest Macpherson, Lewis N. Dembitz, and George A. Brent, for appellant:

A medical college is exempt as a "school" (*Omaha Medical College v. Rush*, 22 Neb. 449, 35 N. W. 222), and theological seminaries, alike of all denominations, are notoriously free from tax burdens (*Cathedral of St. John v. Arapahoe County*, 29 Colo. 143, 68 Pac. 272).

When the Constitution speaks of education it means such as every child ought to obtain in order to make it a happy man or woman and a useful member of the community.

The word "education" embraces those exercises which bring out and improve bodily strength and skill.

Mt. Hermon Boys' School v. Gill, 145 Mass. 146, 13 N. E. 354; *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598; *People ex rel. Academy of Sacred Heart v. Tax & A. Comrs.* 6 Hun, 109, 64 N. Y. 656; *People ex rel. St. John's College v. Tax & A. Comrs.* 10 Hun, 246; *People ex rel. Seminary of Our Lady of Angels v. Barber*, 42 Hun, 27; *Hennepin County v. Grace*, 27 Minn. 503, 8 N. W. 761; *Cassiano v. Ursuline Academy*, 64 Tex. 673.

Mr. H. L. Stone, for appellee:

Appellant is what its name imports, merely an association to promote physical culture; in other words, a social club whose members and their families obtain certain benefits or gain by the payment of fixed dues or charges per month or per annum. This is not such an institution of education as is exempted from taxation by the Constitution.

Bosworth v. Kentucky Chautauqua Assembly, 112 Ky. 115, 65 S. W. 602.

Paynter, J., delivered the opinion of the court:

The German Gymnastic Association of Louisville is a corporation by virtue of the act of the general assembly of this commonwealth approved March 4, 1854. It owns real property in the city of Louisville of the value of \$15,000, where regular gymnastic exercises are taught. A teacher in physical culture is constantly employed, who instructs the members, and also one day of the week is devoted to the teaching of branches ordinarily taught in schools.

Lectures and addresses are delivered, and occasionally discussions of timely topics take place. The association is maintained by the payment of monthly dues by the members. There are no shares of stock, and no one derives any pecuniary benefit from the association. Section 170 of the Constitution provides that "institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education," shall be exempt from taxation. It is claimed that appellant is exempt from taxation by virtue of this provision of the Constitution. If it was conceded to be an institution of education, it would not be exempt from taxation if it was used or employed for gain. The record shows that it was not so employed, so the only question to be answered is, Is it an institution of education? Education is not confined to the improvement and cultivation of the mind. It may consist in the cultivation of one's religious or moral sentiments. It likewise may consist in the development of one's physical faculties. Those in charge of colleges and institutions of learning recognize this to be true. Their students are taught, not only the dead and modern languages, mathematics, and the sciences, etc., but the Bible and Christian evidences, and a gymnasium is maintained, and football and other athletic sports are encouraged. The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to a perfect education. The framers of the Constitution did not use the term in such a restricted sense as to exclude exercises which tend to develop strength. This is of as much importance to the state as is the acquisition of a knowledge of Latin, Greek, mathematics, etc. In *Mt. Hermon Boys' School v. Gill*, 145 Mass. 146, 13 N. E. 354, the court said: "Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all." In *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598, the court said: "In its broadest sense, the word 'education' comprehends, not merely the instruction received at school or college, but the whole course of training, moral, intellectual, and physical." In *People ex rel. Seminary of Our Lady of Angels v. Barber*, 42 Hun, 27, the court said: "Suitable recreation and physical exercise are deemed requisite to health and successful culture." If one institution afford an opportunity to acquire this perfect education, it is one of

A. 847; *Kentucky Female Orphan School v. Louisville*, 40 L. R. A. 119; *Yale University v. New Haven*, 48 L. R. A. 490; *White v. Smith*, 65 L. R. A.

43 L. R. A. 498; *Harvard College v. Cambridge*, 48 L. R. A. 547; and *Phillips Academy v. Andover*, 48 L. R. A. 550.

education. If three institutions are organized,—one seeking by a course of instruction to cultivate the mind, one by a method of instruction to improve students' religious or moral conditions, and another to teach physical culture to produce a better physical development,—each is an institution of education; as much as the one at which the student can acquire the threefold knowledge. It is simply a matter of judgment or convenience, on the organization of institutions of education, whether one shall furnish all the opportunities for the acquisition of an education, or whether there shall be separate institutions for that purpose. Our conclusion is that the appellant is an institution of education, not employed for gain, and is exempt from taxation.

The judgment is reversed for proceedings consistent with this opinion.

Burnam, Ch. J., and Hobson, J., dissent.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Apprt.,

v.

William S. LOWE.

(.....Ky.....)

1. A railroad company, in moving engines about a yard, must give signals for the benefit of, and keep a lookout for, car inspectors employed there, and who are likely to be passing back and forth over the tracks.
2. Whether or not a car inspector is guilty of contributory negligence in stepping on a main track without looking behind him at a time when a train is due from the opposite direction is for the jury.
3. A railroad company is liable for running an engine over a car inspector who has stepped onto the track in front of it without looking, if those in charge of it, after perceiving his danger, or after they should have perceived it by the exercise of ordinary care, in view of the circumstances, might have avoided the injury.
4. In moving engines and trains on tracks and about yards in towns where not only railroad employees, but other persons, are in the habit of crossing the tracks, those in charge of the trains should anticipate the presence of persons on the tracks, and keep a lookout for them.
5. A hostler in charge of an engine running through a yard is not a fel-

NOTE.—On the question whether servants handling trains and car inspectors or repairers are fellow servants, see *note* to *Sofield v. Gugenheim Smelting Co.* 50 L. R. A. 457; also *Buck v. New Jersey Zinc Co.* 60 L. R. A. 453.

As to duty of railroad company to protect car repairer while at work on cars, see also, in this series, *St. Louis, A. & T. R. Co. v. Triplett*, 11 L. R. A. 773.

65 L. R. A.

low servant of a car inspector at work therein, so as to relieve the company from liability for injuries inflicted by him upon the inspector by the negligent running of the engine.

6. Thirteen thousand dollars is excessive to award as damages for negligently knocking down, severely bruising, and causing loss of an arm by, a laborer thirty-four years old who was earning \$1 per day.

(*Burnam, Ch. J., and O'Rear and Barker, JJ., dissent.*)

(May 13, 1904.)*

A PPEAL by defendant from a judgment of the Circuit Court for Washington County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Benjamin D. Warfield, for appellant:

Appellee's own testimony shows that he was guilty of contributory negligence but for which the accident would not have happened, and that his negligence continued down to the moment of the accident. His negligence bars any recovery in this action.

Maysville v. Guilfoyle, 110 Ky. 670, 62 S. W. 493; *Louisville & N. R. Co. v. Fox*, 20 Ky. L. Rep. 81, 42 S. W. 922.

If one contributes to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened, he cannot recover, except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use the proper degree of care to avoid the consequences of such negligence.

Paducah & M. R. Co. v. Hoebl, 12 Bush, 41; *Illinois C. R. Co. v. Dick*, 91 Ky. 441, 15 S. W. 665; *Johnson v. Louisville & N. R. Co.* 91 Ky. 651, 25 S. W. 754; *Louisville & N. R. Co. v. Cummins*, 111 Ky. 333, 63 S. W. 594.

In an action by the servant against the master, negligence cannot be presumed, but must be proved.

Brooks v. Louisville & N. R. Co. 24 Ky. L. Rep. 1318, 71 S. W. 507; *Bogenschuts v. Smith*, 84 Ky. 330, 1 S. W. 578; *Louisville & N. R. Co. v. Milliken*, 21 Ky. L. Rep. 489, 51 S. W. 796; *Louisville & N. R. Co. v. Bock*, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262; *Louisville & N. R. Co. v. Law*, 14 Ky. L. Rep. 860, 21 S. W. 648.

Those operating engines in railroad switch yards are not required to anticipate, or keep

*A decision was reached in this case, and an opinion handed down, on February 19, 1902, but a petition for rehearing was filed, and the court, after consideration, substituted the opinion printed herewith for the former one.

a lookout for, persons using the tracks in such yards; and railroad companies can only be held liable for injuries to such persons where, notwithstanding their negligence, their peril is actually discovered by those operating the engines in time, by the exercise of ordinary care, thereafter to avoid the consequences of the peril to which the injured persons' own negligence has exposed them.

Vertrees v. Newport News & M. Valley R. Co. 95 Ky. 314, 25 S. W. 1; *McDermott v. Kentucky C. R. Co.* 93 Ky. 408, 20 S. W. 380; *Louisville & N. R. Co. v. Hooker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119; *Coleman v. Pittsburg, C. C. & St. L. R. Co.* 23 Ky. L. Rep. 401, 63 S. W. 39; *Ærkfetz v. Humphreys*, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 28 L. R. A. 181, 13 C. C. A. 364, 31 U. S. App. 277, 66 Fed. 115; *Wabash R. Co. v. Skiles*, 64 Ohio St. 458, 60 N. E. 576; *Elliott, Railroads*, § 1258; *Louisville & N. R. Co. v. Robertson*, 9 Heisk. 276; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Gahagan v. Boston & M. R. Co.* 70 N. H. 441, 55 L. R. A. 426, 50 Atl. 146; *Grand Trunk R. Co. v. Baird*, 36 C. C. A. 574, 94 Fed. 946; *Loring v. Kansas City, Ft. S. & M. R. Co.* 128 Mo. 349, 31 S. W. 6; *Carlaon v. Cincinnati, S. & M. R. Co.* 120 Mich. 481, 79 N. W. 688; *Keefe v. Chicago & N. W. R. Co.* 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503; *Daly v. Detroit Citizens' Street R. Co.* 105 Mich. 193, 63 N. W. 73; *Schaible v. Lake Shore & M. S. R. Co.* 97 Mich. 318, 21 L. R. A. 660, 56 N. W. 565; *Lynch v. Boston & A. R. Co.* 159 Mass. 536, 34 N. E. 1072; *Kenna v. Central P. R. Co.* 101 Cal. 26, 35 Pac. 332.

The person operating the engine and appellee were fellow servants.

Volz v. Chesapeake & O. R. Co. 95 Ky. 188, 24 S. W. 119; *Illinois C. R. Co. v. Coleman*, 22 Ky. L. Rep. 878, 59 S. W. 13; *Southern R. Co. v. Clifford*, 110 Ky. 727, 62 S. W. 514.

If appellee's negligence concurred with the negligence, if any, of appellant, so that but for appellee's negligence the injury would not have occurred, there can be no recovery.

Paducah & M. R. Co. v. Hoehl, 12 Bush, 41; *Illinois C. R. Co. v. Dick*, 91 Ky. 441, 15 S. W. 665; *Johnson v. Louisville & N. R. Co.* 91 Ky. 651, 25 S. W. 754; *Kentucky C. R. Co. v. Dills*, 4 Bush, 593; 4 Am. & Eng. Enc. Law, 17; *Cooley, Torts*, 674; *Patterson, Railway Accident Law*, 48.

The verdict is grossly excessive.

Newport News & M. Valley R. Co. v. Campbell, 15 Ky. L. Rep. 715, 25 S. W. 267; *Louisville & N. R. Co. v. Sheets*, 11 Ky. L. Rep. 781, 13 S. W. 248; *Louisville Water Co. v. Upton*, 18 Ky. L. Rep. 326, 36 S. W. 520. 45 L. R. A.

Mr. William C. McChord, also for appellant:

The court should have instructed the jury to find for defendant.

Illinois C. R. Co. v. Dick, 91 Ky. 441, 15 S. W. 665; *Paducah & M. R. Co. v. Hoehl*, 12 Bush, 41; *Kentucky C. R. Co. v. Thomas*, 79 Ky. 163, 42 Am. Rep. 208; *Louisville & N. R. Co. v. McCoy*, 81 Ky. 415; *Ramsey v. Louisville, C. & L. R. Co.* 89 Ky. 102, 20 S. W. 162; *Holloway v. Louisville & N. R. Co.* 92 Ky. 249, 19 S. W. 572; *Newport News & M. Valley Co. v. Deuser*, 97 Ky. 96, 29 S. W. 973; *Louisville & N. R. Co. v. Webb*, 99 Ky. 343, 35 S. W. 1117.

Lowe, at the time of receiving the injury, was a co, or fellow, servant with the hostler and helper, whose negligence it is claimed was the cause of the injury.

The liability of the master to the servant is governed by the ordinary principles of tort. The burden is on the servant to show a breach of duty on the part of the master. The duties of the master may be designated under the following heads or classifications: (1) To furnish suitable machinery and appliances; (2) to keep machinery and appliances in repair; (3) to select sufficient and trustworthy and careful fellow servants properly to carry on the business; (4) to establish proper rules and regulations for the safety of servants, such as will afford them reasonable protection against the dangers incident to the performance of their respective duties; (5) properly to instruct youthful or inexperienced servants as to the dangers incident to the service in which they are engaged.

Where the master delegates to a servant the right to discharge some or all of the duties which he owes to his servants, he (the master) is liable for the acts of such agent as if done by him in person.

Priestly v. Fowler, 3 Mees. & W. 1, Murphy & H. 305, 7 L. J. Exch. N. S. 42, 1 Jur. 987; *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339.

As time progressed and business expanded the courts of different states extended or enlarged this rule, and held the master liable in other instances, viz., where the offending servant was not acting in the place of, or discharging the duties of, the master at the time the injury occurred, but was intrusted with a position of superiority, and authorized to command and control the action of subordinates placed under his charge to assist him in the performance of the particular work assigned them by the master.

Louisville & N. R. Co. v. Collins, 2 Duv. 120, 87 Am. Dec. 486.

So, the doctrine that a laborer in one department is not a fellow servant with a laborer in another department has been

recognized. But in a majority of the courts the principle of different department liability only applies in cases where the offending employee is authorized to exercise some of the duties of the master.

Public policy requires that where the laborers are coequals, and engaged in laboring in the same field, or on the same railroad train, or in any other employment, each shall exercise proper care in the conduct of the business, and look to it that his collaborer does the same thing.

Louisville, C. & L. R. Co. v. Cavens, 9 Bush, 560; *Illinois C. R. Co. v. Hilliard*, 99 Ky. 686, 37 S. W. 75; *Volz v. Chesapeake & O. R. Co.* 95 Ky. 189, 24 S. W. 119; *Randall v. Baltimore & O. R. Co.* 109 U. S. 479, 27 L. ed. 1004, 3 Sup. Ct. Rep. 322; *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397; *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119.

Although servants may be working in different departments, yet, if their labors bring them together, or co-operate to accomplish the same general purpose of the master, and their relation in the different departments is such that they may have an influence upon each other, and at the same time they shall be directly co-operating with each other in the particular business in hand, or their usual duties shall bring them in habitual consociation, so that they may exercise an influence upon each other promotive of proper caution, they are fellow servants.

Chicago & N. W. R. Co. v. Moranda, 108 Ill. 576; *Chicago & A. R. Co. v. O'Bryan*, 15 Ill. App. 134; *Shearm. & Redf. Neg.* § 235; *Bartonshill Coal Co. v. McGuire*, 3 Macq. H. L. Cas. 300, 4 Jur. N. S. 773.

If the plaintiff's pleadings or proof, or if all the proof heard on the trial, shows that the plaintiff, by his own negligence, contributed to the injury, there can be no recovery.

Cahill v. Cincinnati, N. O. & T. P. R. Co. 92 Ky. 345, 18 S. W. 2; *Clarke v. Louisville & N. R. Co.* 101 Ky. 34, 36 L. R. A. 123, 39 S. W. 840; *Favre v. Louisville & N. R. Co.* 91 Ky. 543, 16 S. W. 370.

If the proof on the whole case shows contributory negligence on the part of the plaintiff, a peremptory instruction to find for the defendant should be given.

Johnson v. Louisville & N. R. Co. 91 Ky. 652, 25 S. W. 754; *Bogenschutz v. Smith*, 84 Ky. 338, 1 S. W. 578; *Hughes v. Cincinnati, N. O. & T. P. R. Co.* 91 Ky. 531, 16 S. W. 275.

There can be no such thing as contributory negligence, unless both parties are guilty of negligence.

Kentucky C. R. Co. v. Thomas, 79 Ky. 164, 42 Am. Rep. 208; *Paducah & M. R. Co. v. Hoehl*, 12 Bush, 41; *Favre v. Louisville & N.* 65 L. R. A.

R. Co. 91 Ky. 541, 16 S. W. 370; *Wright v. Cincinnati, N. O. & T. P. R. Co.* 94 Ky. 117, 21 S. W. 581; *Shearm. & Redf. Neg.* 5th ed. § 61; *Johnson v. Louisville & N. R. Co.* 91 Ky. 653, 25 S. W. 754; *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 85.

Messrs. H. W. Bruce, W. D. Hines, and E. W. Hines also for appellant.

Messrs. J. W. S. Clements and J. H. Thurman for appellee.

Hobson, J., delivered the opinion of the court:

Appellee, William S. Lowe, was in the service of appellant, the Louisville & Nashville Railroad Company, as assistant inspector of trains at Lebanon Junction, which is a town of about 1,200 inhabitants, at the junction of the Knoxville branch with the main line of appellant's road. There is maintained at this place a railroad yard, containing an extensive system of side tracks, used in making up freight trains going out of the yards. The regular trains, too, pass over the main tracks, and are sometimes switched on the side tracks, so that cars are moving about the yard pretty much all the time. A switch engine is kept in the yard for the purpose of switching cars and making up trains. Large coal bins are maintained there by the appellant, at which all engines are supplied with coal. Perhaps as many as 150 engines, including the different passages of the switch engine, pass across the yard every day. The coal bins are north of the station, and in a curve of the track, so that an engine beyond a certain point cannot be seen south of the bins. Appellee had been the watchman in the shops for about six weeks before he was made assistant car inspector. On the 12th of September, 1899, which was the first day that he served as car inspector, he went on duty at 6 p. m., and inspected a freight train then ready to go out southward on the Knoxville branch. The train was standing on a side track east of the main track, fronting south. He began at the engine on the west side of the train, and inspected the cars, going back from one to another until the inspection was finished, when the train pulled out. The tool-house to which he was then to go was on the east side of the tracks, and south of the point where he then was. So he walked southward along by the side of the departing train, and, when the side track merged in the track next west of it, he got over on that track, and then on the main track. While he was walking southward on the main track, an engine and tender backing down on that track ran upon him in the rear, knocking him down, cutting off his right arm, and inflicting severe bruises, for which injuries he recovered damages in the sum

of \$13,000. The evidence introduced by him on the trial tended to show these facts: The track was straight for some distance, and appellee, walking along with his back to the engine, could have been seen by the persons on it for some distance if a proper lookout had been kept. The tender had been loaded with coal at the coal bin. The coal was piled up higher than the engineer's head, so that his line of vision did not reach the track, but rose above the track the further it was prolonged, and he was therefore unable to see anything on the track in front of him. A passenger train from the south was just about due on the main track, and appellee supposed that no other train would be on that track. So he kept a lookout in front of him for it, but did not look behind him after he started south. When he turned and started south, he looked back, and, seeing nothing, supposed the way was clear. The engine by which he was hurt was then standing at the coal bin around the curve. After taking coal, it came rather rapidly southward, in order to get off the main track before the arrival of the passenger train from the south. Appellee's proof tended to show that no signal was given of the movements of this engine, and that it was run substantially without any lookout in front of it. The proof is conflicting as to whether signals were given by the ringing of the bell, and as to the speed of the train, but the evidence for appellee shows that the engine was running at something like 12 or 15 miles an hour. When it stopped after running over appellee, it was just even with the engine of the outgoing freight train, by the side of which he had been walking, and had therefore run something like $\frac{1}{4}$ mile more than that engine after it started and appellee turned and began to walk south. When it stopped it had only one minute to get in on the side track in time, according to appellant's proof. Appellee could not go directly to the toolhouse, because the outgoing freight train was between him and it. He perhaps got on the main track, thinking no other train, except the passenger train from the south, could properly be on that track at that time, and this would be in front of him. There is some evidence from which it is argued that the time had already expired when any other train, under the rules, might properly use the main track. The men in charge of the engine did not see appellee at all, and did not know he was hurt until informed by others.

Appellant complains that the court refused to instruct the jury peremptorily to find for it. It also complains of the instructions given by the court. The court, in substance, instructed the jury that if they believed from the evidence that appellee, at the

time he received the injuries, was upon appellant's track in the usual course of his employment, and that its agents in charge of the engine and tender that injured him negligently failed to ring the bell or give other signal of its approach, or negligently failed to stop it after they saw his peril, or after they might have seen it by the use of reasonable care, then they should find for the plaintiff, unless they believed from the evidence that he by his own negligence contributed to such an extent to the injury that but for his negligence it would not have happened, and that in this event he could not recover, unless appellant's agents in charge of the engine and tender knew, or could have known by ordinary attention, of the peril in which his negligence had placed him, and thereafter failed to observe reasonable care to avoid the injury which followed.

It is earnestly maintained for appellant that the evidence shows no negligence on its part; that, as to appellee, it was not required to give notice of the movement of its trains, or keep a lookout for him in moving them. In support of this view, we are referred to a number of decisions in other jurisdictions; but, without discussing them, we conclude that the rule has been so often held otherwise in this state that it is no longer an open question.

Appellant has at Lebanon Junction something like 200 employees. The place at which appellee was injured is used by them and by other persons, to a great extent, in coming and going. The proof presents a case where the presence of persons on the track should reasonably be anticipated by those in charge of the train. The point was not far from the station,—between it and the coal bins,—and where a great many people passed back and forth, especially during the day. In *Shelby v. Cincinnati, N. O. & T. P. R. Co.* 85 Ky. 224, 3 S. W. 157, the intestate was in the yard of the railroad at Junction City for the purpose of soliciting employment in watering stock, and was run over by a train backed without signal or outlook. The place was not so much traveled as in the case before us, and the intestate was barely a licensee, and yet the court held the company liable. After showing that increased vigilance and precaution are required, the court said: "But it is obvious that neither the duty of giving the warning of the approach of trains, nor of resorting to the proper and necessary means to prevent collision with persons, can be performed unless there be some one in a position to see ahead of the train and to control it." In *Conley v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 402, 12 S. W. 764, the intestate was killed in like manner by a backing train as he was crossing the track, and the case is discussed on

the idea that he was technically a trespasser. The court held the company liable, and said: "A train of running cars—these were running, according to the appellant's proof, at the rate of about 15 miles per hour—is more dangerous to the life of persons with whom it comes in contact than that of the most ferocious and powerful wild animal. And certainly it cannot be lawfully turned loose to run by itself, and expose persons that may be on the track, either by accident, mistake, or design, to its destructiveness. Humanity positively forbids the owner of property that is dangerous to human life and safety to knowingly turn such property loose, even upon his own ground, where it will do mischief even to a technical trespasser." In *Louisville & N. R. Co. v. Potts*, 92 Ky. 30, 17 S. W. 185, the deceased was in the employ of the railroad company at Junction City, a town of about 400 people. It was his duty to enter in a book the numbers of the cars standing on the side tracks, and point out to the engineer those he was to take up. While standing on one of the tracks, he was run over and killed by some cars detached from the engine moving up behind him without any lookout or signal of their approach. The court said: "*The Shelby Case*, 85 Ky. 224, 3 S. W. 157, which occurred in the same town, and the *Conley Case*, 89 Ky. 402, 12 S. W. 764, seem conclusive of the question. It is held in those cases that neither a train nor a single car should be permitted to move on a side track in a city or town, 'without some servant is in position to give warning of its approach, and to control its movements.' . . . It was as essential that the servant should be in a position thus to see and give warning, as it was to be in a position to control the cars." In *Barber v. Cincinnati, N. O. & T. P. R. Co.* 14 Ky. L. Rep. 869, 21 S. W. 340, the intestate was in the service of the railroad company, getting out ballast, near High Bridge, Kentucky. The quarry was on the west side of the track, and, to obtain a suitable place for piling the rock, he had to wheel it across the track and along by the side of it a short distance, to a point on the east side, and for that purpose was required to place plank across the track on which to run his wheelbarrow. Warning signals by the train to laborers working on the road were required by the rules of the company. But no signal was given of the approach of the train, and when it was very close to the intestate he ran to the track, and tried to move the plank to avoid danger of the train's being derailed. In doing this, he was killed. The men in charge of the train knew of the labor done at this point, and the mode of doing it. The trial court gave a peremptory instruction to the jury to find for the

defendant, but on appeal this was reversed. In the subsequent case of *Illinois C. R. Co. v. Mahan*, 17 Ky. L. Rep. 1200, 34 S. W. 16, Mahan was the telegraph operator at Arlington, and received orders to stop an extra train. It disregarded his signal to stop, and he, seeing that a collision was inevitable with a passenger train coming in the opposite direction, unless the order to stop was obeyed, seized a lantern and followed the train some 30 yards, waving his light. It stopped, and the conductor came back to him. The extra then backed in off the main track to get out of the way of the approaching passenger train, and they also got off the main track to let that train pass. In doing this they got on the side track and while standing there the train which he had stopped continued backing down on the side track without any lookout or signal of its approach, and ran over him. Judgment in his favor was affirmed. The court said: "If, in the emergency which seemed to confront him, the appellee got on the side track, or too close to it, when there was space elsewhere within which to stand or walk and give his signals to the approaching passenger train, he was, perhaps, guilty of negligence, but for which the injury would not have occurred; yet it is manifest that, by the exercise of ordinary care on the part of those controlling the backing train, the danger could have been discovered, and the injury averted. By witnesses in the service of the appellant it is shown to have been the duty of those operating the extra to have had a brakeman on the rear of the backing train, who might give warning of its comparatively noiseless approach; and it is no excuse for the failure to make such provision in this instance to say that the company was using, instead of the usual cabooses, a box car, which did not conveniently admit of this customary precaution. The necessary care was not exercised on this occasion, and the failure to exercise it was gross negligence."

These cases control the one before us, for the danger from the want of signals of the approach of the train, or outlook in front of it, was greater in this case than in any of them, under the evidence. The same rule has been announced elsewhere. Thus in 2 Thompson on Negligence, § 1839, it is said: "Persons lawfully at work in repairing a railway track, or in repairing a highway where it crosses a railway track, cannot be expected to pursue their labors, and at the same time maintain a constant lookout for an approaching train. They are passive, and are not a source of danger to the train. Those who are driving the train are active, and are handling and in control of the instrument of danger and mischief. The obligation of reasonable care which the law puts upon the

railway company under these circumstances therefore demands nothing less than an active vigilance in favor of persons thus lawfully at work upon the track, and the giving of seasonable danger signals to arouse their attention and enable them to get out of the way before it is too late." In §§ 1840-1842 it is shown that the same rule applies in favor of the servants of a contractor, or persons engaged in loading or unloading cars, or receiving mail or express matter. In § 1846 the care required in moving trains through cities and towns is pointed out, and it is laid down to be negligence, when a train is moved backwards, not to have a person keeping a lookout. See also 2 Shearm. & Redf. Neg. §§ 457, 458. The case of *Illinois C. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. 665, is not inconsistent with the above. In that case Dick was only a licensee to cross the track. For his own convenience he left the usual way of crossing, and was walking along the track. He had no right to be where he was. At least, there is nothing in the case to show that his presence there should have been anticipated, or that it was a place at which the servants of the company should have been on the outlook for persons. The appellee was in the discharge of his duties in going from the inspection of the train to the toolhouse and was at a place at which the presence of persons on the track might be anticipated. While he was not at work on the track, he was at work for the defendant, and was lawfully on the track in the course of his employment, and is as much within the principle of the rule as if laboring on the track. Whether he was guilty of contributory negligence is a question for the jury.

It is earnestly insisted, also, that the court erred in instructing the jury that appellee could not recover if but for his negligence the injury would not have happened, unless appellant's agents in charge of the engine and tender knew, or could by ordinary care have known, of the peril in which his negligence had placed him, and thereafter failed to observe reasonable care to avoid the injury which ensued. The instruction of the court followed the rule announced in an opinion by Judge Crenshaw, in the year 1856, in *Louisville & N. R. Co. v. Yandell*, 17 B. Mon. 598. It was reaffirmed in an opinion by Judge Robertson in *Louisville & N. R. Co. v. Collins*, 2 Duv. 114, 87 Am. Dec. 486, and *Louisville & N. R. Co. v. Robinson*, 4 Bush, 507. These cases have since been followed by the court so often that the question is no longer open. *Louisville & N. R. Co. v. McCoy*, 81 Ky. 411; *Louisville & N. R. Co. v. Earl*, 94 Ky. 374, 22 S. W. 607; *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 345, 18 S. W. 2; *Louisville & N. R. Co. v. Schuster*, 10 Ky. L. Rep. 65, 7 S. W. 874; *Louisville & N. R. Co. v. Krey*, 16 Ky. L. Rep. 797, 29 S. W. 869; *Louisville & N. R. Co. v. Hackman*, 17 Ky. L. Rep. 81, 30 S. W. 407; *Pittsburgh, C. C. & St. L. R. Co. v. Lewis*, 18 Ky. L. Rep. 957, 38 S. W. 482; *Crowley v. Louisville & N. R. Co.* 21 Ky. L. Rep. 1435, 55 S. W. 434; *Flynn v. Louisville R. Co.* 110 Ky. 662, 62 S. W. 690; *Gunn v. Felton*, 108 Ky. 565, 57 S. W. 15. To same effect, see 1 Thomp. Neg. §§ 230-232; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

In towns and cities where the presence of persons on the track of the railroad may be rightfully anticipated, a due regard for human life requires that a lookout should be maintained in the operation of engines and trains. This has been often declared. The place where the injury sued for occurred was in a town, and at a place which was used, not only by the numerous employees of appellant, but by other persons, in passing from the station to the coalyards, and from one portion of the town to another. The presence of persons on or about the track at the point where the injury occurred should reasonably have been anticipated, and it was incumbent on those operating the engine in question to keep a lookout. Otherwise all the care would be required of those on the track, and none would be required of those operating the train. Instructions embodying the view of the law insisted on for appellant have been held erroneous by this court as to persons rightfully on the track at such places, on the ground that they placed all the care on the person injured. *Louisville, C. & L. R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 227; *Louisville & N. R. Co. v. Clark*, 105 Ky. 571, 49 S. W. 323. In view of the character of the place where the accident occurred, and the fact that the deceased was not a trespasser, the court properly qualified the instruction on contributory negligence as indicated.

It is further urged that appellee and the men in charge of the engine were fellow servants, being all engaged in the operations of the yard, and that, at any rate, appellant is not liable, except for the gross negligence of its man in charge of the engine. The engine was run from the coal bin to the side track by a man employed for that purpose to take charge of the engines in the yard, and known as the "hostler." There is much conflict in the authorities as to who are fellow servants, but the rule in this state has been steadily maintained from the beginning. In *Louisville & N. R. Co. v. Collins*, 2 Duv. 114, 87 Am. Dec. 486,—the first case on the subject,—where a laborer on an engine in the yard

was injured by the negligence of the man in charge of the engine, this court said: "The only consistent or maintainable principle of the corporation's responsibility is that of agency. *Qui facit per alium facit per se*. It is therefore responsible for the negligence or unskillfulness of its engineer, as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient; as to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross; but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. Among common laborers, constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental, but independent, service, no one of them, as between himself and his coequals, is the corporation's agent; and therefore it is not, on the principle of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employees would be its agent as to entire strangers to it." This case, and a number of others following it, were reviewed and approved in *Louisville, C. & L. R. Co. v. Cavens*, 9 Bush, 559, and still later in *Greer v. Louisville & N. R. Co.* 94 Ky. 169, 42 Am. St. Rep. 345, 21 S. W. 649, and *Illinois C. R. Co. v. Hilliard*, 99 Ky. 684, 37 S. W. 75. In the last case the conductor of a train was injured by the negligence of a car inspector, and it was insisted that the jury should have been instructed that they were fellow servants, or that the company was at least liable only for the gross negligence of the car inspector. The court held otherwise, and said: "In the first place, the person employed at Mound Station to inspect each car of a train, and ascertain if it is in a safe condition, was not a fellow servant of plaintiff, in the sense of being upon a common footing, and agents of each other. They acted in different spheres, and neither could or was required to know whether the other was properly doing his duty. In the second place, it would have been improper to require

the jury to believe the inspector was guilty of gross negligence. The simple inquiry was, as they had been instructed, whether the company, through its inspector, used ordinary care in examining the cars, so as to ascertain whether the ladders attached to each were in a safe condition, for it was the legal duty of the company to guard against every source of danger they could, by the exercise of that kind and degree of care, foresee and prevent; and, while a railroad company cannot be required to insure the safety of a train, it is bound to make a reasonable, proper, and careful examination of each car." In *Louisville & N. R. Co. v. Davis*, 14 Ky. L. Rep. 716, a switch engineer in a railroad yard was held not to be a fellow servant of a switchman and coupler in the yard. In *Louisville & N. R. Co. v. Moore*, 83 Ky. 675, a fireman, while acting as engineer, was held to be engineer for the time, and not to be a fellow servant of the brakeman. The same rule has been applied as between the crews of different trains, and it seems to us to be a very unsubstantial distinction between the engineer who runs an engine in the yard, and one who runs it at other stations along the road, as the fireman usually does in switching. Appellee had no control of the engineer in charge of this engine. He had nothing to do with the running of the trains or the running operations of the road. He was engaged in a distinct department, his only duty being to inspect cars.

Lastly, it is insisted that the verdict is excessive. Appellee is thirty-four years of age, and was earning \$1 a day. He has lost one arm, and does not appear to have received other permanent injury. In no case before this court has it ever sustained so large a verdict for such an injury, and we are all of opinion that the verdict is excessive, and that for this reason a new trial should be granted. We see no other error in the record.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Burnam, Ch. J., and **O'Rear** and **Barker**, JJ., dissent, because peremptory instructions were not given.

LOUISIANA SUPREME COURT.

Mrs. C. E. WHITWORTH *et al.*

v.

SHREVEPORT BELT RAILWAY COMPANY, *Appt.*

(.....La.....)

*Potts and Whitworth, employees of the telephone company, were engaged in stretching a line of that company upon its poles. In doing so, the line had to be passed above a span of the electric car system. Potts, upon the telegraph pole, was holding one end of the wire, while Whitworth, upon the ground, was holding the other. The latter stumbled, and in doing so dropped his end of the wire, which fell to the ground, resting upon the span wire below, which, by reason of defective insulation in the hanger by which the trolley wire and the span wire were connected, was heavily charged with electricity. Potts, holding the other end of the wire, instantly, received a shock and fell headforemost, but his spurs caught on a spike on the telephone pole, and he hung suspended in the air. Whitworth ran to his relief, and, catching hold of the wire of his own company, which he had been using, to do so, he himself was instantly killed. *Held*, that Whitworth, in going to the rescue of Potts, was not in fault, but was acting under a high sense of moral duty, and for his death while engaged in performance of that duty, occasioned by the negligence of the electric company, it is responsible in damages.

(February 29, 1904.)

A PPEAL by defendant from a judgment of the Judicial District Court for the Parish of Caddo in favor of plaintiffs in an action brought to recover damages for the alleged negligent killing of plaintiffs' intestate. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. Wise, Randolph, & Rendall for appellant.

Messrs. Alexander & Wilkinson and Shepherd & Land for appellees.

The briefs are so fully abstracted in the opinion that nothing could be inserted here without needless duplication.

Nicholls, Ch. J., delivered the opinion of the court:

This action is brought by Mrs. Carrie E. Nola Whitworth, the widow of P. B. Whit-

*Headnotes by NICHOLLS, Ch. J.

NOTE.—For other cases in this series on the question of negligence in voluntarily incurring danger to rescue another person, see *Corbin v. Philadelphia*, 49 L. R. A. 715, and *note*; *West Chicago Street R. Co. v. Lilderman*, 52 L. R. A. 655; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 267; and *Pittsburg, C. C. & St. L. R. Co. v. Lynch*, 63 L. R. A. 504.

65 L. R. A.

worth, in her own behalf, and by Lester Allen Whitworth, the minor son of P. B. Whitworth, represented by his guardian, G. W. Prewitt. A judgment is prayed for in favor of each of the plaintiffs for \$15,000.

It is alleged that P. B. Whitworth, the husband of one of the plaintiffs, and the father of the other, was killed on August 1, 1901, in the city of Shreveport, by an electric shock communicated to his body from the electric wires of the Shreveport Belt Railway Company; that his death was solely due to its utter and wanton negligence in operating a street railway by means of an overhead wire on Texas avenue, without proper insulation, and permitting defective insulations of the trolley hangers to remain in such condition that the current freely passed to the span wire, and thus communicated with the telephone wire, which said Whitworth was engaged in stretching on poles parallel to the said railway company track, and by the shock from which Mr. Potts, who was on the telephone pole, 40 feet from the ground, was shocked and killed. Plaintiffs showed that in the effort to save the life of Potts, who was hanging helpless on the telephone pole as a result of a shock from an electric current transmitted to the telephone wire from the span wire of defendant company, said P. B. Whitworth received a shock which caused him intense agony and pain, and resulted in his death; that said P. B. Whitworth attempted to pull the wire from the body of Potts when he received the shock. They showed that said P. B. Whitworth was a young man, twenty-four years of age, earning \$50 per month, supporting his wife and child; that by the reckless indifference of the said railway company to the safety of the public, and its wanton negligence, Carrie Whitworth and Lester Allen Whitworth were deprived of the support of their husband and father.

That the pain and agony of P. B. Whitworth before death, after receiving the electric shock, was intense; that said P. B. Whitworth was without fault; and that his death was due entirely to the wanton negligence of defendant company.

In view of the premises, they prayed for service of citation and petition on said Shreveport Belt Railway Company, through its president, Walter B. Jacobs, to answer to the demand of Mrs. C. E. N. Whitworth for damages for the pain and suffering, death, and loss of support of her husband, P. B. Whitworth, by said defendant company, in the full sum of \$15,000, and the demand of George Prewitt, guardian of Lester Allen Whitworth, son of P. B. Whitworth, for

damages to said minor in the full sum of \$15,000 in the pain, suffering, and death, and loss of support, occasioned to said minor by the careless killing of his father by said defendant company, and for all necessary orders and general relief.

The defendant pleaded the general issue. Further answering, it averred that, if the alleged company or its employees were guilty of any negligence, and that, if the appliances used by it were defective in any way, which was denied, P. B. Whitworth was guilty of contributory negligence which resulted in his death, and he cannot recover.

It was agreed between counsel that the evidence taken in the suit of *Mrs. Birdie Potts v. Shreveport Belt Railway Company* should be used on the trial of this cause, with the right of either party to introduce other evidence.

The jury returned a verdict against the defendant in favor of Mrs. Carrie E. Whitworth for \$3,500, and against the defendant in favor of Lester Allen Whitworth for \$2,500.

Defendant appealed.

This case is the sequel of that of *Potts v. Shreveport Belt R. Co.* reported in 110 La. 1, 98 Am. St. Rep. 452, 34 So. 103, in which the plaintiff recovered a judgment against the defendant for damages resulting from the death of her husband through its negligence. The following facts are extracted from the report of that case: When Potts was killed he was in the employ of the Cumberland Company, as foreman of a line gang, in stringing its wires upon the poles of that company. In stringing the wires, Potts had with him two assistants, Whitworth and Holt, also in the employ of the telephone company. Under a franchise granted by the city of Shreveport, the defendant company was operating a double-track electric railway on Texas avenue, in that city. It was the overhead trolley system. There was a trolley wire over each track. They were suspended by wires spanning the street, called "span wires." These were attached to wooden poles placed opposite each other on the two sides of the street. The trolley wires were made fast to the span wires by means of what are called "hangers" or "ears." These hangers should be insulated, the purpose being to confine the current of electricity which propels the cars to the trolley wire. Were it otherwise, each span wire would be a "live" or "hot" wire, charged with the same voltage of electricity that the trolley wire had. This would result in so much leakage of the electrical current as to impair its efficiency in the work of operating the cars, and would, besides, render each span dangerous. The Cumberland Telephone Company, also, under a franchise from the city of Shreveport, was

occupying the sides of Texas avenue with its poles and wires. On cross-arms attached to its poles it maintained and operated numerous wires on and along the streets.

The electric current with which telephone wires are charged is too weak to be dangerous to human life, but the current with which the trolley of the car company is charged is of deadly potency. Potts's death was occasioned by the telephone wire he was stringing coming in contact with a span wire of the car company.

This span wire, notwithstanding its connection with the trolley wire, should have been, through proper insulation, harmless. But it was not. It was deadly dangerous. The insulation at the hanger or ear was gone, if it had ever existed, and the wire was "alive" with likely the same voltage of electricity as was passing over the trolley. This being so, the instant the telephone wire touched it, one end of the wire being on the ground, thus completing the circuit, it (the telephone wire) became likewise charged with the deadly current. At the time Potts was killed, he was up on the pole to which the wire was to be strung. In close proximity was the span wire of the defendant. That it was heavily charged with electricity, there was no doubt. The death of Potts attested this fact. That it was so charged was due to the fact that it had no insulation to protect it from the trolley wire. The wire Potts was stringing had been passed over the span wire. This had been accomplished by means of a rope. Whitworth was westward of the pole Potts was upon. Under instructions from Potts, he was (on the ground) pulling the wire which was being strung. This pulling of the wire kept it taut, and while taut it was free from contact with the span wire. But Whitworth stumbled, and this circumstance caused a slackening of the wire. This slackening of the wire brought it in contact with the span wire, and immediately it became charged with the deadly current. So deadly was the current, that, when Potts was shocked, and hung suspended, and Whitworth, rushing up to the end of the wire, and, touching the ground in the generous effort to pull it away from Potts, seized it, he was himself instantly killed. This court held in the *Potts Case* that the defendant was negligent, and rendered judgment in favor of the plaintiff against it. We are called on to determine whether the plaintiffs in this case are entitled to damages for the death of Whitworth.

Defendant's counsel, in their statement of facts, referring to the *Potts Case*, say: "It will be remembered that Potts, with Holt and Whitworth, was engaged in stringing a telephone wire along Texas avenue, in the city of Shreveport. At the time of his death, Potts was at the top of a pole, endeavoring

to place the wire above the span wire of the defendant company. Whitworth, on the ground, had hold of one end of the telephone wire, pulling the wire, when he stumbled, letting go the wire, when it fell on the span wire, which was charged with electricity from the trolley wire, occasioned from defective insulation. It seems that Potts fell and died the moment Whitworth stumbled and let go the wire."

The admissions so made as to the negligence of the defendant company bring the issues involved in this case within very narrow compass. It is conceded on both sides that, as soon as Potts received from the telephone wire the electric shock by which he was killed, he immediately fell head downward from the point where he was standing, and, his spurs catching upon one of the spikes on the pole, remained suspended in the air, and that Whitworth, after stumbling and losing hold of his end of the telephone wire, took hold of it again, and was instantly killed.

The plaintiffs urge that in so doing he could not be held guilty of negligence, as his act was in aid of an attempt to save the life of his companion and fellow workman, Potts, and any others who might incautiously come in contact with the telephone wire, which was hanging suspended from the span wire.

Defendant contends that it was evident to all who witnessed the unfortunate occurrence that Potts was dead when Whitworth caught hold of the wire, and fell dead instantly; that when Potts received the electric shock, and fell from the top of the pole, head down, hanging by his spurs, Holt (one of his assistants) realized that he could do nothing for him but to begin preparations for his interment; that, when he started to ring for assistance to take Potts down, he warned Whitworth not to touch the wire, then down in the mud; that the action of Whitworth was not to save human life, for Potts was manifestly dead several minutes before he took hold of the wire; that others saw it, and he must have seen it, and, moreover, he was warned not to touch the wire by several persons; that, in disregard of this warning, Whitworth, a telephone lineman himself, caught hold of the wire and dropped dead; that his conduct was rash, and recovery cannot be had in the case; that the doctrine held by Rorer on Railroads [p.1029] is to the effect that "it is not a wrongful act to make an effort to save human life if the effort made be compatible with a reasonable regard for one's own safety;" that the same doctrine is announced in 2 Thompson on Negligence, p. 1174, § 21, and in *Peyton v. Texas & P. R. Co.* 41 La. Ann. 861, 17 Am. St. Rep. 430, 6 So. 690.

Counsel of plaintiff, on the other hand, contend that Whitworth met his death in the 65 L. R. A.

attempt to rescue one who was in imminent and deadly peril through the negligence of the defendant; that the spectators were thrown into a state of great excitement by the horrible sight; some hastened to telephone the power house to turn off the current; some cried out, "Cut the wire;" others, "Don't touch the wire;" that Whitworth, seeing his comrade in that horrible predicament, sizzling and frying to death, and hanging head down 40 feet in the air, attempted to cut the telephone wire, and was killed. Counsel say: "Defendant company adopts the only possible defense open to it,—that Whitworth was grossly reckless and imprudent; that his widow and child should be denied damages for his death. It has been held that it must be an extreme case to justify refusing damages in a matter of this nature on the ground of the recklessness of the rescuer. This is based on the theory that it is frequently impossible to rescue one in imminent peril without sharing in the danger. It has been further held that due allowance must be made for the excitement caused by the sight of a fellow creature losing his life, and that the danger must not be measured after it is passed, by one who was not present, in apothecary's scales, to determine whether the rescuer exposed himself to more danger than was prudent."

What can be more dangerous than to throw one's self in front of the wheels of a rapidly approaching train? Yet this court, in *Peyton v. Texas & P. R. Co.* 41 La. Ann. 861, 17 Am. St. Rep. 430, 6 So. 690, refused to hold that his efforts to save another were so rash, under such circumstances, as to debar his recovery, saying that the appreciation of the value of human life was so great, and the admiration for heroism so universal, that we know of no case where the court had withheld damages under circumstances like that before it. Counsel say:

"The judgment in the case at bar might be well based on the principle that in such a case the rescuer is attempting to save the company from the consequences of its own negligence, and it is not for the company to theorize as to how it might have been done more prudently and with less danger.

"Had Whitworth been successful in rescuing his friend, the defendant would have reaped the benefit of his act. He failed, and lost his own life, and it strikes us that it comes with poor grace from the defendant to say he was negligent, and should not have acted with imprudence. There was intense excitement at the place of the accident. The wires were lying loose in a public street, and the excited citizens were crying: 'Cut the wire,' and others, 'Don't touch the wire,' and, in the midst of these exclamations, Whitworth attempted to cut the wire, either

for the purpose of saving his friend Potts, or to attempt to get it out of the street, and was himself killed. There was no time for reflection. There was no opportunity for deciding the best course to pursue, and he acted on the moment in the way to him seemed best. According to defendant's counsel, Whitworth should have differentiated between the extreme danger which, under the cases, he could risk, and the imprudence which he must avoid.

"That others thought there was a chance to save Potts is shown by the fact that they telephoned defendant's power house to turn off the current, and still others advised the cutting of the wire. It all happened in less time than it takes to tell it. Under such circumstances, what was more natural than for the deceased to attempt to cut the wire? Admitting that there was great danger in the attempt, still there was a chance that it might be done without being injured, and it might have saved the life of his companion. As long as there was a chance to save human life or to prevent injury to others, no court will say that he was recklessly imprudent, particularly against him whose negligence was responsible for the situation.

"If there was excitement, and, through panic and fear, reason had lost its proper sway, this excitement was caused by the defendant's negligence, and that, then, would be the primary cause of the accident, and it would still be liable. See Thompson on Negligence, § 197, for a full exposition of the law. This author says: 'If A acts erroneously under the influence of a sudden impulse of fear, or inconsequence of a sudden appearance of danger, caused by the negligence of B, A may recover damages of B, although, if A had not so acted, he would not have been hurt.'

"This court, in the case of *Potts v. Shreveport Belt R. Co.* 110 La. 1, 98 Am. St. Rep. 452, 34 So. 103, having held that Potts was without fault, and having awarded his widow damages for his death, it therefore was *res judicata* that the defendant was negligent, and that Potts was acting with care. Therefore Whitworth was attempting to save his friend, who was without fault, from the consequences of the negligence of the defendant.

"If the condition be such as shows imminent danger of serious injury or death, the rule is to be applied to the act out of which the contributory negligence is claimed to arise, and, when it is coupled with the negligence of another in producing the condition, it will be quite an extreme case which defeats recovery by the court on the ground of contributory negligence. *Gibney v. State*, 137 N. Y. 1, 19 L. R. A. 365, 33 Am. St. Rep. 690, 33 N. E. 142; *Linnehan v. Sampson*, 65 L. R. A.

126 Mass. 506, 30 Am. Rep. 692.' *Manthey v. Rauenbushler*, 71 App. Div. 176, 75 N. Y. Supp. 716.

"In the same case the court further said: 'It was not a case where nice distinctions could be made as to the position of the truck, the speed of the horse, and the danger which confronted unless he was stopped.' 71 App. Div. 177, 75 N. Y. Supp. 717.

"So, in the present case, Whitworth saw the necessity for immediate action, and pursued the only possible means of saving Potts. In *Peyton v. Texas & P. R. Co.* 41 La. Ann. 864, 17 Am. St. Rep. 430, 6 So. 690, this court said: 'When one risks his life or places himself in a position of great danger in an effort to save another, or to protect another who is exposed to sudden peril or in danger of great bodily harm, it is held that such exposure and risk for such a purpose is not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons.' See also *Eckert v. Long Island R. Co.* 43 N. Y. 502, 3 Am. Rep. 721, and Thompson on Negligence, §§ 198, 199, for a strong presentation of the subject.

"That it is not rashness to voluntarily incur great danger to save another in peril is expressly decided by the supreme court of Ohio in *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316-322, 13 L. R. A. 190, 29 Am. St. Rep. 553, 28 N. E. 172. This court expresses itself thus: 'There was but a fraction of a minute in which to resolve to act, or action would come too late. Under these circumstances, it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be, in effect, to deny the right of rescue altogether, if the danger was imminent.

"The attendant circumstances must be regarded: The alarm, the excitement, and confusion usually present on such occasions, the uncertainty as to the proper move to be made, the promptness required, and the liability to mistake as to what is best to be done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under these or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is neither supported by principle nor authority.'

"In another case (*Eckert v. Long Island*

R. Co. the leading case on the subject) Grover, J., said: 'It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If from the appearances, he believed that he could, it was not negligence to make an attempt to do so, although believing that possibly he might fail and receive an injury to himself. He had no time for deliberation. He must act instantly if at all, and a moment's delay would have been fatal to the child. 43 N. Y. 502, 3 Am. Rep. 721; *Thomp. Neg.* 2d ed. pp. 193, 194, 195. See also *Gibney v. State*, 137 N. Y. 1, 19 L. R. A. 365, 33 Am. St. Rep. 690, 33 N. E. 142; *San Antonio & A. P. R. Co. v. Gray*, 95 Tex. 424, 67 S. W. 763; *Becker v. Louisville & N. R. Co.* 110 Ky. 474, 53 L. R. A. 267, 96 Am. St. Rep. 459, 61 S. W. 997; 1 *Shearm. & Redf. Neg.* § 85.

"If latitude of judgment is allowed to the rescuer, although believing that he might fall and receive injury to himself, can a more proper instance be conceived, when Whitworth saw his friend and comrade meeting an awful death by burning in midair, hanging head down?

"If anything is to be conceded to the excitement and commotion of the moment, can a case be conceived when such excitement could be more natural or irresistible? If decision of thought and quickness of action are ever demanded, when more so than in a case where Potts was entangled in live wires and being roasted to death? If an appeal to humanity is ever to be heeded, when could it be more imperative than on this awful occasion? But defendant's counsel say that Potts was already dead. We say that neither he nor anyone else knows or could know that to be a fact.

"The degree of insulation would have much to do with that question, and could only be determined by a test. We feel that plaintiffs have as strong a case as can be well conceived. Here are all the elements to be found to warrant a judgment. The necessity for quick action, the doubt and uncertainty as to what is the best course, the tragedy of the situation of Potts,—all these facts justified Whitworth in running even a great risk to save his friend. Under such circumstances the impulse to aid must have been well-nigh uncontrollable, and all the spectators testify as to the intensity of the excitement prevailing at the time. Whitworth's action must receive its color from the scene in which it is set. What is recklessness at one time may be common prudence when a calamity is impending, and no other resource is apparent. The awful consequences flowing from the gross carelessness and indifference of defendant company stand out in letters of iron. Whitworth's humanity was in striking con-

trast with it callousness in exposing others to deadly danger, and its cold-blooded plea in keeping with its conduct in weighing the cost of insulation, on the one hand, and the lives of men, on the other. There is nothing in the record to show that deceased knew that the wire was a live one, nor that he intentionally took hold of the deadly instrument. From the evidence, we think it clear that it was his purpose to relieve his dying companion, whom he thought still lived, or he wanted to get the wires out of the street, or cut them and put them away, so that the crowd that was congregating could not come in contact with them. To show contributory negligence, the defendant must prove that he, knowing of the danger, voluntarily exposed himself to it. This it has not done. It has not been shown that he knew the wire he caught hold of was a deadly one, and, unless we assume that he intended to commit suicide, we must presume that he thought the wire harmless.

"It may be claimed that he should have known that his companion was dead, and it may be argued that the situation presented was past human aid. But that is not the criterion. He could not feel his companion's pulse, and listen to his heart beats, to ascertain if he still lived. The situation, to him, evidently held out the hope that by prompt action he could relieve the situation of his friend. He was not guilty of contributory negligence in acting on the appearances as they were presented to him. He was inexperienced, and therefore it is fair to assume he knew little of the dangerous agency with which he was dealing. He evidently thought the wire he attempted to cut would not harm him.

"The jury, who saw and heard the evidence, have rendered a reasonable verdict, and we ask that it be affirmed."

The only act of negligence which defendant charges against Whitworth is his going forward after the accident had happened to Potts, and taking hold of the live telephone wire which he had been using. Defendant's counsel insist that Potts was dead at the time Whitworth took hold of the wire, but we think he is mistaken as to that fact. At the time that Potts received the electric shock from the telephone wire, Holt was below him on the same pole. On discovering what had happened, he went up the pole to where Potts was, to see whether he had by his fall become entangled in any way with any of the wires—intending, if such was the case, to cut them off—and, finding he was not, he went down and crossed the street to telephone to the office to obtain help. On coming out, he saw a policeman going up the pole. He himself returned to the pole with a hand line, went up the pole, and tied it

around Potts and lowered him down. Reilly, a witness for the plaintiff, says he was right at Mr. Potts when he was drawing his last breath; that he was right across from where he was; that he heard some one hollering for help; he supposed it was Potts himself; that he was somewhat acquainted with him, and went up to the pole where he was. He said he did not help to bring him down, but stayed by the pole until he was brought down by the rope that was put around him by the darky. The witness, being asked how long Mr. Potts lived after he saw him, answered "Well, I suppose Mr. Potts was dead before I got off the pole. I think he must have been, for, after I got there, he drew a couple of gasps after I got down." Holt testified that upon leaving the house into which he had gone to telephone for help, and after he had returned to the telephone pole, he saw several persons carrying Whitworth off. Therefore Whitworth must have taken hold of the wire in the interval between Holt's leaving the pole after first coming down from it and his going up the pole a second time. Clanton, a witness for the defendant, testified that when he came on one of the Belt line cars, opposite to the pole on which Potts had been working, he looked up and saw Potts hanging there; that he got off and started towards the pole, and when he got even with Whitworth, and about 4 feet from him, he hollered to him not to touch the wire, but he took hold of it, and it killed him; that he and his brother-in-law, Mr. Price, went on and got a rope that the telephone men were using, and got Potts off the pole; that he saw Potts before anyone had gone to him; that Mr. Price was the only one that went up the pole; that he saw Holt. He was going around trying to get some one to help him take Potts off the pole. Witness repeated "that as he got to the spot Whitworth came up to take hold of the wire, and that he told him not to do it, and he got hold of it, and it killed him.

In answer to a question he stated that Potts was already dead when he first looked at him. This witness was sincere in his statements as to the facts of the case, but his testimony does not accord with that of others. Price was not the first or only man that was on the telephone pole. Holt was upon it at the instant of the accident, and went up to where he was, and then went down, and went up the pole a second time. Holt says before he got back he saw a policeman going up the pole, and Reilly testified that he himself went up, and that Potts was still alive when he got to him; that is to say, he gasped several times after he reached him. Holt and Clanton say they told Whitworth not to touch the wire, but Holt did not tell him the result of the examination of

the condition of things which he had found when he went up to where Potts was hanging. He did not tell him that he was then dead, nor did he tell him that he was then free from contact with the live wire, which contact had caused his death. He does not seem to have had any conversation with him as to Potts's condition at that time, and he himself was, doubtless, not aware of the extent of his injuries. Neither Holt nor Clanton, if they themselves knew the fact, told him of the force of the electricity with which the telephone wire was then charged. Holt, in his testimony, testified that a wire was often hot, and yet not sufficiently so to produce serious injury; that the strength of the current would depend upon the greater or less extent of the leakage from defective insulation.

Whitmeyer saw Whitworth's actions throughout, and testified to the fact that they were evidently aimed at relieving Potts from the supposed danger of his situation.

We have had twice before us cases where the plaintiffs in the case were injured in their attempt made to save others from imminent danger. The first case was that of *Peyton v. Texas & P. R. Co.* 41 La. Ann. 361, 17 Am. St. Rep. 430, 6 So. 690; and the second, *De Mahy v. Morgan's L. & T. R. & S. S. Co.* 45 La. Ann. 1329, 14 So. 61. In the second of these cases there was judgment in favor of the defendant under the special facts shown. The injury received was by a mother, who, with her little daughter, about two years old, had gone as a passenger upon a car operated by the defendant company upon its branch road between St. Martinsville and Cade Station. The latter place not being of sufficient importance in its business to justify the building of a passenger station, passengers going from St. Martinsville to Cade were in the habit of remaining in the coach until the train for which they were waiting should reach there. The schedule of the road was so made as to give the company an opportunity in this interval to attach to the coach any freight cars which might have been left at the station to be taken to St. Martinsville. The practice of the company was, upon the trains reaching Cade, to detach the locomotive, and by means of different switches to couple the cars onto the coach, which was left stationary on a track. This coupling necessarily gave, when made, some movement to the coach. On the day in question the coupling was made with no greater force than usual,—a coupling from which no injury could or would have resulted under ordinary conditions. On that particular occasion, however, the mother of the child had incautiously permitted it to go several times upon the platform in front of the

coach, although the conductor had warned the passengers to keep their seats. The child, not standing steadily upon its feet, was thrown forward by the force of the coupling into the space between it and the freight car just attached, and was in imminent danger of being crushed. The mother, who received herself no injury from the coupling, ran to the front door, down the steps, and, thrusting her arm under the coach, extricated the child, but at the expense of having her own arm badly broken and permanently injured. Her husband sued the company for damages, but judgment was rendered against him on two grounds. The first was that the company was not guilty itself of any negligence; that it had no reason to anticipate that a child of that age would be permitted to be upon the platform; and, second, because the mother, who was injured without fault on the part of the company, had brought her injuries upon herself by allowing the child to go upon the platform. The act on her part which barred the action was not her conduct in placing her arm under the moving car to save her child, but her antecedent act of allowing it to have gone upon the platform.

In the other case (that of *Peyton v. Texas & P. R. Co.* 41 La. Ann. 861, 17 Am. St. Rep. 430, 6 So. 690), judgment was rendered in favor of the plaintiff. The defendant company in that case was adjudged guilty of negligence in running a train upon a thoroughfare of the city of Shreveport, in front of the Fair Grounds, where a large number of persons were congregated in and around its tracks, at a dangerous rate of speed, in charge of a fireman, instead of a regular, skilled engineer; and, by reason of this negligence, an inebriated man, standing on its tracks in front of the approaching car, with his back to it, was about to be crushed, when a friend went to his rescue, and pulled him successfully off the track, but, in so doing, got struck and injured himself by the car. The defense of contributory negligence on the part of the plaintiff was not sustained. The court evidently considered that the plea of contributory negligence set up by the company which was itself at fault, is one which, though inuring to the company, does so by way of consequence or result, and is not one granted directly to the company in aid of any right which it has itself; that the plea in bar of an action is one which has grown up under jurisprudence, and not by any direct, positive law in aid of the general good and welfare, in furtherance of the two maxims, *Nul prendra avantage de son tort*, and *Volenti non fit injuria*, and, being the act of the court, is more or less subject to its control or modification in any given case, where, in its

opinion, the public good and welfare are better to be subserved by not applying it, as where the thing done is not in fact to be considered a fault, but a meritorious act. The case at bar differs from the *Peyton Case* in this, that Peyton was injured by being advanced upon and struck by the car of the company while he was in or alongside the tracks of the company, running through a public thoroughfare, while in this case Whitworth himself advanced upon and took hold of the wire of his company, which he had been using, in its dangerous condition. In both cases, however, the defendant company was guilty of negligence. In the case of *Corbin v. Philadelphia*, 195 Pa. 461, 49 L. R. A. 715, 78 Am. St. Rep. 825, 45 Atl. 1070, this question was very thoroughly considered. The case will be found reported in the 49th volume of the Lawyers' Annotated Reports, accompanied by very copious and valuable notes and extracts taken from decisions of other states. In the case quoted, the city authorities of Philadelphia had caused a trench to be dug in one of the streets of that city, which became filled with a deadly gas, and which they had abandoned, leaving it without the necessary and proper safeguards to protect the passing public from falling in it. A child went into the trench to recover his ball, which rolled into it, and became overcome by the gas, whereupon a stranger went into the trench, and became himself overcome by the gas, and died. The child revived and escaped injury. The mother of the deceased brought suit against the city to recover damages for the death of her son, and judgment in favor of the defendant was rendered by the lower court, and reversed and remanded by the supreme court of Pennsylvania, to be submitted to the jury, three judges dissenting.

That case closely resembles the present one in its legal aspects. The supreme court, in the course of its opinion, said: "A rescuer—one who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril—ought not to hear from the law words of condemnation of his bravery because he rushed into danger to snatch from it the life of a fellow creature imperiled by the negligence of another; but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence. This, conscience and reason approve, and the best judgment of thoughtful and intelligent judges has declared it to be the law of the land."

The court quoted approvingly from *Eckert v. Long Island R. Co.* 43 N. Y. 503, 3 Am. Rep. 721, which it declared was fairly

regarded as the leading case upon the subject.

In the latter case the court said: "Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious damage to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt to do so, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons."

In the case at bar the jury evidently considered that Whitworth was not guilty of rashness in acting as he did. We ourselves think that he was not fully advised of the precise existing situation, and of the condition of Potts as he then was, hanging upon the pole; that he was not advised as to

the precise danger he was himself incurring when he took hold of the wire; and that, even if he heard the warning to him of Holt and Clanton not to touch the wire, he did not know the grounds upon which that warning was based. He may well have conceived that the advice was being given to himself to act from selfish motives, and from the selfish side of his nature, and to take no risks whatever in the premises,—advice which his own sense of duty and regard for the safety of others led him not to follow. We certainly cannot impute to him an intention to commit suicide. We do not think we are called upon in this case to go back of the conclusions of fact reached by the jury.

For the reasons herein assigned, *the judgment appealed from should be, and it is hereby, affirmed, at costs of appellant.*

Land, J., recused, having presided in the court below.

A petition for rehearing having been filed, Provosty, J., on April 11, 1904, handed down the following additional opinion:

On further consideration, the amount of the judgment in this case is reduced to \$5,000, and, as thus amended, the decree heretofore handed down is adhered to, and a rehearing is refused.

MISSOURI SUPREME COURT.

Herman SCHUBACH

v.

Jesse A. McDONALD, Judge of St. Louis City Circuit Court, *et al.*,

And

Five Other Cases.

(.....Mo.....)

1. Mere failure of a petition to state a cause of action, or the defective statement of a good cause of action, does not deprive the court of jurisdiction.

2. A court of equity has jurisdiction to enjoin ticket brokers from disposing of, or attempting to transfer, tickets which

they have purchased with notice from persons who agreed that they should not be transferred.

3. A petition for injunction to restrain ticket brokers from dealing in non-transferable tickets, which does not show that it is applicable to a concrete case, is brought within the jurisdiction of the court under the doctrine of "alder" by a return which shows that defendants have in possession at the time tickets of the value of which they will be deprived by the issuance of the injunction.

4. Prohibition will not lie to restrain the enforcement of an injunction against future dealings in nontransferable railroad tickets, where the court had juris-

NOTE.—For a case in this series holding that the return part of an excursion ticket containing no restrictions is good in the hands of a transferee, see *Carsten v. Northern P. R. Co.* 9 L. R. A. 688.

As to assignability of railroad ticket generally, see *Nichols v. Southern P. Co.* 18 L. R. A. 55, and *note*.

As to reasonableness of rule forbidding stop-over on railroad tickets, see, in this series, *Robinson v. Southern P. Co.* 28 L. R. A. 773, and *note*.

As to reasonableness of condition that re-

turn part of excursion ticket shall be stamped by agent at place of departure, see *Watson v. Louisville & N. R. Co.* 49 L. R. A. 454.

As to validity of statutes against ticket brokerage or "scalping," see, in this series, *Burdick v. People*, 24 L. R. A. 152, and *note*; *State v. Corbett*, 24 L. R. A. 498; *People ex rel. Tyroler v. Warden of New York City Prison*, 43 L. R. A. 264; and *Jannin v. People*, 53 L. R. A. 349.

As to validity of ordinance forbidding sale of gift of railway transfer, see *Ex parte Lorenzen*, 50 L. R. A. 55.

diction of the petition because of tickets actually in the possession of defendants; since, if error exists, it must be corrected by the proper process, and not by prohibition.

5. A purchaser of a special railroad ticket at a reduced rate, which on its face recites that it is nontransferable, and that it is supported by the consideration of a reduced rate, has no right to transfer it, a deprivation of which will give him a cause of complaint.
6. No assignee of a railroad ticket sold at a reduced rate, and which recites that fact on its face, and also that it is nontransferable, can acquire any right in the ticket as a contract for transportation, which he can assign, or which will give him a right to complain in case he is forbidden to assign it.
7. A railroad company may issue special tickets at a reduced rate, which shall be nontransferable, either limited or unlimited as to time or occasion; and, in case the contract of which the ticket is the evidence is violated by a transfer of the ticket, it may invoke the jurisdiction of a court of equity to cancel the contract because of the fraud; or, if the ticket is used by another, it may maintain an action for damages for breach of the contract.
8. A concrete case of which the court has jurisdiction is presented by a petition on behalf of a railroad company to enjoin ticket brokers from buying and selling special tickets made nontransferable on their faces, not only as to those tickets which have already been issued, but as to such as will be issued in the future, where the injunction is to be made applicable only after the contract has been entered into, the ticket issued, and property rights thereunder have accrued.
9. Equity has jurisdiction to enjoin ticket brokers from trafficking in nontransferable railroad tickets where there is no adequate remedy at law because of their insolvency and the frauds which, by such traffic, will be perpetrated upon the railroads and innocent purchasers of tickets which cannot be used, and because of the many suits which would be necessary if an attempt should be made to recover the damages in each case separately.
10. In granting an injunction to prohibit ticket brokers from violating the rights of railroad companies in contracts represented by special nontransferable tickets to be issued by them, the court does not prescribe a rule of civil conduct, nor invade the prerogative of the legislature, nor establish government by injunction.

(Valliant and Gantt, JJ., dissent.)

(December 23, 1903.)

APPPLICATION for a writ of prohibition to prevent the judges of the Circuit Court of the City of St. Louis from enforcing injunctions which had been granted by them to restrain petitioners from trafficking in railroad tickets. *Rule to show cause discharged.*

The facts are stated in the opinions.

65 L. R. A.

Messrs. Judson & Green and Henry W. Bond, for petitioners:

There is no primary equity in the petition for injunction, and no existing controversy as to present existing property rights.

State ex rel. Merriam v. Ross, 122 Mo. 457, 23 L. R. A. 534, 25 S. W. 947; *State ex rel. Kenamore v. Wood*, 155 Mo. 445, 48 L. R. A. 425, 56 S. W. 474.

The writ of prohibition in Missouri is one of common law and statutory rights, and lies to restrain an inferior court from unauthorized acts, in cases of which such court has jurisdiction, as well as in those of which it has none. It lies in cases of excess of jurisdiction as well as want of jurisdiction.

St. Louis, K. & S. R. Co. v. Wear, 135 Mo. 230, 33 L. R. A. 341, 36 S. W. 357, 658; *Spelling, Inj. & Extr. Rem.* § 1726; *Mo. Rev. Stat. 1899*, §§ 4448 *et seq.*; *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494; *State ex rel. Young v. Oliver*, 163 Mo. 696, 64 S. W. 128; *State ex rel. St. Louis & K. R. Co. v. Hirszel*, 137 Mo. 447, 37 S. W. 921, 38 S. W. 961; *State ex rel. Ellis v. Elkin*, 130 Mo. 105, 30 S. W. 333, 31 S. W. 1037; *State ex rel. Kenamore v. Wood*, 155 Mo. 445, 48 L. R. A. 425, 56 S. W. 474; *State ex rel. Anheuser-Busch Brewing Asso. v. Eby*, 170 Mo. 497, 71 S. W. 52; *School Dist. No. 6 v. Burris*, 84 Mo. App. 663.

It is immaterial that the petitions for injunction may have been demurrable as failing to state a cause of action. The prohibition will lie, nevertheless, when the excess of jurisdiction involves irreparable injury to the defendant.

State ex rel. Merriam v. Ross, 122 Mo. 435, 23 L. R. A. 534, 25 S. W. 947; *State ex rel. Ellis v. Elkin*, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; *State ex rel. Kenamore v. Wood*, 155 Mo. 425, 48 L. R. A. 425, 56 S. W. 474.

The destruction of the business of petitioners constituted an irreparable injury without other adequate remedy by appeal or writ of error.

State ex rel. Anheuser-Busch Brewing Asso. v. Eby, 170 Mo. 526, 71 S. W. 52; *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 257, 33 L. R. A. 341, 36 S. W. 357, 658.

The recitals in the petitions for injunction, of the coming Louisiana Purchase Exposition in St. Louis, are wholly disingenuous and misleading, as no relief is sought with reference to any specific ticket or tickets issued or to be issued for such exposition, and the injunction order of the circuit court is not limited to any such specific ticket or specific occasion. The recital is obviously misleading for the purpose of obscuring the real purpose,—that of throt-

ting in *perpetuo* the business of defendants by a universal injunction.

16 Am. & Eng. Enc. Law, 2d ed. p. 431; *Black v. Huggins*, 2 Tenn. Ch. 782; *Hilton v. Granville*, 4 Beav. 130, 11 L. J. Ch. N. S. 388, Craig & Ph. 283; *Clifton v. Robinson*, 16 Beav. 355.

It was our right and duty, while denying the jurisdiction in *limine*, to show that, upon the plaintiffs' own theory, the equities relied on for an injunction did not exist.

State ex rel. Young v. Oliver, 163 Mo. 679, 64 S. W. 128; High, Extr. Legal Rem. § 765; *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494.

It is for the legislature, and not for the courts, to determine, in advance, the right of defendants to engage in the business of buying and selling unused railroad tickets. It is the exclusive province of the law-making power to lay down and define rules of civil conduct which are unrelated to the judicial protection of existing property rights or issues thereon.

Montesquieu, *Spirit of Laws*, p. 174; Mill, *Representative Government*, 326; 1 Pom. Eq. Jur. 65; Cooley, *Principles of Const. Law*, p. 44; 12 *Law Quarterly Rev.* p. 362; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Interstate Com. Com. Rep.* 1896, pp. 327-344; *Jones v. Perry*, 10 Yerg. 72, 30 Am. Dec. 430; *Taylor v. Place*, 4 R. I. 336; 1 Beach, *Inj.* § 20; *Hughlett v. Harris*, 1 Del. Ch. 349, 12 Am. Dec. 104; 1 Bl. Com. p. 44; *Ellsworth v. Hale*, 33 Ark. 633; *Bates v. Kimball*, 2 D. Chip. (Vt.) 77; *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494; *Tanner v. Wallbrunn*, 77 Mo. App. 262.

A court of equity cannot enjoin where there is no existent basis of facts affording a present right which is directly threatened by the action sought to be enjoined. It has no power to enjoin, unless the conditions have already arisen and come into being, which could be injured by the acts sought to be restrained.

High, *Inj.* §§ 7, 9, 10, 23; *State ex rel. McCaffery v. Aloe*, 152 Mo. 479, 47 L. R. A. 393, 54 S. W. 494; *Business Men's League v. Waddill*, 143 Mo. 498, 40 L. R. A. 501, 45 S. W. 262.

Therefore an injunction cannot be awarded to allay "mere apprehension."

German Evangelical Lutheran Church v. Maschop, 10 N. J. Eq. 57; *Mariposa Co. v. Garrison*, 28 How. Pr. 448; *Watrous v. Rodgers*, 16 Tex. 410; *People v. Canal Board*, 55 N. Y. 390; *Lester Real Estate Co. v. St. Louis*, 160 Mo. 227, 69 S. W. 300; 16 Am. & Eng. Enc. Law, 2d ed. p. 361.

So to enjoin trespassers or nuisances, complainant must first show title and pre-

sent fixed right in himself to the land affected or threatened with injury.

Sullivan v. Moreno, 19 Fla. 200; *Western Min. & Mfg. Co. v. Virginia Cannel Coal Co.* 10 W. Va. 250; *Gleason v. Jefferson*, 78 Ill. 399.

The order of the circuit court involves the substitution of attachments in contempt in its application to future issues of tickets for future occasions in place of the hearing and determination by the chancellor according to the special circumstances of the special case; and, therefore, violates the fundamental limitations of injunction in remedial procedure.

17 Am. Bar Asso. (1894), address by Charles Claflin Allen.

This extraordinary and unprecedented order is not warranted for the protection of the business of the railroad companies. The future occasions when the right to issue excursion tickets may be exercised are not capable of judicial protection until the occasions arise. The abstract right must assume a concrete form before it becomes property in the judicial sense, capable of judicial protection.

2 Austin, *Jurisprudence*, §§ 815, 817; 1 Bl. Com. 138; *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 449, 51 L. R. A. 151, 81 Am. St. Rep. 368; 60 S. W. 91; *St. Louis v. Hill*, 116 Mo. 533, 21 L. R. A. 226, 22 S. W. 861.

The business of the ticket brokers is a lawful business, protected by the constitutional guaranties, and is the outgrowth of conditions created by the railroads themselves; and the incidental evils arising therefrom must be corrected by the exercise of the legislative power, and by the railroads themselves in providing for the redemption of unused tickets.

People ex rel. Tyroler v. Warden of City Prison, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *New York C. & H. R. R. Co. v. Reeves*, 41 Misc. 490, 85 N. Y. Supp. 28, 30 N. Y. L. J. No. 21, 3 Inters. Com. Rep. 337 *et seq.*; *National Wholesale Lumber Dealers' Asso. v. Norfolk & W. R. Co.* 9 Inters. Com. Rep. 103.

The interruption and destruction of business by this attempted exercise of legislative power, by laying down a rule of civil conduct for the future, with no concrete case presented for the application of the judicial power, is violative of the constitutional guaranties of due process of law in the Federal and state Constitutions.

U. S. Const. 14th Amend.; Mo. Const. art. 2, § 30; *Hunt v. Searcy*, 167 Mo. 158, 67 S. W. 206; *State ex rel. Hadley v. Washburn*, 167 Mo. 680, 90 Am. St. Rep. 430, 67 S. W. 592; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 374, 48 L. R. A. 265, 77 Am. St. Rep.

765, 55 S. W. 627; *State v. Julow*, 129 Mo. 172, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Brannon, 14th Amend. pp. 295-297; Cooley, Const. Lim. 92.

Messrs. Johnson & Richards and Charles Claffin Allen, for defendants:

The alternative writ of prohibition in this case should be quashed, because the court below had jurisdiction of the parties and of the subject-matter, and full power and authority to issue the injunctions which were issued by the several divisions of the St. Louis circuit court.

Mo. Rev. Stat. 1899, § 4488; 23 Am. & Eng. Enc. Law, 2d ed. p. 195.

The thing complained of is not the statement of a defective cause of action by the plaintiffs below, but the defective statement of a good cause of action. Such defect can be reached by motion to make more definite and certain in the injunction proceeding below.

State ex rel. Hofmann v. Scarritt, 128 Mo. 331, 30 S. W. 1026.

Injuries to "business" are the subject-matter of injunction.

Hamilton-Brown Shoe Co. v. Sasey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106; *Vegelahn v. Guntner*, 167 Mass. 99, 35 L. R. A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551, 37 L. J. Ch. N. S. 889, 19 L. T. N. S. 64, 16 Week. Rep. 1138; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307.

The railroad company has a property in tickets.

State v. Corbett, 57 Minn. 345, 24 L. R. A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006.

Railroads are compelled to serve all of the public upon the same terms, but are expressly authorized by law to issue nontransferable tickets at reduced rates, provided such tickets are offered to all of the public alike, and the legal character of these nontransferable "mileage," "excursion," and "commutation" tickets is fixed by statute.

Mo. Rev. Stat. 1899, § 1127; U. S. 1 Rev. Stat. Supp. chap. 382, p. 690, § 22; U. S. 2 Rev. Stat. Supp. p. 369, chap. 61, U. S. Comp. Stat. 1901, p. 3171; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324.

The courts have repeatedly enjoined ticket brokers from dealing in nontransferable tickets.

Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65; *Kinner v. Lake Shore & M. S. R. Co.* 23 Ohio C. C. 294; *Pennsylvania R. Co. v. Beekman* (D. C.) 30 Wash. L. Rep. 715; *Louisville & N. R. Co. v. Bitterman* (U. S. 65 L. R. A.

C. Ct. N. O. La.; Boarman, J.); *Boston & M. R. Co. v. Fogg* (Super. Ct. Suffolk Co. Mass., July 15, 1903); *Wabash R. Co. v. Wasserman* (St. L. C. Ct. October, 1902).

A writ of prohibition is not a writ of right; before it is granted two things must appear: First, that the law sanctions it, and, second, that a sound judicial discretion commends it.

Davison v. Hough, 165 Mo. 561, 65 S. W. 731; High, Extr. Legal Rem. § 765; *State ex rel. Smith v. Levens*, 32 Mo. App. 520; *State ex rel. McCaffery, v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494.

This writ is not allowed to usurp the functions of an appeal, writ of error, or certiorari.

State ex rel. Laclede Bank v. Lewis, 76 Mo. 376; *State ex rel. Brainerd v. Thayer*, 80 Mo. 436; *State ex rel. Ellis v. Elkin*, 130 Mo. 103, 30 S. W. 333, 31 S. W. 1037; *Ward v. Ryan*, 166 Mo. 646, 65 S. W. 1025; *State ex rel. Delmar Jockey Club v. Zachritz*, 166 Mo. 307, 89 Am. St. Rep. 711, 65 S. W. 999; *Olney v. Eaton*, 66 Mo. 563; *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494; *State ex rel. Hawes v. Withrow*, 154 Mo. 397, 55 S. W. 460; *State ex rel. Atty. Gen. v. Gill*, 137 Mo. 681, 39 S. W. 276; *State ex rel. St. Louis & K. R. Co. v. Hirzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; *State ex rel. Young v. Oliver*, 163 Mo. 679, 64 S. W. 128; *State ex rel. Kenamore v. Wood*, 155 Mo. 425, 48 L. R. A. 425, 56 S. W. 474; *State ex rel. Union Depot R. Co. v. Southern R. Co.* 100 Mo. 59, 13 S. W. 398.

The plaintiffs here have had "due process of law" in its highest form,—a court of equity.

Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 376, 68 S. W. 1043; *Burdick v. People*, 149 Ill. 600, 24 L. R. A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952.

Messrs. George F. B. Jackson and E. S. Robert also for defendants.

Marshall, J., delivered the opinion of the court:

These are original proceedings against the defendant judges of the circuit court of the city of St. Louis to prohibit them from further entertaining jurisdiction in certain injunction suits, pending before them in said court, wherein the railroads that are joined as defendants are the plaintiffs, and the plaintiffs herein are the defendants. A preliminary rule was issued by one of the judges of this court, the defendants made return thereto, and the plaintiffs moved for judgment upon the pleadings.

The controversy is this: The defendant

railroads have systems extending over a large portion of the United States, and have termini in St. Louis. The plaintiffs herein are ticket brokers engaged in business in St. Louis. The railroads, each for themselves, instituted about 50 suits in the circuit court of St. Louis asking injunctions against the plaintiffs herein and other ticket brokers in that city. The petitions are practically alike. The substance of the averments of the petition is fairly stated by one of the counsel for the defendants to be as follows: "That in the year 1904 the Louisiana Purchase Exposition Company will hold a World's Fair at St. Louis, to which all the nations of the world have been invited, to which 23,000 citizens have subscribed, and the Federal government contributed \$5,000,000, the city of St. Louis \$5,000,000, the subscribers \$5,000,000, and the state of Missouri \$1,000,000 for a state exhibit. That various meetings and ceremonies will take place before and during the fair. That to enable people to attend the fair and such meetings and ceremonies excursion tickets will be issued from time to time. That they will attend in such large numbers that it is impracticable to secure their signatures to the return parts of the tickets. That for the same reason identification is impracticable. That, in addition to these World's Fair tickets, said railroad, from time to time, issues nontransferable 'excursion' tickets, 'mileage' tickets, and 'commutation' tickets below the regular one-fare rate for various meetings, assemblages, and purposes. That such tickets are by their express terms, set forth therein, good for the transportation of the original purchaser alone, and void in the hands of others. That by virtue of the terms of said tickets, if presented by one other than the original purchaser, the conductor must lift the same. That the sale of such nontransferable tickets, where they are interstate, is forbidden by the interstate commerce law, and where within the state is forbidden by the laws of the state of Missouri, because the purchaser would thereby get a lower rate than the general public. That the sale of the same is not only void for that reason, but because it is a fraud on the purchaser and on the railroad company, or a joint fraud on both. That where persons purchase such tickets innocently it frequently leads to their being ejected from trains because said scalpers have represented such tickets to be good; and that where the purchaser knows they are nontransferable, and void in the hands of persons other than the original purchaser, the buyer deceives the conductor and servants of the railroad; and that it is a fraud on the plaintiff. That some of the tickets so issued have a return

coupon, which must be presented to the agent before the presentation for the return trip. That the defendants are residents of the city of St. Louis and engaged in the business of ticket brokers or scalpers in the city of St. Louis, and that they have full knowledge of the character of such tickets, that they are issued at a special rate, and that they are null and void in the hands of any person other than the original purchaser. That they either deceive the buyer by representing them as good, or deceive the railroad by aiding the buyer in using them; and that Herman Schubach is engaged in the business of selling such tickets, and proposes to continue the sale of the same, and regularly deal in the sale of said nontransferable tickets, thus defrauding the railroad or the buyers of the ticket, or both. That by reason of the impossibility of detecting such frauds the plaintiff is subjected to recurring loss and injury, and the innocent buyer to pecuniary loss, annoyance, and humiliation. That the burden cast on the conductors of detecting such fraudulent tickets subjects the railroad company to constant danger from suits for damages for unavoidable errors, and subjects the railroad and public to interruption and delay in the operation of trains. That the railroad company has no way of discovering who the persons are who so defraud it, or who are thus defrauded, by the purchase of such nontransferable tickets, because of the impossibility of securing evidence of such frauds, and that, if such frauds were detected, it would lead to a multiplicity of suits. That the defendants are financially irresponsible, and no judgment at law could be collected. That in consequence there is no adequate remedy at law. That it is the constant practice of the plaintiff and its connecting lines to issue tickets at reduced rates to the traveling public, which by their terms are nontransferable, and constitute a special contract between the plaintiff and the original purchaser whereby the original purchaser agrees that the ticket shall not be transferred by him to any other person. That the defendants are, and for a long time past have been, engaged in the business of buying, selling, and dealing in such tickets, and inducing the original purchasers to sell the same." The prayer of the petition is that the defendants therein (the ticket brokers) be enjoined from buying, selling, or dealing in tickets issued by the railroad, plaintiff therein, which, by the terms thereof, are nontransferable.

The judges severally issued rules upon the defendants therein to show cause on a day certain why injunction should not issue as prayed. Upon the return being made to the rule, the six circuit judges before whom

such injunction cases were pending sat together, and the matter was fully argued before them, with the result that they determined that temporary injunctions should issue, and accordingly each of the judges separately issued injunctions in the following form: "Now at this day come the parties hereto, by their respective attorneys, under the order to show cause heretofore issued herein, and submit the application for a temporary injunction to the court upon the petition and the return of the defendant to the order to show cause, and the court having duly considered the same, and being sufficiently advised in the premises, doth order that upon plaintiff giving bond in the sum of twenty-five hundred dollars (\$2,500) conditioned according to law, with good and sufficient surety or sureties to be approved by the court or judge or clerk thereof in vacation, the defendant, his agents, servants, and employees, and all other persons acting for him, either directly or indirectly, be, and are hereby, enjoined and restrained until the further order of the court from buying, selling, dealing in, or soliciting the purchase or sale of any mileage passenger ticket, or any part thereof, or any excursion passenger ticket, or any part thereof, or the return coupon thereof, or any part thereof, or any commutation passenger ticket, or any part thereof, now being issued, or heretofore issued and sold, or which may hereafter be issued and sold by plaintiff for passage over its railroad, or issued by any other railroad for use over plaintiff's road, or any part thereof, where any of the above-described tickets were sold and where it appears upon any such ticket, coupon, or return ticket that same was issued and sold below the regular schedule rate under contract with the original purchaser entered upon such ticket and signed by such original purchaser that such ticket is nontransferable and void in the hands of any person other than the original purchaser; and from soliciting, advertising, encouraging, or procuring any person other than the original purchaser of such ticket to use or attempt to use the same for passage on any train or trains of the plaintiff: Provided, however, this order shall not apply to the sale of any such aforementioned and described tickets that were purchased by defendant from plaintiff or any of plaintiff's duly authorized agents, and not for defendant's use as a passenger over plaintiff's road."

Thereupon the defendants in such injunction suits applied to one of the judges of this court for writs of prohibition to prohibit the said judges from enforcing such injunctions, and from entertaining further jurisdiction of such injunction suits. The petitioners for prohibitions are alike, and predicate a right of action upon a charge that the circuit judges had no jurisdiction, or acted in excess of their jurisdiction, in the premises, in the following respects: "Plaintiff states that in and by its aforesaid proceedings said court, and defendant, as judge thereof, transcended and exceeded its lawful jurisdiction in the following particulars: (1) Said petition for injunction stated no matter or thing upon which a court exercising equity powers could grant any injunction, or the particular writ awarded in this case. (2) Said petition for injunction is not based upon any specific property for the protection of which judicial protection is sought; but it is attempted by the injunction sought and granted in said cause to lay down a rule of civil conduct, so that the business of this plaintiff would be permanently destroyed by the exercise of the judicial power thus exercised without reference to any specific existing property. (3) Said petition for injunction and the temporary injunction thereon granted in prescribing a rule of civil conduct regardless of any existing property is an attempted usurpation of the legislative power of the state, which alone can prescribe a rule of civil conduct covering future transactions having no relation to existing properties and their judicial protection. (4) That the necessary effect of this attempted regulation of civil conduct by a blanket injunction covering property rights hereafter to be created and acquired will be the substitution of summary hearings in contempt for the orderly determination of controversies by court or jury when controversies as to existing property rights are presented for hearing. (5) Said injunction serves the purpose of taking the property of plaintiff without 'due process of law.' (6) Said injunction is against the law of the land, and thereby, if permitted to stand, destroys a lawful avocation and business of plaintiffs. (7) Plaintiff is remediless in this: That his business is interrupted and destroyed by the granting of the injunction herein, and that the remedy by motion to dissolve in the circuit court is wholly inadequate, as, even if said injunction should be dissolved, it may be maintained in force by an appeal; and, in any event, plaintiff's business would be wholly destroyed before the final determination of the same could be reached by this unwarranted and illegal procedure of said court, outside of its lawful jurisdiction."

The defendants made return to the preliminary rules, setting up the proceedings in the injunction cases in the circuit court, and justifying the action of the circuit judges, and maintaining the jurisdiction of

that court. The plaintiffs, by way of replication, ask that the preliminary rule in prohibition be made absolute, and thus the issues are made up. For the sake of brevity the plaintiffs herein will be hereinafter referred to as the "ticket brokers," and the defendant railroads as the "railroads."

1. Reduced to its essentials, and crystallized, the ticket brokers' position is that no "concrete case" is stated in the injunction suits which a court has power to deal with. Or, otherwise stated, that there is no existing controversy between the ticket brokers and the railroads which could constitute a cause of action upon which a court could act. Or, amplified, that a court of equity has jurisdiction to issue injunctions as a class, but it has no power to issue an injunction where only abstract rights are involved, or where the injury is merely apprehended or feared, and is not immediate, impending, and imminent; and that to authorize a court that has jurisdiction to act "there must be an existent basis of facts affording a present right which is directly threatened by the action sought to be enjoined. It has no power to enjoin unless the conditions have already arisen and come into being, which could be injured by the acts sought to be restrained;" and that courts cannot determine the rights of parties in advance of an actual, existing controversy concerning them. Or, as counsel happily express it: "The abstract right must assume a concrete form before it becomes property in the judicial sense, capable of judicial protection." These are fundamental essentials in the law, and it has always been true that there must be an actual live subject-matter, as well as actual live parties, to every suit. It is also true that courts of equity alone have power to issue injunctions, and that they never exercise this power to allay mere apprehensions of injury, but only when the injury is imminent and irreparable. *Business Men's League v. Waddill*, 143 Mo. 495, 40 L. R. A. 501, 45 S. W. 262; *Lester Real Estate Co. v. St. Louis*, 169 Mo., *loc. cit.* 234, 69 S. W. 300. The railroads and the circuit judges do not controvert these propositions. The matter therefore compresses itself into the question whether or not a basic subject-matter over which a court of equity has jurisdiction was presented to the circuit court for adjudication by the injunction suits; that is, whether a matter was presented which that court has power to deal with, and not whether such a matter was inartificially or defectively presented. In other words, the question is one of jurisdiction, and not of pleading; for, if the court had jurisdiction over the subject-matter, it had the power to decide whether the pleadings

were or were not properly drawn, and also to decide whether or not the plaintiff was entitled to the relief sought. If a court has the power to act, its jurisdiction is in no wise impaired by the consideration whether it acted in accordance with the law, or erroneously. Given the jurisdiction, all else is a mere matter of error, to be corrected on appeal. Or, further illustrated, if the court has jurisdiction over the subject-matter, it has the power to decide whether the petition does or does not state a cause of action, and the mere failure of a petition to state a cause of action, or the defective statement of a good cause of action, in no way affects the jurisdiction of the court. *State ex rel. Hofmann v. Scarritt*, 128 Mo., *loc. cit.* 339 340, 30 S. W. 1026.

The crucial question therefore is, Do the petitions of the railroads for injunctions against the ticket brokers present a concrete or an abstract case? In the solution of this question the decision of the Supreme Court of the United States in the case of *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324, establishes the first postulate of the proposition. It is true, as the ticket brokers claim, that that was not an injunction suit; but the form of the action is immaterial, for it is the legal principles deduced and the rules announced that are important and pertinent. That was a suit for damages for being put off of a train. The plaintiff purchased from the defendant, at St. Louis, a ticket from St. Louis to Hot Springs and return. The ticket, by its terms, required that the original purchaser should identify himself to the satisfaction of the defendant's agent at Hot Springs, and that the return ticket should be officially signed and stamped by the agent at Hot Springs; all of which the original purchaser agreed to "in consideration of the reduced rate at which this ticket is sold." The plaintiff failed to so identify himself, and failed to have the return ticket so stamped, and in consequence was put off of the train, and sued for damages. The lower court sustained a demurrer to the petition, and the Supreme Court of the United States affirmed the judgment, holding that a railroad company has a right to make a contract with the purchaser of a reduced-rate ticket that the original purchaser shall so identify himself, and that the return ticket shall be so signed and stamped, and that the reduced rate at which the ticket is sold affords a consideration for such a contract; in other words, that for a valuable consideration a railroad may enter into a contract that the ticket sold to the passenger shall be nontransferable, and that the return portion shall not entitle even the original purchaser to a return trip unless he so identi-

fies himself and has the return ticket so stamped. This is manifestly upon the principle that when persons *sui juris* enter into contracts that are not prohibited by law, based upon a valuable consideration, they must live up to them, and that each has a property right in the contract, which the law will protect. In addition to this, the laws of this state and the interstate commerce laws, while prohibiting discriminations, permit the railroads to issue excursion or commutation tickets at special rates. Mo. Rev. Stat. 1899, § 1127; U. S. 1 Rev. Stat. Supp. chap. 382, p. 690, § 22; U. S. 2 Rev. Stat. Supp. chap. 61, p. 369, U. S. Comp. Stat. 1901, p. 3171.

The second postulate in the case is that the petitions for injunctions recite that World's Fair excursion tickets, nontransferable excursion tickets, mileage tickets, and commutation tickets have been issued, or will be issued from time to time, based upon a consideration of reduced rates, which, by their express terms, are to be good only in the hands of the original purchaser, and that it is, or will be, impossible, impracticable, or, at any rate, unbearably inconvenient, for the original purchasers to be identified in St. Louis, and have the return ticket stamped, or for the train conductors to determine whether the person attempting to ride on such return ticket is the original purchaser or not; that it would be a fraud upon the railroads for anyone except the original purchaser to ride upon such return tickets, and a fraud for the original purchasers to sell such return tickets to the ticket brokers, and for the ticket brokers to sell such return tickets to any third party, to be by him so used, or upon the representation that they would entitle the buyer to so ride thereon; that, in the nature of things, the railroads could never ascertain that such frauds were about to be committed until after the trains had left St. Louis and such tickets were presented to the train conductors, and then it would be too late to ask for or receive injunctive relief against the perpetrators of such frauds; and that the ticket brokers are insolvent, so that no adequate remedy at law could be had against them; and, further, that even if such frauds could be discovered in time to ask specific relief in each case, it would involve the prosecution of a multiplicity of suits to meet the exigencies. This postulate also includes the fact that the injunctions issued by the circuit court enjoined the ticket brokers from buying, selling, or dealing in any mileage tickets, and excursion tickets, or the return coupon thereof, or any commutation ticket, now issued or hereafter to be issued, "where it appears upon any such ticket, coupon, or return ticket that the same was issued and 65 L. R. A.

sold below the regular schedule rate under contract with the original purchaser, entered upon such ticket, and signed by such original purchaser, that such ticket is nontransferable and void in the hands of any other person other than the original purchaser." And bearing upon this proposition it is important to note in this connection that, while the return of the ticket brokers to the rule to show cause why an injunction should not issue denies the power of the court to issue an injunction on the ground that no concrete case is presented by the petition, it then very inconsistently sets up that it has been the common practice of the railroads to issue mileage tickets, excursion tickets, and commutation tickets which are stamped on their face "nontransferable," but that the practice and understanding of the ticket brokers all over the United States are that such tickets may be transferred or sold, and that the name of the original purchaser may be signed by anyone on the return ticket, and that the ticket brokers in the litigation have a number of such tickets, which they have purchased in good faith, and under the belief that they are transferable, and would be honored by whomsoever presented; and that the injunction asked would render such tickets valueless, and would destroy the business of the ticket brokers; and therefore they ask the protection of the court in that regard.

Upon the doctrine of "aider," therefore, the return of the ticket brokers helped out the insufficiency, if any, that existed in the petition, and unquestionably made a concrete case as to the tickets that are now held by the ticket brokers, and presented a live subject-matter between live parties, which the court had power and jurisdiction over. Therefore it cannot now be said that the circuit court had no jurisdiction, and, as that court had jurisdiction *quoad* such tickets, prohibition will not lie, for a writ of prohibition can never be made to perform the functions of an appeal or writ of error, and lies only where a court or tribunal clothed with judicial powers acts in relation to matters over which it has no jurisdiction, or, having jurisdiction over the subject-matter, acts in excess of its jurisdiction. *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494; *Davison v. Hough*, 165 Mo. 561, 65 S. W. 731; *State ex rel. Anheuser-Busch Brewing Asso. v. Eby*, 170 Mo. 497, 71 S. W. 52.

The case might be allowed to rest here, but there are other cogent, decisive, and imperative propositions which must be adjudicated to make the case complete. It will be observed that reference is made in the petition for an injunction to the approaching World's Fair in St. Louis, and it is averred

that, in order to make it possible for persons of ordinary means to attend it, the railroads have been induced by the officials of the fair to agree to issue excursion tickets at greatly reduced rates to all who desire to attend the fair or the various meetings, conventions, etc., that will be held in St. Louis at that time. And counsel for the railroads point out that the courts have issued injunctions against ticket brokers prohibiting them from dealing in nontransferable tickets that have been issued by the railroads on the occasion of the Nashville Centennial Exposition in 1897 (*Nashville O. & St. L. R. Co. v. McCConnell*, 82 Fed. 66), the meeting of the Grand Army of the Republic in Cleveland (*Kinner v. Lake Shore & M. S. R. Co.* 23 Ohio C. C. 294), the meeting of the Grand Army of the Republic in Washington (*Pennsylvania R. Co. v. Beekman* [D. C.] 30 Wash. L. Rep. 715), the meeting of the Confederate Veterans in New Orleans, in May, 1903 (*Louisville & N. R. Co. v. Bitterman*, not yet reported), the meeting of the National Teachers' Association in Boston, in July, 1903 (*Boston & M. R. Co. v. Fogg*, not yet reported), and the Dedicatory Exercises of the World's Fair at St. Louis, in May, 1903 (*Wabash R. Co. v. Wasserman*, decided by Hon. H. D. Wood, of the circuit court of the city of St. Louis, and printed in the appendix to the briefs of counsel herein). Counsel for the ticket brokers meet this by saying, first, that all those cases were decided by courts of inferior jurisdiction; second, that in the case of *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006, the court of appeals of New York held a statute that prohibited anyone except common carriers and their agents from selling tickets for passage on railroads or vessels to be unconstitutional; third, that in the case of *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689, the United States circuit court for the western district of New York denied an injunction against ticket brokers as to special tickets for the Pan-American Exposition at Buffalo on the ground that the railroads had unlawfully combined to fix rates for such exposition; fourth, that in *New York O. & H. R. R. Co. v. Reeves*, 41 Misc. 490, 85 N. Y. Supp. 28, Judge Lambert, of the supreme court of New York, denied an injunction against the ticket brokers which sought to prohibit them from dealing in tickets that were nontransferable on their face, and held that the purchaser of such a ticket had a property interest in the ticket, which he could sell, notwithstanding that by the terms of his contract with the railroad the ticket was on its face nontransferable, and that, while the railroad could lawfully refuse to transport

the transferee or any other person than the original purchaser on the ticket, it was not entitled to an injunction to prevent the ticket brokers from buying and selling such tickets; fifth, that in all the cases cited by counsel for the railroads "a special injunction issued under the special circumstances of the special ticket for the special occasion." Or, otherwise stated, that upon special occasions the railroads can lawfully issue special tickets at reduced rates, which are nontransferable, and which the ticket brokers may be enjoined from dealing in, but that when the railroads issue special tickets, which upon their face show the contract between the purchaser and the railroad to be that they are issued at reduced rates, and are not transferable, such tickets may be dealt in by the ticket brokers, and the courts cannot interfere, because they do not relate to a special occasion, such as an exposition, a meeting of the Grand Army of the Republic, or of the Confederate Veterans; in other words, that the jurisdiction of a court of equity to issue an injunction in such cases depends upon the occasion that gave use to the issuance of such tickets, and that, if the petition for an injunction recites that special tickets have been issued for a special occasion, which appear on their face to have been issued at special rates, and to be used by a specially named person, a concrete case is presented wherein the court can enjoin the ticket brokers from dealing in them; but, if a special ticket is issued, which appears on its face to have been issued at a special rate, and to be used by a specially named person, but which was issued generally, and not for a special occasion, only an abstract right is involved, and a court of equity has no jurisdiction, and a writ of prohibition will lie against it. Of course, it must be understood that this is not the way the counsel for the ticket brokers state the matter, but it is the everyday meaning and result of their contention. But, even if the contention of counsel for the ticket brokers that such special tickets must relate to a special occasion be true, the writ of prohibition asked herein would have to be denied as to all the railroads except the Missouri Pacific, for all except that road aver that they have issued, or are about to issue, such special tickets for the special occasion of the World's Fair in St. Louis in 1904. True, they say they also intend to issue such special tickets from time to time, and the Missouri Pacific Railroad does not refer to the World's Fair at all. However, to allow this case to go off upon any such consideration, or without squarely meeting and deciding it in its entirety, would not be subserving the ends of justice. Broadly stated, therefore, the question for decision

is whether a petition by a railroad for an injunction against a ticket broker to restrain him from dealing in special tickets which recite upon their face that they are issued at reduced rates, and are nontransferable, but which do not relate to any particular occasion, states a concrete case, which a court of equity has jurisdiction to hear and decide. If it does, the writ of prohibition asked for herein should be denied. If it does not, the writ should go.

The power to contract concerning a legal subject-matter carries with it the right to make any kind of a contract in relation thereto that the contracting parties may agree upon. The power being unlimited, the nature and character and terms of the contract to be made and the occasion that gives rise and the business necessities or exigencies that prompt it are all matters of private convention between the parties. The power to limit any kind of a contract in its operation to the contracting parties, and to exclude from its benefits any third persons, or to limit the contract as to the time it shall continue, or to leave it unlimited as to time, is recognized in law. Thus, a lease may prohibit the lessee from assigning, transferring, or subletting the premises, either for the whole or any part of the term. A copartnership agreement necessarily excludes the right of any member to sell his interest, and thereby substitute the purchaser in his place as a member of the firm: and such agreements may be limited or unlimited as to duration. A contract of hiring gives no right to either party to assign or transfer his interests or rights under the contract, and such contracts may be limited or unlimited as to duration. These illustrations are made, not because they constitute similar cases to the case at bar, but because they show that when a right to contract at all concerning a particular subject-matter is conferred by the law, and the right so conferred is unlimited, or when the right to so contract arises out of the natural rights of man, it is purely a matter of agreement between the contracting parties what the terms, duration, character, or nature of the contract shall be. The Supreme Court of the United States, in *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249. 8 Sup. Ct. Rep. 1324, and the statutes of the United States and of this state, recognize the right of a railroad to issue excursion or commutation tickets, based upon the consideration of a reduced rate. The right so conferred is not limited. There is no limitation that such tickets can be issued only upon special occasions. Neither is there any prohibition against the right to make such tickets nontransferable. Persons who do not wish to be so restricted and limited

can purchase the usual unlimited, unrestricted ticket, and pay full price therefor, and then sell the unused portion thereof. But no one has any right to buy a special ticket at a reduced rate, which on its face recites that it is nontransferable, and that it is supported by the consideration of a reduced rate, and thereby agree to such limitations, and thereafter violate his agreement by transferring it to another, or to complain that he has not the right to transfer it. And no third person can acquire any right or interest, or power, or claim in or to the ticket, or to the privileges conferred thereby, other than the original purchaser possessed or could confer under it; and, if the original purchaser had no power to transfer it, no assignee of such purchaser could acquire any rights under it, for the original purchaser could convey none. It is wholly illogical and sophistical to say the original purchaser had a property right in the ticket—the piece of paper on which the ticket or contract is printed—which he can sell and transfer, but that the assignee acquires thereby no rights against the railroad, and it can refuse to transport him. Such reasoning confuses the piece of paper upon which a contract is written with the agreement of the parties, and erroneously separates the evidence of the contract from the contract itself. Of course, any man can physically pass the piece of paper on which any kind of a contract is written to another, but that will give such other person no rights under the contract that is written on the piece of paper, if the contract itself is nontransferable. It follows, therefore, that under the law it is competent for a railroad to issue special tickets, based upon reduced rates, and to make them nontransferable, and valid only in the hands of the original purchaser, and that such tickets may be limited as to time or as to occasion, or they may be unlimited as to time or occasion, and that the original purchaser of such tickets cannot assign or transfer such tickets or any rights whatever thereunder to any third person. It also follows that, if any person buys such a special ticket, and sells it to a third person, to be used by him or another, the railroad can invoke the aid of a court of equity to cancel the contract because of the fraud thus perpetrated; or, if the ticket is used by another, it can sue for damages for the breach of such contract. It also follows that, if such a case at law or such a suit in equity as to a single such ticket presents a concrete case over which a court has jurisdiction, a concrete case may likewise be presented if it relates to all such special tickets, whether they were all so purchased and so attempted to be transferred by the

same person or not. To illustrate: If a railroad should issue a thousand such special tickets, and if one ticket broker should purchase the whole issue, and thereafter undertake to throw them on the market and sell them contrary to his agreement, or should actually sell them, and if the railroad company should invoke the aid of a court of equity or of a court of law in the one case or the other, there would be no room for doubt that a concrete case would be presented, which the court would have jurisdiction to decide.

But counsel for the ticket brokers inferentially say that, while such conditions might present a concrete case, the petitions for injunction in these cases and the injunctions issued by the court cover, not only such tickets as have been issued and sold, and as to which there is therefore an existing contract, and hence a right of property in the contract, but that they also cover such special tickets as may hereafter be issued from time to time, and as to which there is no contract and no property right, and which have not been sold and may never be sold, and therefore no concrete case is presented; and that the injunctions issued are "blanket injunctions," as counsel call them, which undertake to prescribe a rule of civil conduct, which the legislature alone has power to prescribe, and to punish any infraction of such rule by contempt proceedings, instead of by the usual remedies provided for a breach of such rules, and that it is therefore "government by injunction," instead of according to laws regularly enacted and enforced. If this contention is well founded, a writ of prohibition could not be too quickly issued by this court. But there is no proper foundation in this case for such well-known and generally accepted principles of law to apply to, and the injunction issued by the circuit court does not offend against these principles. The injunction applies to all such special tickets as have heretofore been issued, and to such as are now being issued, and which have already been sold; and it applies also to all such special tickets as may hereafter be issued and sold. That is, the injunction applies only to such tickets after they have been sold, and after a contract has been entered into, and after property rights under the contract have arisen, and after a controversy in relation to such property rights has arisen, and after an injury to such property rights has been threatened by the ticket brokers, and after such injury has become imminent, and under circumstances and conditions set out in the petition which show prima facie that the damage resulting to such property rights by the threatened, but as yet unperformed, acts and con-

duct of the ticket brokers, would be irreparable, and such as the law affords no adequate remedy for. Such averments in a petition state a concrete case in equity, which the court has power to deal with. In fact, the original and primary office of a writ of injunction is to prevent a wrong—an injury—being done. Therefore, if the contention of counsel for the ticket brokers in this regard, that there can be no concrete case until the defendant has already acted, be well taken, it follows necessarily and logically that a preventive injunction can never issue, and the result of so holding would be to abolish preventive injunctions altogether.

It has already been made clear that the law affords no adequate remedy in cases of this kind, because of the insolvency of the ticket brokers, and because of the nature of the business and the frauds threatened upon the railroads, and upon innocent third persons who might be induced to purchase such tickets from the ticket brokers, and because of the hundreds and thousands of suits that would be necessary to redress the invasion of the rights of the railroads under such contracts by the ticket brokers, and because it would not be possible, in the nature of things, for the railroads to discover the frauds in time to ask preventive or injunctive relief. "An injunction is a judicial process issuing out of a court of chancery, whereby a party is required to do or to refrain from doing a particular thing. The most ordinary form of injunction is that which operates to prevent the performance of an act. The other form of injunction commands that an act shall be done." 16 Am. & Eng. Enc. Law, 2d ed. p. 342. And § 3649, Rev. Stat. 1899, provides that the remedy by writ of injunction shall exist "to prevent the doing of any legal wrong whatever, wherever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." By this, of course, is meant in any case that falls within the class of cases that are properly cognizable in a court of equity. Cases involving threatened frauds, where the defendant is insolvent and the threatened injury would be irreparable, or where the redress of the injury would result in a multiplicity of suits, fall within the class of cases properly cognizable in courts of equity. *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649; *Michael v. St. Louis*, 112 Mo. 610, 20 S. W. 666; High, Inj. 3d ed. p. 12. The last-named author says: "The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction."

Originally, injunctions were preventive only, and it is only within recent years that a mandatory injunction has sprung into existence. Preventive injunctions necessarily operate upon an unperformed and unexecuted act, and prevent a threatened, but nonexistent, injury. A concrete case is presented whenever a right of the plaintiff is threatened by the defendant and the damage would be irreparable, and where protection of that right belongs to the class of cases that are cognizable in equity. Of course, criminal cases do not fall within such a class.

Measured by these standards, the petitions for injunction asked the preventive aid of a court of equity in respect to rights of the railroad which a court of equity has power to protect against invasion and injury by the ticket brokers, which injury, it is alleged, is imminent, impending, and irreparable; and that this is so is the more clearly shown by the character of the return to the order to show cause, wherein the ticket brokers say they have invaded such rights of the railroads in the past as to such special tickets, and have money now invested in tickets of that character, which will be lost if the injunction is granted, and assert an intention and right to continue to deal in such tickets. Therefore, as to the tickets that have been issued and sold by the railroads, and are now held by the ticket brokers, both parties assert a property right therein; and hence there is an existent controversy, concerning a legal subject-matter, between live parties, and consequently there is a concrete case presented for adjudication to the circuit court, which it has jurisdiction to decide. It cannot, therefore, be said that the circuit court had no jurisdiction as to those matters. As to the tickets to be issued and sold hereafter, the railroads have a right to issue and sell tickets of such character as shall express on their face that they have been issued at a reduced rate and are nontransferable; and the ticket brokers assert a right to buy and sell and deal in them notwithstanding the terms thereof, and notwithstanding the original purchaser could confer no rights upon anyone thereunder. There is, therefore, an existent property right of the railroads, which the ticket brokers say they intend to invade, the danger is imminent, and, under the allegations of the petition, the injury will be irreparable; and, in the very nature of the business, the injury cannot be adequately redressed by an action at law, or in any other manner than by a preventive injunction. A proper case for the exercise of the powers of a court of equity by a preventive injunction was therefore also presented for the determination of 65 L. R. A.

the court, as to this branch of the case. And in granting such preventive injunctions the court of equity does not prescribe a rule of civil conduct, nor invade the province of the legislative branch of the government; nor does it establish a "government by injunction." It only does what has already been done by courts of equity since their adoption into the body of our institutions. It enforces the rules of civil conduct prescribed by the organic law or the statute law, or that arise naturally and regulate all men, by guarding the rights of one citizen against illegal invasion and irreparable injury by another citizen, and which the citizen, of his own force, is unable to guard for himself. And in the doing thereof courts of equity recognize no forms, no technicalities, no delays, and no shadows, but act according to the dictates of good conscience, good morals, good conduct, and good government; and they compel every man to act right, and to respect the rights of others, whether his conscience is quick enough to appreciate the difference between right and wrong or not.

There is no merit in the contention that, by granting the injunctions in question in this case, the court has infringed upon the powers of the legislative branch of the government. The court has created no right in anyone. The court has enacted no law or rule of conduct. The court has simply protected rights that are natural or were created by the legislature. The right asserted by the railroads, and denied and threatened by the ticket brokers, is a right that is natural to mankind. It is a right that the legislature of this state and the Congress of the United States have expressly conferred upon the corporation railroads, and which the Supreme Court of the United States has expressly declared they possess. It is a right that is guaranteed to every man by the organic law of the land,—a right to contract concerning a legal subject-matter. Such a right is property, within the meaning of the law. The ticket brokers deny the existence of that right, and threaten to invade it. The law affords no adequate remedy for such an infringement of such a right. The damage will necessarily and obviously be irreparable. This being true, a concrete case for injunctive relief is presented, and, in the granting of such relief, it cannot justly or fairly be said that the courts invade the prerogatives of the law-making power in any manner whatever. That power has already created the identical right claimed, and it is the duty of the courts to protect that right in the same manner and to the same extent that they protect any other property rights that are possessed by any citizen. The railroads are

not entitled to, and are not accorded, any right in this regard that is not as fully possessed by any citizen, and that would not be protected in the same manner if such protection was invoked by the humblest citizen.

These considerations and conclusions result in holding that the Circuit Court had jurisdiction to hear and determine the injunction cases, and that it did not exceed its jurisdiction, and therefore *the preliminary rule in prohibition must be discharged*, at the costs of the plaintiff.

Robinson, Ch. J., and Brace, Burgess, and Fox, JJ., concur.

Valliant, J., dissenting:

Being unable to concur in the opinion of the majority of the court in these cases, and regarding the principle involved as one of much importance, I feel constrained to state as briefly as I can the reasons for my dissent.

I do not question that a railroad company may, under a valid contract, issue a ticket limited to be used only by the purchaser, or that it may lawfully refuse to honor such ticket for the transportation of anyone except the original purchaser. And possibly a case might arise under such circumstances as would justify a court of equity in interfering to prevent the transfer or sale of such a ticket. No such case occurs to me now. No one doubts that the circuit court, as a court of equity, has jurisdiction to issue injunctions, and no one doubts that to prevent irreparable injury or a multitude of suits is ground for equitable relief. I am also ready to concede that, if the railroad company were required to wait until a case should actually arise, before calling on the court for an injunction, the remedy would not be so convenient, far-reaching, or so absolutely destructive of the business of the ticket broker, as it is in the form given. But conceding all those propositions, I hold that no court has jurisdiction to render a judgment or decree that in effect is but the enactment of a law, or to lay down a rule of conduct to take effect on the cause of action not yet arisen, or to render a judgment in advance, to be applied when the cause of action arises.

The cases made in the petitions on which the railroad companies obtained these injunctions are, in effect, that the railroad companies, in consideration of the World's Fair and other important public events that may occur in the future in St. Louis, are contemplating issuing round-trip tickets for the transportation of persons from any given point in the United States to St. Louis and return, the tickets to be nontransferable and good going and returning only for the 65 L. R. A.

passage of the persons to whom they are respectively issued; that each ticket is to recite on its face that it is sold at a reduced rate, and in consideration thereof the purchaser agrees not to transfer it, but that the defendants are engaged in the business of buying and selling secondhand railroad tickets, and that, in spite of the recitals on the face of the tickets, these ticket brokers are liable to buy them and sell them to persons other than the original purchasers, who will use them in payment of their railroad fares, to the irreparable injury of the railroad companies; that if the railroad companies wait until the tickets are issued, and the brokers buy them and sell them, it will be too late to obtain equitable relief, because, in the very nature of the transaction, the deed would be done before the process of the court could be obtained. On the filing of those petitions, and on a joint preliminary hearing, the court issued injunctions enjoining the defendants, until the further order of the court, from buying or selling tickets that the railroad companies might thereafter issue of the character specified. At the preliminary hearing the defendants urged the proposition that there was no concrete case stated on the face of the petition, nothing to bring the judicial power of the court into action, nothing to give the court jurisdiction. But the court ruled to the contrary.

When a petition is filed in the circuit court which the defendant thinks does not state a case that gives the court jurisdiction, he has no right in the first instance to a writ of prohibition to prevent that court taking cognizance of it, because that court has the first right to decide whether or not the petition states a case within its jurisdiction, and the presumption is that, if the court has no jurisdiction of the case stated, it will so decide. And even if the court should erroneously decide that it has jurisdiction, the writ of prohibition will not ordinarily issue, if the rights of the parties can be adequately protected by appeal. But when the court at the very outset, not only erroneously decides that the petition is sufficient to give jurisdiction, but renders an interlocutory decree of such effect that it is destructive of the defendants' rights, beyond redress by appeal, then the writ of prohibition ought to go. That is just what the court in these cases has done. The temporary injunctions are as effective for the destruction of the rights of the defendants as would be perpetual injunctions on final decree, because, in the very nature of the proceedings, the causes would not reach the appellate court until after the public occasions mentioned in the petitions had passed. The defendants have nothing to

hope for in the final hearing, because there are no facts in issue to which evidence could be addressed to change the mind of the chancellor. When the cases come on for final hearing, what issue is there to try? Will the court hear evidence to prove at the time of filing the suits the railroad companies really intended to issue the kind of tickets specified, and that they had cause to apprehend that, if they should conclude to issue them, the ticket brokers would buy and sell them? There are no issues of fact. There is nothing in the cases to try on final hearing. It is said that these injunctions can injure no one, because they are not to take effect until a concrete case arises,—until one of the defendants does an act forbidden,—then the injunctions cease to be mere abstract fulminations, and become concrete judgments. That is so, but the vice of it is that it is a prejudgment of the case before it has arisen. Suppose next year a railroad company issues a ticket in the form suggested, and a broker buys and sells it, and he is arraigned before the court on a charge of contempt. He comes into court and says: "I am advised that I had a legal right to buy and sell that particular ticket, and I ask for a trial on that issue." But the court will look at the ticket, and see printed on its face that it was sold at a reduced rate and is nontransferable, and will say to the defendant: "There is nothing to try. That was settled by a judgment rendered a year ago. The only question before the court now is as to the character and degree of punishment to be inflicted." Then, if the defendant should say, "But this ticket was not issued until a year after that judgment was rendered,"—the answer would be: "This judgment is prospective in its character, affecting, not only what has been, but what may be. It establishes a rule of conduct for all time, and confers the character of *res judicata* upon every transaction involving the buying and selling of a round-trip railroad ticket upon which the railroad company may have taken the care to have printed on its face that it was sold at a reduced rate, and is nontransferable." Suppose a railroad company should issue a ticket of the kind in question, and then, in order to ascertain if anyone is violating the injunction, should send a detective to a broker to sell him a ticket, and send another to buy it, and the broker, so induced, buys and sells; could he not, when arraigned in court on a charge of contempt, well say: "I bought that particular ticket from an agent of the railroad company especially authorized to sell it to me, and I sold it to one in like manner authorized to buy it?" Doubtless, if he should be allowed to get that far in his defense, the 65 L. R. A.

court would not inflict the penalty for contempt upon him; but, giving to the decree its natural effect, the act suggested would be *res judicata* as well as to that transaction as to any other defense he might desire to make. It is no answer to this position to say that the court could be relied on to use its discretion to allow the defendant, when arraigned, to be heard concerning any particular defense he might have. If the court should hear him at all, it would only be *ex gratia*. If the judgment is right, he has no legal right to be heard, because it has already been prejudged that his handling of the ticket was unlawful. The only questions the judgment leaves open are, Did the ticket bear those marks? and, Did the broker buy and sell it? If so, he is guilty. When a man buys and sells a ticket that was not in existence when the injunction was issued, and he is arraigned in court to be punished by fine and imprisonment for doing so, to say to him that he will not be heard on the proposition that he had a right to do what he did, and to inflict the penalty upon him without giving him such hearing, is to take his money and deprive him of his liberty without due process of law, in violation of both our state and Federal Constitutions. That is just what is liable to be done in these cases, if the injunctions are taken to mean what they say, and enforced accordingly. It was said in the oral argument by eminent counsel for one of the railroad companies that the business of these ticket brokers was dishonest; that they were as bad as men who keep "fence houses" where stolen goods are knowingly bought and sold. It is strange, if that is so, that the business has not been forbidden by an act of our general assembly, or by the legislatures of many states in the Union. It is the only case to which our attention has been called in which the character of the business received judicial mention. It was said by Chief Justice Parker, of the New York court of appeals: "It is not contended that the business of ticket brokers is in itself of a fraudulent character. The business can be honestly conducted; it has been so conducted in the past by honest men engaged in it; and the most that is asserted is that there are some men engaged in the business who have imposed on the public. The same assertion can be made with equal truth of every business, trade, and profession. . . . The business of selling passage tickets continues, therefore, to be regarded as a lawful and legitimate business." [*People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 124, 43 L. R. A. 268, 68 Am. St. Rep. 763, 51 N. E. 1006.]

The lawmaking power of this state has not declared this business unlawful, and the

judiciary has no authority to do so; yet the effect of these injunctions is to drive these men out of business, and that is the purpose avowed in the arguments of the learned counsel for the railroad companies. It is for the legislature to declare the policy of our law, and for the courts to apply the law to particular acts after they are committed, or acts threatening some property right when in existence. It is true, these injunctions prohibited the buying and selling of only such tickets as carry on their face certain recitals, but there is nothing to prevent the railroad companies printing those recitals on the face of all tickets, and having all of them signed by a purported purchaser; and whether the recitals are true, or the signature bona fide, are questions on which the broker, according to the terms of these injunctions, when arraigned on a charge of contempt, will have no right to be heard. Any fact so appearing on the face of the ticket is, as to him, *res judicata*. The railroad company is clothed with the power of stating the necessary facts on the face of the ticket, and any fact, when so stated, becomes, by relation back to the judgment, *res judicata*, and is past disputing.

As between the plaintiffs and the defendants in those suits, if the court had jurisdiction to decree as it has decreed, the decree settles the rights of the parties touching the subject adjudged, and the plaintiffs cannot by any subsequent legislation be deprived of their vested rights in the matters covered by that decree. If the plaintiffs are entitled to what those decrees essay to adjudge to them, then, as to the defendants in those suits, no power in the land can deprive them of it. Those decrees cover tickets to be hereafter issued, as well as tickets already issued, and are aimed chiefly at tickets hereafter to be issued. No one will doubt but that the general assembly has the power to enact that all railroad tickets issued in this state shall be transferable or assignable; yet, if the court had jurisdiction to enter the decrees that it did enter in these cases (and, so far as the question of jurisdiction is concerned, there is no difference between an interlocutory decree and a final decree; jurisdiction to grant a temporary injunction is jurisdiction to make it perpetual), then, if the general assembly should to-morrow enact a law to the effect that all railroad tickets hereafter issued in this state should be transferable, the act would be invalid in its application to the acts of the parties to those suits relating to tickets covered by those decrees, because, if the decrees are valid, they confer on those plaintiffs, as against those defendants, vested rights, and subsequent legislation cannot destroy vested

rights. But I apprehend that, if any such condition should arise, it would be held that the fault was with the court, which had gone beyond its jurisdiction, and attempted to reach into the future to adjudicate upon cases before they had arisen. Suppose our general assembly should conclude that the business of railroad ticket brokers was detrimental to the well-being of the state, and pass an act saying that anyone who should hereafter buy or sell a railroad ticket that recited on its face that it had been issued by the company at a reduced rate, and for that reason was nontransferable, should be deemed guilty of a misdemeanor, and upon conviction be punished by fine and imprisonment; would anyone say that the general assembly, in passing that act, was usurping the powers of government intrusted to the judiciary? Whatever else might be said, in questioning the validity of the act no one would say that it was not legislative in its character. No one would claim for it that it was a judicial act. Yet that is exactly the kind of act effected by these injunctions. Our attention has been called to a bill now pending in the municipal assembly, which, in its essence, copies the very words of these injunctions, and proposes to enact them into a law. Are these railroad companies appealing to the World's Fair sentiment in the municipal assembly to induce its members to usurp judicial powers, or has the circuit court assumed legislative functions? The act, in its nature, is either legislative or judicial. It belongs either to the one department of the government or to the other. It cannot be exercised by both. In the language of the supreme court of Vermont: "No power can be properly a legislative and properly a judicial power at the same time; and, as to mixed powers, the separation of the departments in the manner prescribed by the Constitution precludes the possibility of their existence." *Bates v. Kimball*, 2 D. Chip. (Vt.) 77.

No court of last resort has ever before laid down the doctrine that this court now announces in the majority opinion. We have no precedent for it. This I feel safe in saying, because, although we are aided by an unusually strong array of eminent counsel, representing nearly all the great railroad interests centering in St. Louis, yet they have referred us to no appellate court that has given its sanction to such a use of judicial power. The very fact that the only legislative body in the state now in session, and at all available to the purpose, is resorted to, to obtain the same object these injunctions purport to accomplish, evinces a lack of confidence in the position taken by the railroad companies in these cases.

In the brief of the learned counsel for the ticket brokers is a collection of authorities sustaining every proposition they make, and demonstrating that the interlocutory decrees granting these injunctions are legislative, and not judiciary, in their character. I am strongly tempted to quote from some of these authorities, but I have already oc-

cupied as much space as ought to be taken in a dissenting opinion.

For the reasons outlined in the foregoing pages, I respectfully dissent from the majority opinion. In my judgment, the writs of prohibition ought to issue.

Gantt, J., agrees with me in this opinion.

SOUTH DAKOTA SUPREME COURT.

STATE of South Dakota

v.

Thomas HALL, *Plff. in Err.*

(.....S. D.....)

1. The trial judge cannot be held to have abused his discretion in refusing to transfer a case to another court for trial on the ground of prejudice, where he was called from another circuit to try the case on the allegation of prejudice on the part of the local judge, and there is nothing to show that an impartial jury had not been secured, while numerous affidavits state that a fair trial can be had, although there is some prejudice against the accused, and some affidavits state that such trial cannot be had.
2. Permitting an officer who had heard the evidence on a former trial of accused, and had formed an opinion as to his guilt, to summon the jury for the new trial, is not such an abuse of discretion as to require a new trial, where it affirmatively appears that he had no actual bias or prejudice against accused, and there is nothing to show that he used his office to the detriment of the prisoner.
3. Refusing to strike out the opinion

of a witness as to the genuineness of signatures in evidence upon withdrawing other signatures which had been introduced for the purpose of comparison is not error, where the witness had seen the person write who is alleged to have written the signatures, as to which he testifies, and is therefore competent to give his opinion as to their genuineness independently of any comparison with other signatures in evidence.

4. An entry in a record kept by a postmaster as to the payment of a money order is admissible in evidence, although neither the statute nor the requirements of the postoffice department require the record to be kept, where it is necessary and proper in the orderly conduct of the business of the office.

(July 2, 1902.)

ERROR to the Circuit Court for Hamlin County to review a judgment convicting defendant of murder. *Affirmed.*

The facts are stated in the opinion.

Mr. C. H. Winsor for plaintiff in error.

Messrs. A. W. Burt, Attorney General, Alva E. Taylor, and Aubrey Lawrence for the State.

NOTE.—*Procedure in proof of handwriting.*

- I. Scope, 151.
- II. Procedure generally, 151.
- III. Purpose of the proof, 153.
- IV. Examination of the witness, 154.
- V. Deciphering of obscurities, 155.
- VI. Summary, 156.

I. Scope.

The purpose of this note is merely to state the rules as to practice and procedure which have been held to apply, or not, to the case of proof of handwriting by the usual means. This excludes the discussion of the special rules applicable to the proof of handwriting by comparison of genuine with the disputed writings, treated in the note to Hoag v. Wright, 63 L. R. A. 163, upon the *Examination of witnesses to handwriting by comparison*; it also excludes the treatment of the subjects of the limitations and extent of evidence as to handwriting, and of *The competency of witnesses to handwriting*, treated in a note to Ratliff v. Ratliff, 63 L. R. A. 963; as also the special subject of *The competency of witnesses to handwriting by comparison*, treated in a note to Tower v. Whip, 63 L. R. A. 937; the subject of *Compari-* 65 L. R. A.

son of handwriting," generally, covered in the note to University of Illinois v. Spalding, 62 L. R. A. 817; the subject of *The competency of standards for comparison of handwriting*, in the note to Gambrell v. Schooley, 63 L. R. A. 427; and *Comparison of marks and spelling*, found in a note to Re Hopkins' Will, ante, 95.

II. Procedure generally.

When an objection is made to the admission in evidence of a writing, upon the ground that there is no proof of the genuineness of the signature, and the presiding judge has personal knowledge of the handwriting of the signer, and from this acquaintance is satisfied that the signature is genuine, no other evidence is necessary to make a prima facie case for the party producing the writing upon the question of its genuineness, until some evidence is introduced in opposition to the case thus made. Brown v. Lincoln (1867) 47 N. H. 468.

And where a witness in a deposition in a suit in equity swears to the handwriting of a document, and afterwards becomes blind, his deposition may be read in his lifetime. Lynn v. Robson (1823) 1 L. J. Ch. 88.

It seems that when a paper is about to be put into the hands of a witness counsel have no

Corson, J., delivered the opinion of the court:

The plaintiff in error was convicted of the crime of murder, on an information duly filed by the state's attorney of Hamlin county. He sued out a writ of error, and upon the hearing of the same in this court the judgment of the court below was reversed. The case is reported in 14 S. D. 161, 84 N. W. 766. Upon the second trial he was again found guilty by the jury, and his case is now before this court upon the second writ of error for review. There is a large number of errors assigned in the record, but, as the learned counsel for the plaintiff in error relies upon four for the reversal of the judgment, this court will limit itself, in the consideration of the case, to those discussed by counsel.

right, absolutely, to see it until it is put in evidence. In such a case *Best, Ch. J.*, said: "If you put a paper into the hands of a witness in order to refresh his memory, the other side have a right to see it; if you merely give it to him to prove handwriting, they have not such right." *Sinclair v. Stevenson* (1824) 1 Car. & P. 582, 2 Bing. 514, 10 J. B. Moore, 46.

Proof that the handwriting of an individual upon a register of marriages, which was in the legal custody of a person who was not compellable by law to produce it, was that of a person whose handwriting the witness knew, was admissible without the production of the original register. *Sayer v. Glossop* (1848) 2 Exch. 409, 2 Car. & K. 694, 17 L. J. Exch. N. S. 800, 12 Jur. 465.

The refusal of a party to produce in court writing which the other party seeks to annul as a forgery, for the examination by the court and expert witnesses; and the refusal, on frivolous and contradictory pretexts, to allow a particle of ink to be taken from it for examination by an expert,—can, it has been held, be interpreted only as an admission that such an inspection will tend to prove its falsity. *Sharon v. Hill* (1885) 26 Fed. 337.

In connection with the evidence bearing upon the genuineness of a disputed signature, it is proper to submit to the jury the paper bearing the signature. *Huston v. Schindler* (1874) 46 Ind. 38.

But the refusal of the court to require a will, the genuineness of which is in issue, to be taken to the jury room for examination by the jury when they have not desired it, and against the objection of one of the parties, is not contrary to law or practice in such matters. *Re Foster* (1876) 84 Mich. 24.

And it was not error to exclude from the jury for their inspection a microscopic enlargement proved by a competent witness to have been made by him by hand from the image in a camera-lucida of the signature in question. The admission of what purported to be an enlarged copy of the signature would open the door to innumerable collateral questions, and the enlarged signature was at best secondary evidence, the original signature being in court, and it not being proposed to compare it with enlarged copies of other and genuine signatures. *White Sewing Mach. Co. v. Gordon* (1890) 124 Ind. 495, 19 Am. St. Rep. 109, 24 N. E. 1053.

The trial court did not err in refusing to

The first error assigned is that the circuit court erred in its refusal to grant the motion of the accused to change the place of trial from Hamlin county. The motion was made upon the ground that a fair and impartial trial could not be had in that county. The motion for such change was based on § 7312, Comp. Laws, as amended by chapter 50, Laws 1891, in which it is provided that "a criminal action . . . may, at any time before trial is begun, on the application of the defendant, be removed from the court in which it is pending, . . . whenever it shall appear to the satisfaction of the court . . . that a fair and impartial trial cannot be had in such county or subdivision." It will be observed that, whenever "it shall appear to the satisfaction of the court" that a fair trial

admit in evidence letters which a witness had received in correspondence with the person alleged to have written the disputed signature, and which the witness swore were the source of his opinion as to the genuineness of the letter; the witness having them in his possession had the right to refer to them for the purpose of refreshing his memory before testifying, and in corroboration of his testimony, addressed to the court, upon the subject of his competency to testify; but they were not competent evidence to go to the jury. *Ibid.*, Following *Thomas v. State* (1885) 103 Ind. 419, 2 N. E. 808.

In a case involving forgery it is not error to allow the jury to use, and take with them in their retirement, a magnifying glass for the examination of papers submitted in evidence. *Hatch v. State* (1879) 6 Tex. App. 384.

The general rule is that, if one has seen another write, he is competent to give an opinion as to whether or not a signature purporting to be his is so or not; and the evidence of the witness is therefore admissible independently of other considerations.

So, the decision of *STATE v. HALL* seems unassailable, to the effect that, after a witness has sworn that he saw one of the parties write two writings which contain nothing material to the case, and which are then admitted in evidence, and that in his opinion two other and material writings were also written by that party, whereupon the immaterial writings are, by the court, withdrawn from the jury,—it is not error in the court to refuse, also, to order stricken out the opinion of the witness in regard to the material writings, upon the ground that the opinion of the witness was based upon the writings which had been withdrawn.

But when an expert had stated certain facts as the grounds upon which his opinion as to the genuineness of handwriting was based, and the court excluded those facts from the consideration of the jury, it was error in the court then to refuse to exclude the opinion itself. *Koons v. State* (1880) 36 Ohio St. 195.

Where a witness testified generally to the genuineness of a signature, and later, after further testimony was given, testified upon cross-examination that he was not familiar with the handwriting of the person whose signature was in question, and did not remember that he had ever seen his handwriting, there was no error in admitting the disputed

cannot be had, the court may order the person accused to be tried in another county. The motion in this case was supported by a number of affidavits, and resisted by about 100 affidavits on the part of the state. In the affidavits on the part of the accused were stated in detail, and at considerable length, the grounds of the motion, among which are that the body of the deceased, with certain wounds thereon, was seen by numerous citizens and residents of the county of Hamlin, and that ever since the arrest of the accused an intense prejudice and public feeling had been manifested against him by the people of said county; that the newspapers of said county had published articles strongly prejudicial to the accused; that much difficulty had existed in obtaining an impartial jury

on the first trial of the cause; that a large number of the residents of said county were in attendance at the trial, and heard the evidence given therein; and that the case had been much discussed by the people of said county. It was shown, however, by the affidavits on the part of the state, that neither the accused nor deceased was a resident of the county, and that, in the opinion of the affiants, a fair and impartial trial could be had in that county; and several of the persons making affidavits stated that they had never heard the case discussed, and that they were severally competent to sit upon the jury. While undoubtedly there was some feeling, and possibly prejudice, against the accused, on the part of many persons in that county, caused by their belief that he was

paper in evidence, since subsequent testimony abundantly proved that it was genuine. *Bulen v. Granger* (1886) 63 Mich. 311, 29 N. W. 718.

After one party has put in evidence writings with proof of nonexpert witnesses that they are in the handwriting of a certain individual, and the other party calls experts who testify that in their opinion the writings are not the handwriting of that person, it is then a matter within the discretion of the court to allow the first party to call an expert to testify to his opinion in support of the testimony of the first witnesses. *Costello v. Crowell* (1882) 133 Mass. 353.

Where the testimony of witnesses tending to establish the genuineness of the disputed signatures seems to the court to be convincing, the court will not set aside the judgment for the purpose of giving the appellant, who has had the benefit of expert testimony on the subject of the handwriting, an ample opportunity to present whatever evidence he desired, and opportunity to introduce further expert testimony. *Briggs v. United States* (1894) 29 Ct. Cl. 178.

But when an instrument has been *prima facie* proved by the testimony of a witness that he has often seen the person purporting to have executed it write, and that he takes the signature in question to be genuine, whereupon the instrument is allowed to go to the jury; if they then, without any further evidence, reject the instrument as not genuine,—a new trial will be granted upon the ground that the verdict is against the weight of evidence. It is not necessary in such a case for the party producing the instrument to prove more until it is to some extent impeached. *Cook v. Smith* (1863) 30 N. J. L. 387.

Under the Louisiana Civil Code, art. 226, whenever a signature is formally disavowed in writing, which disavowal need not be under oath, the mode of proof provided by the Code by comparison of experts must be resorted to in the first instance; but the party offering this kind of testimony is not thereby precluded from producing any other legal evidence which may be in his power, as that of witnesses well acquainted with the handwriting of the persons whose names are on the papers, either in aid of, or to contradict, the testimony of the experts. *Clark v. Cochran* (1814) 3 Mart. (La.) 353.

But when the formal disavowal in writing of 65 L. R. A.

a private writing is not made by the party charged with the execution of it, the other party may, without the necessity of resorting in the first instance to proof of his claim by experts, produce other legal testimony. *Ibid.*, Followed in *Lynch v. Postlethwaite* (1819) 7 Mart. (La.) 69.

The Louisiana Civil Code, art. 1648, provides that a holographic will must be proved by the testimony of two credible persons, who shall have become familiar with the handwriting of the testator from having seen him often sign his name and write other matter, and who shall attest and solemnly declare that they recognize the testimony as entirely written, dated, and signed in the testator's handwriting; and all this must be expressed in such terms as will satisfy the judge that they entertain no doubt as to the genuineness of the will. But this rule does not exclude other and cumulative or corroborative evidence; and both parties may resort to all the means of proving or disproving handwriting; and courts are not prohibited from giving due weight to circumstances which evidence legally admitted presents. *McDonogh's Succession* (1866) 18 La. Ann. 419.

It is manifestly error in the court to charge the jury as to the facts which would have been demonstrated beyond question by an expert witness if the defendant had chosen to avail himself of his privilege of cross-examination. *Withaup v. United States* (1904) 127 Fed. 530.

When the proof as to the genuineness of the signature of a promissory note in suit is very nearly equally balanced, and it is very difficult to determine on which side it is entitled to the greater weight, evidence tending to show a reason for the execution of the note, and a reasonable probability or improbability that the party charged with it made and delivered it, is competent and highly important for the consideration of the jury. *Hunter v. Harris* (1890) 131 Ill. 482, 23 N. E. 626.

III. Purpose of the proof.

For the purpose of corroborating direct evidence that a person executing an instrument was drunk at the time of execution, it is proper to allow proof by witnesses that the signature in question differs from the natural and ordinary signature of the same person. *McLeod v. Bullard* (1881) 84 N. C. 515.

In order to make competent papers alleged

guilty of the crime charged, still we cannot say that the learned circuit court committed error in denying the motion. On the motion of the accused alleging prejudice on the part of the trial judge of that circuit, another circuit judge had been called in to try the case, who, we must presume, was entirely impartial and unbiased, and who, in passing upon the motion for a change of venue, gave the affidavits on the part of the accused, as well as on the part of the state, full and careful consideration. And, so far as the record in this case discloses, a fair and impartial jury was impaneled for the trial of the said cause. The learned counsel for the accused places much reliance upon the case of *State v. Billings*, 77 Iowa, 417, 42 N. W. 456. The statement of facts in that case, on which a motion for a change of venue was based, showed, not

only a very strong feeling against the accused on the part of the people, but that the excitement was so great that there were threats of lynching. The supreme court of Iowa was not unanimous in its decision; the writer of the opinion stating that he did not concur in the view of the majority of the court, as he regarded it in conflict with the cases of *State v. Read*, 49 Iowa, 85, and *State v. Perigo*, 70 Iowa, 657, 28 N. W. 452. The two cases cited present a state of facts which, in our opinion, are more strongly in favor of the change of venue than those in the case at bar; but the change of venue was refused in each case by the trial court, and the supreme court sustained the rulings of the court below on the ground that granting or refusing the motion was in the sound discretion of the trial court, and that the facts of the cases

to have been written by a person whose identity with a person bearing another name is in question, it is not necessary that they should be clearly proved to have been written by him, as is necessary in the case of proof of a writing intended to be used as a standard of comparison of handwriting, when the question of forgery of a disputed writing is involved; although it is the intention of the party offering them afterwards to compare them for the purpose of establishing the identity. *Bell v. Brewster* (1887) 44 Ohio St. 690, 10 N. E. 679.

Contestants of a will upon the ground of forgery are not required specifically to allege in their complaint, and point out in the evidence, the exact person by whose hand the forgery was perpetrated. *McDonald v. McDonald* (1895) 142 Ind. 55, 41 N. E. 336.

So signatures may be shown to be forged by the opinion of an expert who is familiar with the handwriting of the person supposed to have forged them, although he knows nothing of the handwriting or signatures of the persons whose signatures those in question purport to be. *Stone v. Moore* (1899; Tex. Civ. App.) 48 S. W. 1097.

Thus it was declared in *Brown v. Hall* (1888) 85 Va. 146, 7 S. E. 182, that, upon the trial of an issue as to the genuineness of a holographic will, it was error to exclude the offer of the contestant to prove, by the evidence of a witness acquainted with the handwriting of the propounder, but not acquainted with the handwriting of the alleged testator, that the will was in the handwriting of the propounder. The court said: "It should go without the saying that this ruling was palpably erroneous. It, in effect, asserts the anomalous proposition that, while it is competent to prove that a paper propounded as the holograph will of a certain person is not in the handwriting, and was not written by that person, yet it is not competent to prove that it was written, not by the person by whom it purports to have been written, but by another and different person, the propounder himself; or, in other words, that it is not competent to establish the invalidity of a paper, propounded as the last will and testament of a person, by proving that it was a fraud and forgery, and that it was forged by the propounder thereof."

65 L. R. A.

IV. Examination of the witness.

(The reader is referred to the note to *Hoag v. Wright*, 63 L. R. A. 183, for a discussion of the subject of the examination of witnesses—whether expert or nonexpert—in connection with a comparison by the witness; this discussion being limited to the examination of witnesses by other means.)

It is error to refuse permission to a witness who has testified to the genuineness of disputed handwriting, to state to the jury the ground or reason of his belief. *Kendall v. Collier* (1895) 97 Ky. 446, 30 S. W. 1002.

When a witness to the genuineness of a disputed signature expressly founds his opinion upon signatures to instruments which he saw executed by the same person, he may be asked, upon cross-examination, as to whether the signature in question differs in any particular from those upon the other instruments which he saw executed, that being a fact proper for the consideration of the jury in determining what weight they should give to the opinion of the witness. *Bevan v. Atlanta Nat. Bank* (1892) 142 Ill. 802, 31 N. E. 679.

An expert called to prove by internal evidence that a signature is not the genuine handwriting of defendant, and not a free and natural one, but a simulated, stiff, and imitative hand, may be examined as to the grounds and reasons of his opinion, and may point out to the jury those facts and appearances upon the note which tended to support his opinion. *Keith v. Lothrop* (1852) 10 Cush. 453.

When one party has called an expert witness who testifies to an alteration in an instrument from one date to another, giving the particulars of the alteration, he is not in a position to object, upon the ground that he had not been shown to be competent to speak on the subject, to the same witness testifying upon cross-examination as to whether all the alterations were apparently in the same handwriting. *Howell v. Manwaring* (1886) 3 N. Y. S. R. 454.

A witness to the handwriting of a manuscript, who stated that he thought from the contents and from other circumstances that the handwriting was written by a certain individual, might properly be asked what the circumstances were from which he drew his inference. *Reg. v. Murphy* (1837) 8 Car. & P. 297.

So when a witness called to testify to hand-

disclosed no abuse of that discretion. We cannot say, after a careful review of the affidavits, that the learned circuit court in the case at bar committed error in denying the motion of the accused to change the place of trial, or abused its discretion.

The next alleged error discussed by counsel is that the court erred in overruling the challenge to the panel of talesmen on the ground of bias of the officer who summoned the same. The provisions of § 7347, Comp. Laws, are that, "when the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror. Such challenge must be made in the same form, and determined in the same manner, as if made to a juror." Section 7358

provides: "Particular causes of challenge are of two kinds: (1) For such a bias as when the existence of the facts is ascertained, in judgment of law, disqualifies the juror, and which is known in this Code as implied bias; (2) for the existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, and which is known in this Code as actual bias." Section 7359 defines causes for which a challenge for implied bias may be taken. It is contended on the part of the accused that it was shown by an examination of the officer that the challenge was properly taken under the 2d subdivision of § 7358. It will be noticed by this

writing had testified that he had seen the person in question subscribe his name to various papers passing between them, is was proper to ask him what kind of instruments those papers were; while it would not be competent to go into detail as to the contents of the papers, the question was competent upon the point of the witness's knowledge of the handwriting, to show that the instruments were of an important character which might call the more particular attention of the witness to them. *Bardin v. Stevenson* (1878) 75 N. Y. 164.

There was no error in the ruling of the court in permitting the prosecution, after closing its case, to cross-examine witnesses introduced by the defendants for the purpose of proving more fully the signatures to certain papers which had been before, as contended, insufficiently proved; since the introduction of testimony, even out of the usual order of time (which was not declared to be the case here), must to some extent be discretionary with the judge. *Com. v. Eastman* (1848) 1 Cush. 189, 48 Am. Dec. 596.

When the defendant in an action for a libel offered to prove by an expert that the address upon the envelope containing the libel was not in his handwriting, it was held that the rejection of this evidence was not improper, since the best evidence upon that subject was the testimony of the defendant himself that he neither wrote it himself, nor caused it to be written. *Cheritree v. Roggen* (1873) 67 Barb. 124.

But it was held in *Foulkes v. Com.* (1843) 2 Rob. (Va.) 886, that on a trial for forgery of an instrument it was not obligatory upon the prosecutor to examine the person whose name was subscribed to the paper alleged to be forged, as a witness to prove that the paper and the signature were not in his handwriting; but it was competent to prove the same facts by other witnesses, the only difference being as to the persuasive effect before the jury, which was a matter in the discretion of the prosecutor.

When one party has proved by a witness that he has been for several years acquainted with his handwriting, and that in his opinion a signature purporting to be that party's is not genuine, and that he writes a heavier hand, the party may then, upon cross-examination, prove by the same witness that there has been a change in the other's handwriting since the ex-

ecution of the instrument in question, and that he knows he writes a heavier hand than formerly. *Armstrong v. Thruston* (1857) 11 Md. 148.

On a trial for forgery it was reversible error to allow a witness whose signature was alleged to be forged to answer the question whether the signature in question was a forgery, in place of the question whether it was or was not made by him; since the question called for an answer which was not merely one of fact, but involved the question of intent. *Wiggins v. State* (1878) 1 Lea, 738.

V. Deciphering of obscurities.

Whether the question of the meaning of words obscurely written is a question for the court or the jury does not seem to be settled.

In *Remon v. Hayward* (1835) 2 Ad. & El. 666, a headnote, there being no mention of the point in the text, is to the effect that when a question arose at nisi prius, from the obscurity of the handwriting as to what the words of a written instrument produced in evidence really were, the lord chief justice decided them, and refused to have the question put to the jury.

But in the Pennsylvania supreme court it has been held that the assumption by the court of the exclusive right to decipher contested letters, alleged by the two parties to be "Jan" or "June," was fatal error. It is the court's right to interpret the meaning of written words, but this does not extend to the letters, since to interpret and to decipher are different things, and though the judge "is supposed to have peculiar skill in the meaning and construction of language, neither his business nor learning is supposed to give him a superior knowledge of figures or letters." *Armstrong v. Burrows* (1837) 6 Watts, 266. And this was followed in *Kux v. Central Michigan Sav. Bank* (1892) 93 Mich. 511, 53 N. W. 828.

When a certified copy of an instrument is in evidence, witnesses who have examined the original should be permitted to prove that certain words or characters in the original are so written as to be uncertain and different from the certified copy; and photographic copies of the original are admissible for the same purpose. *Mutual L. Ins. Co. v. Baker* (1895) 10 Tex. Civ. App. 515, 31 S. W. 1072.

But where the commissioner of the General

subdivision that the challenge may be allowed or disallowed by the trial court "in the exercise of a sound discretion." While it appeared from the examination of the officer who summoned the jurors that he had heard the evidence on the former trial, and had formed an opinion as to the guilt or innocence of the accused, he had never expressed any opinion, and stated that, if called as a juror in the case, he could try the case impartially, and render a verdict in accordance with the evidence that might be given on the trial. It affirmatively appears from the evidence that the officer had no actual bias or prejudice against the accused, and that no names of persons to act as jurors were given to him, and that he had had no conversation with any juror that he summoned with regard to the merits of the case. As will have been noticed, the officer was not absolutely disqualified. Whether or not, therefore, he was disqualified, was a matter within the sound judicial discretion of the trial court. While the existence of an opinion founded upon hearing the evidence at a former trial did undoubtedly lead the trial court to exercise great care in determining the competency of the officer, it was not, as a

matter of law, an absolute disqualification. The personal appearance and demeanor of the officer, and the intelligence and want of prejudice exhibited by him upon the examination, are important factors in reaching a just conclusion as to the probability of the officer having improperly used his position as a summoning officer. These aids to a correct judgment are not available to this court on appeal. The court might very properly, therefore, after his examination of the officer, and in the light of all his statements, have held him competent, as he would have held a juror under like circumstances, and overruled the challenge; and this court would not, excepting in a very clear case of abuse of this discretion, reverse the ruling of the trial court. *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616. As bearing upon this question, see *State v. Chapman*, 1 S. D. 414, 10 L. R. A. 432, 47 N. W. 411; *Haugen v. Chicago, M. & St. P. R. Co.* 3 S. D. 394, 53 N. W. 769; *State v. La Croix*, 8 S. D. 374, 66 N. W. 944.

The third error discussed by counsel for accused is that the court erred in not withdrawing from the jury the evidence of one Bristow in regard to the signature of the ac-

Land Office was in doubt as to a name in an instrument, in certifying a copy thereof, it was not proper for him to make the character as nearly like the original as possible, and leave the ultimate solution of the question to the jury. *McCamant v. Robert* (Tex. Civ. App.) 25 S. W. 732, Following *Mutual L. Ins. Co. v. Baker* (1895) 10 Tex. Civ. App. 515, 31 S. W. 1072.

And that experts were admissible to assist the court, or the jury, in deciphering obscure writings was determined early.

So in *Masters v. Masters* (1718) 1 P. Wms. 421, "where the will was writ blindly and hardly legible, and as to the money legacies writ in figures, it was ordered to be referred to the master [of the rolls] to examine and see what those legacies were, and he to be assisted by such as were skilled in the art of writing." To the same effect are *Goblet v. Beechey* (1829) 3 Sim. 24, 9 L. J. Ch. 200; *Remon v. Hayward* (1835) 2 Ad. & El. 666; *Stone v. Hubbard* (1851) 7 Cush. 596.

So the question whether words erased and only partly visible have been canceled is one, not of law, but of fact; and since in a jury case such question is to be decided by the jury, and not by the court, the evidence of expert witnesses ought to be admitted upon the point. *Beach v. O'Riley* (1878) 14 W. Va. 55.

And Cal. Code Civ. Proc. (1903) § 1863, provides: "When the characters in which an instrument is written are difficult to be deciphered . . . the evidence of persons skilled in deciphering the characters . . . is admissible to declare the characters."

VI. Summary.

It is proper to submit to the jury the writing which is in dispute if no question of comparison by the jury is involved; and so they may be allowed the use of a magnifying glass 65 L. R. A.

to aid them in the examination of the paper; other matters, such as the allowance of examination of witnesses out of the usual order, are discretionary in the court; and a verdict against what amounts to uncontradicted prima facie evidence of the genuineness of a writing will be set aside (*supra*, II.). Opinion evidence in regard to handwriting, intended to prove other matters than its source or the time when it was executed, may be admitted; and, when forgery is involved, it is competent to prove the forgery by persons acquainted only with the handwriting of another than the person whose handwriting the writing purports to be, or, on the other hand, it is not necessary to indicate the exact person by whose hand the forgery was done (*supra*, III.).

Witnesses generally should be allowed, and compelled upon cross-examination, to state the grounds and reasons for the opinions advanced by them; and, it seems, when a witness has expressed an opinion as to the genuineness of handwriting from the writing and from other circumstances, he may be asked what those circumstances are. Apparently, also, it is not necessary, in order to prove a signature to be forged, first to call the person whose signature the disputed writing purports to be (*supra*, IV.). When the characters of handwriting are so illegibly written, or have become so obscure by reason of attempted erasure or alteration, that the meaning is not apparent, it is not settled whether the deciphering is for the court or is a question of fact for the jury; but the American cases declare that the question is for the jury, as is also, according to the only decided case upon the point, the question, as one of fact and not of law, whether words erased and only partly visible have been canceled; and upon these questions the evidence of experts is competent (*supra*, V.).

L. B. B.

cused on exhibits 21 and 25, after withdrawing from the jury exhibits 23 and 24. Exhibits 21 and 25 were two instruments claimed to have been signed by the accused, and constituted material evidence on the part of the state. Exhibits 23 and 24 were two instruments not material to the prosecution, but which were shown by the witness to have been indorsed by the accused in his presence. Counsel for the accused contends that Bristow based his testimony as to the signatures upon exhibits 21 and 25 upon the signatures to exhibits 23 and 24, but we do not take that view of the evidence. The witness Bristow had shown clearly by his evidence that he was acquainted with the signature of the accused, and that the signatures purporting to be his upon exhibits 21 and 25 were, in his opinion, his signatures. His evidence, therefore, was admissible, independently of the two exhibits 23 and 24, and established the fact, if the jury believed his testimony, that the signatures to exhibits 21 and 25 were the signatures of the accused. It may be stated as a general rule that, if one has seen a party write, he is competent to give an opinion as to whether or not the signature purporting to be his is in fact his signature. 2 Jones, Ev. § 559; 1 Greenl. Ev. § 577; *State v. Far- rington*, 90 Iowa, 673, 57 N. W. 606; *Com. v. Nefus*, 135 Mass. 533; *State v. Zimmerman*, 47 Kan. 242, 27 Pac. 990; *Long v. Little*, 119 Ill. 600, 8 N. E. 194; *Moon v. Crowder*, 72 Ala. 79; *Chestnut County Nat. Bank v. Arm- strong*, 86 Md. 113, 59 Am. Rep. 156, 6 Atl. 584; 15 Am. & Eng. Enc. Law, p. 255. The state had laid the foundation for the evidence of the witness, showing that he had seen the accused sign his name in two or more instances. The court therefore committed no error in refusing to strike out Mr. Bristow's evidence.

The last error assigned, discussed by counsel for the accused, is that the court erred in admitting certain books in evidence kept in the postoffice at Tarkio, Missouri, entitled, "Registered Advices Received and Money Orders Drawn." The alleged error is that the court erred in admitting these books in evidence, for the reason that it was not shown that they were required to be kept by law, and there was no proof of any regulation of the postoffice department requiring such books to be kept. It is contended on the part of the state that being books kept by the postmaster, and being found in the postoffice, they were admissible upon proof of these facts. The books were introduced in evidence for the purpose of showing that a certain money order issued by the postoffice at Hartford, in this state, was cashed at the Tarkio postoffice. The entries in that book were not made by the witness, but the testimony shows that it was one of the records in that office,

and had been in the office while the witness had been a clerk there, and that they were in the custody of the postmaster, and were a part of the records of the office found there at the time the witness entered upon his duties as clerk; that it was one of the records of the office which had been used and kept by a former postmaster, and was delivered to the witness by the present postmaster to bring to the trial; and that a similar record was kept by the present postmaster. We are of the opinion that the objections of the counsel for the accused are not tenable. It is quite clear from the testimony of the witness that the books offered in evidence were records of transactions made in the office of the postmaster at Tarkio, necessary and proper in the orderly conduct of the business of that office. In other words, they seem to have been official registers or records kept by a person in a public office, in which they were required either by statute or by the nature of his office. Mr. Jones, in his work on Evidence [§ 520], says: "When persons in public office are required by statute, or by the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation, such records are generally admissible in evidence." And among the various records mentioned as admissible are "the record of registered letters received at the postoffice." Certainly, if such record was necessary and proper to be kept, a register of advices received and money orders drawn would be absolutely necessary in the orderly conduct of business in a registry order postoffice. The necessity for such a record is apparent for the orderly conduct of the duties of the office. Such a record, though kept by a former postmaster, is a record of the office, which must be regarded as prima facie evidence of the facts therein contained. Mr. Taylor, in his work on Evidence, states as admissible "official registers or records kept by persons in public office, in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties, or under their personal observation." Taylor, Ev. § 1429. Mr. Greenleaf, in his work on Evidence, cites with approval the following decision in a note to § 496: "Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of the office, it is his duty to keep that record, whether required by law so to do or not; and such record is a public record, belonging to the public, and not to the officer. *Coleman v. Com.* 25 Gratt. 865, 18 Am. Rep. 711." The views of these authors are fully sustained by the Supreme Court of the United States in *Evanston v. Gunn*, 99 U. S.

660, 25 L. ed. 306. In that case the question arose upon the admission in evidence of the record kept by an officer of the United States signal service at Chicago. The court, in its opinion, says: "It may be admitted there is no statute expressly authorizing the admission of such a record as proof of the facts stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is, What is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it." It then quotes with approval the rule as above quoted from Taylor on Evidence, and says: "To entitle them [records] to admission, it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty." And that learned court held that the record of the signal officer was properly admitted. Section 5310, Comp. Laws, which reads as follows: "An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry,"—seems to have been intended to embody the rule laid down in these authorities.

Finding no error in the record, the judgment of the Circuit Court, and order denying a new trial, are affirmed.

James A. WILSON, Appt.,

v.

City of MITCHELL, Resp't.

(.....S. D.....)

1. **Payment by a municipal corporation of the bill of the city plumber for connecting, by direction of the superintendent of waterworks, the city water mains with a well which was in fact on private property, but which was not known to be so, by either the superintendent or any of the city officers, does not constitute a ratification of the act, so as to render the city liable to pay for water taken from the well.**

2. **A municipal corporation cannot ratify the act of the superintendent of its waterworks system in entering**

upon private property and connecting a well there located with the city water mains without consent of its owner, so as to become liable for the water taken from the well; since, having no authority to make such entry itself, it could not ratify the act when performed by its agent.

3. **A recovery by a lot owner against a municipal corporation, for the entry upon his property by a city officer without his consent, and the connection of the city water mains with a well there located, is not facilitated by waiving the tort and suing for the value of the water taken and the use of the property.**

(December 29, 1903.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Davison County in favor of defendant in an action brought to recover the alleged value of the use and occupation by defendant of real estate belonging to plaintiff. *Affirmed.*

The facts are stated in the opinion.

Mr. E. P. Wanser, for appellant:

The old doctrine that assumpsit will not lie against a corporation is now exploded.

Bank of Columbia v. Patterson, 7 Cranch, 299, 3 L. ed. 351; *Danforth v. Schoharie & D. Turnp. Co.* 12 Johns. 227; *Dunn v. St. Andrew's Church*, 14 Johns. 118; *Randall v. Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193.

Even though there was no express act or resolution authorizing the connecting of the mains in the first instance, yet the action of the council on the bill was a clear ratification.

Peterson v. New York, 17 N. Y. 449; *Hooker v. Eagle Bank*, 30 N. Y. 86; *Albany City Nat. Bank v. Albany*, 92 N. Y. 368; *McBrien v. Grand Rapids*, 56 Mich. 106, 22 N. W. 206; *Mott v. Hicks*, 13 Am. Dec. 561, note, 1 Cow. 513; *Messenger v. Buffalo*, 21 N. Y. 196; *Dill. Mun. Corp.* 4th ed. § 459; *Frankfort Bridge Co. v. Frankfort*, 18 B. Mon. 41.

If a municipality obtains the money or property of another by mistake, or without authority of law, it is her duty to make restitution or compensation,—not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial.

NOTE.—For a case similar in principle to this one, holding that a municipality is not liable for the *ultra vires* act of the officer in taking property to abate a nuisance, see *Orlando v. Pragg*, 19 L. R. A. 196.

As to liability of municipality for torts or negligence of officers generally, see, in this series, notes to *Hines v. Charlotte*, 1 L. R. A. 844; *Neff v. Wellesley*, 2 L. R. A. 500; *Chope v. Eureka*, 4 L. R. A. 325; and *Jernee v. Monmouth County*, 11 L. R. A. 416; also the cases of *Robinson v. Rohr*, 2 L. R. A. 366; *Bulger v. Eden*, 9 L. R. A. 65 L. R. A.

205, and note; *Curran v. Boston*, 8 L. R. A. 243; *Brown v. Guyandotte*, 11 L. R. A. 121; *O'Rourke v. Sioux Falls*, 19 L. R. A. 789; *Gibson v. Huntington*, 22 L. R. A. 561; *Topeka v. Boutwell*, 27 L. R. A. 593; *Love v. Raleigh*, 28 L. R. A. 192; *McManus v. Weston*, 31 L. R. A. 174; *Bartlett v. Clarksburg*, 43 L. R. A. 295; *Wallace v. Norman*, 48 L. R. A. 620; *Platt Bros. & Co. v. Waterbury*, 48 L. R. A. 691; *McIlhenny v. Wilmington*, 50 L. R. A. 470; *Gray v. Griffin*, 51 L. R. A. 131; *Rhobidas v. Concord*, 51 L. R. A. 381; and *Hall v. Concord*, 58 L. R. A. 455.

15 Am. & Eng. Enc. Law, p. 1081; *Frankfort Bridge Co. v. Frankfort*, 18 B. Mon. 41; *Maier v. Chicago*, 38 Ill. 266.

Messrs. F. H. Winsor and Preston & Hannett, for respondent:

In the construction and maintenance of the waterworks, the city was performing a public and governmental function, and, therefore, was not liable for the acts of its officers in reference to the making and maintenance of said system of waterworks.

Huron Waterworks Co. v. Huron, 7 S. D. 9, 30 L. R. A. 848, 62 N. W. 975.

The acts done having been beyond the authority and power of the city to do, it cannot be held answerable in damages for that which was done under the illegal and void votes.

Cavanagh v. Boston, 139 Mass. 426, 52 Am. Rep. 716, 1 N. E. 834; *Seele v. Deering*, 79 Me. 343, 1 Am. St. Rep. 314, 10 Atl. 45.

If the officers or employees of a municipality, whether pursuant to a vote of its common council or not, engage in an act which the latter had no power to authorize, they are not, while so engaged, the representatives of the municipality, and it is not, therefore, liable for their negligence or misconduct.

Smith v. Rochester, 76 N. Y. 506; *Morrison v. Laurence*, 98 Mass. 219.

The officials of a city do not act for it, except when the corporation has the power to act in the matter in question.

Rowland v. Gallatin, 75 Mo. 134, 42 Am. Rep. 395.

A city is not liable for the acts of its organized fire department in inflicting injuries upon the property of others.

Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 664; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Alexander v. Vicksburg*, 68 Miss. 564, 10 So. 62; *Dunbar v. The Alcalde & Ayuntamiento*, 1 Cal. 355; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *McDonald v. Red Wing*, 13 Minn. 38, Gil. 25.

Neither is a city liable for damages inflicted upon others by its police department in the performance of its duties.

Peters v. Lindsborg, 40 Kan. 654, 20 Pac. 490; *O'Rourke v. Sioux Falls*, 4 S. D. 47, 19 L. R. A. 789, 46 Am. St. Rep. 760, 54 N. W. 1044.

When an act, because it is *ultra vires*, cannot be authorized in advance of the doing of it, it is impossible to ratify it; and, therefore, the liability of a city cannot be sustained for injuries growing out of such act, by showing that it was ratified subsequently to its commission.

65 L. R. A.

Horn v. Baltimore, 30 Md. 218; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

The so-called waterworks committee, and the finance committee, were but the individual members of the council, and no act of theirs in reference to a public duty could be binding upon the city. They could make no contract on behalf of the city which could be enforced against it.

Foster v. Cape May, 60 N. J. L. 78, 36 Atl. 1089; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Re Plattsburgh*, 27 App. Div. 353, 50 N. Y. Supp. 356.

Corson, J., delivered the opinion of the court:

The plaintiff brought this action to recover of the defendant the sum of \$694, the alleged value of the use and occupation of a certain city lot, with an artesian well thereon, belonging to the plaintiff, for a period of about seven years. A verdict was directed in favor of the defendant, and the plaintiff has appealed.

At the close of all the evidence the defendant moved the court to direct a verdict for the defendant upon the ground that the undisputed evidence showed that the city did not sink a well upon the lot in question, and did not ratify the act of the superintendent of the waterworks in connecting the city mains with the well, and that there was no evidence in the case tending to prove that the city, at the time that it allowed the bill of the city plumber for connecting the city waterworks with the well, knew that the well in question was upon the lot of the plaintiff, and not upon the city property. The motion was granted, and the motion for a new trial denied.

It appears from the evidence that in 1893 the plaintiff was the owner of the city lot, and artesian well thereon, and that in the latter part of that year the superintendent of the waterworks of said city caused a connection to be made between the city mains and the said artesian well without any contract between the city and the plaintiff, and without the plaintiff's consent. There was no evidence, however, tending to prove that the municipality had any knowledge or notice that the well belonging to the plaintiff had been connected with the city waterworks, other than the fact that the same had been connected by the city plumber by order of the superintendent of the waterworks, and the fact of the allowance by the city of the plumber's bill for doing the work and furnishing the material therefor; but it was not shown that either the superintendent of the waterworks, the city plumber, or the city council knew that the well was upon plain-

tiff's property. The liability of the city is sought to be maintained upon the ground that the plaintiff's well was connected with the city waterworks under the direction of the superintendent of the same, and that the city used the water for the period above stated. It is also claimed by the appellant that the city is liable, the same as an individual, upon an implied contract, and, therefore, it being shown that the city has used the lot and well thereon during the time stated, the plaintiff is entitled to recover for the use and occupation of the same. It is undoubtedly true that, under the modern decisions, a municipal corporation may be liable upon an implied contract, if an express contract would be within the powers of the municipality, delegated to it, and the city has ratified the act of its officers; but the claim that the city ratified the act of the superintendent of the waterworks by allowing the plumber's bill for making the connection is not tenable. There is nothing in the bill itself indicating that the work was for connecting the waterworks with the well upon the plaintiff's lot. The item in the bill claimed to have constituted the ratification of the act of the superintendent of the waterworks read as follows: "To eleven days, work for city plumber in connecting new well with mains, \$44;" and for thirty-seven days' work assisting same, \$34. Only one of the members of the city council was called as a witness, and he testified that, as a member of the finance and waterworks committee, he approved the bill, but at the time he approved it he supposed the work was done upon a city lot. It is well settled that an act of an agent is not ratified unless the principal is fully advised of all the facts connected with the act it is claimed he ratifies. *Shull v. New Birdsall Co.* 15 S. D. 8, 86 N. W. 654. It not being affirmatively shown that either the superintendent of the waterworks or any member of the city council had any knowledge that the city waterworks had been connected with the well belonging to the plaintiff, there was no ratification that can bind the city.

But there is a more satisfactory ground for denying the city's liability. The municipality had no authority to connect its waterworks system with the well of the plaintiff without his consent, and the city officer, therefore, had no authority to invade plaintiff's property, and the city could not legally ratify the act of its agent in making such connection. As the city had no power to enter upon private property and appropriate the same to public use, except in the manner provided by law for condemnation of such property, the defendant did not have the power to enter upon the lot of the plain-

tiff and use the same for public purposes without his consent. The acts of the officers of a municipality cannot bind it unless they are acting within the scope of the powers expressly granted by its charter or necessarily incident thereto, or indispensable to the proper exercise of the powers granted. *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L. R. A. 621, 60 N. W. 156.

It is contended on the part of . . . [the defendant] that it was competent for [the plaintiff] to waive the tort, and sue upon the implied contract for the use and occupation of the premises, and recover the value of such use and occupation. This right might be exercised in the case of an individual, but such a rule has no application to the case of a municipal corporation, as the powers of such corporations are limited, and it cannot exercise such as are not expressly granted, or necessarily incident to the power granted. In *Rowland v. Gallatin*, 75 Mo. 134, 42 Am. Rep. 395, the supreme court of Missouri, discussing a similar question, says: "Conceding the plaintiff's claim in this regard, and the finding of the court thereon to be correct, still there is no authority in the charter of the city of Gallatin or elsewhere for the officers of the city, in pursuance of an ordinance or otherwise, to enter upon private property, and remove earth or other material therefrom, or in any other manner interfere therewith, for the purpose of improving the streets of said city; and the city cannot, therefore, be held liable for the acts charged. *Thomson v. Boonville*, 61 Mo. 283; *Hunt v. Boonville*, 65 Mo. 620, 27 Am. Rep. 299." In that case the premises of the plaintiff were entered upon by the street commissioner of the city under the verbal direction of the mayor. But as we have seen, the court held that the municipality was not liable. It is true that was an action of trespass, but undoubtedly the same rule would have been held had the plaintiff waived the tort and sued for the value of the material taken from the lot. The basis of the action would have been the trespass committed by the street commissioner. So, in the case at bar, the trespass of the superintendent of the waterworks in connecting the waterworks system with the well of the plaintiff is the basis of this action, for which trespass, as we have seen, the city would not be liable. Waiving the tort, therefore, by plaintiff, and seeking to recover upon an implied contract, does not change the rights of the parties. As bearing upon this question, see *Cavanagh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716, 1 N. E. 834; *Seels v. Deering*, 79 Me. 343, 1 Am. St. Rep. 314, 10 Atl. 45; *Smith v. Rochester*, 76 N. Y. 506;

Morrison v. Lawrence, 98 Mass. 219; *Rowland v. Gallatin*, 75 Mo. 134, 42 Am. Rep. 395.

We are clearly of the opinion, therefore, that the plaintiff, under the evidence in this

case, was not entitled to recover, and that the court below rightly directed a verdict in favor of the defendant.

The judgment of the Circuit Court and the order denying a new trial are affirmed.

NORTH CAROLINA SUPREME COURT.

John L. HINTON, Admr., etc., of Mary F. Brothers,
v.
MUTUAL RESERVE FUND LIFE ASSOCIATION, Appt.

(.....N. C.....)

1. A foreign insurance company which has been doing business in the state cannot, so far as existing obligations are concerned, escape from the provisions of a statute permitting process to be served upon it by delivery to the insurance commissioner, by withdrawing from the state, discharging its agents, and cancelling its consent to have process served through such commissioner.
2. The holder of a purchase-money mortgage has no insurable interest in the life of the wife of the mortgagor, who did not join in the execution of the mortgage debt.
3. The insurer may resist payment to the assignee, on the ground of fraud, of the amount due on a policy secured by the holder of a purchase-money mortgage on the life of the mortgagor's wife, who was not bound by the mortgage, to secure his debt, where, knowing that, if the insurer knew the facts, it would not issue a policy in his favor, he procured it to be issued to her, paying the premiums himself, and then took an assignment of it without notice to, and contrary to the rules of, the insurer.
4. A mortgagee who has secured a policy on the life of the mortgagor's wife as security for the debt, by having it issued to her and assigned to him under circumstances amounting to fraud upon the insurer, will not be permitted to collect the proceeds of the policy as administrator of her estate, on the theory that she might secure the policy on her own life, and that the assignment, being void, had not affected the integrity of the policy or the right of her administrator to enforce the contract,—at least where he is to be permitted by the husband to retain the proceeds for his own benefit.
5. Parol testimony as to an agreement for disposing of the proceeds of a life-insurance policy is not inadmissible as tending to contradict the terms of the policy.

(May 3, 1904.)

APPEAL by defendant from a judgment of the Superior Court for Pasquotank County in plaintiff's favor in an action brought to enforce payment of the amount alleged to be due under a life-insurance policy. *Reversed.*

The summons in the case was served upon the insurance commissioner, and defendant entered a special appearance for the purpose of a motion to set aside the service of summons. In support of such motion, an affidavit was filed, showing that defendant was a foreign corporation, and that its directors had passed a resolution withdrawing from the state and ceasing to transact business there; dispensing with the services of all agents in its employ, and especially providing that the appointments of the insurance commissioners as attorneys upon whom process might be served be, and the same "hereby are, canceled, revoked, and annulled."

The further facts appear in the opinion.

Messrs. Hinsdale & Hinsdale and J. H. Sawyer, for appellant:

If John L. Hinton had procured Mary F. Brothers to make application for the policy payable to him, and had himself paid all the premiums and assessments thereon, he could not enforce the policy for want of an insurable interest in her life.

Trinity College v. Travelers' Ins. Co. 113 N. C. 244, 22 L. R. A. 291, 18 S. E. 175.

The law will not suffer Hinton to do indirectly what he is not permitted to do directly.

Hinton had no insurable interest in the life of Mary F. Brothers.

Trinity College v. Travelers' Ins. Co. 113 N. C. 244, 22 L. R. A. 291, 18 S. E. 175.

Whether a person who has taken out a policy of insurance on his own life, payable to himself, and paid premiums, can assign the policy to another who has no insurable interest in the life, is doubtful. There is a hopeless conflict of authority.

Morrell v. Trenton Mut. L. & F. Ins. Co. 10 Cush. 282, 57 Am. Dec. 103.

NOTE.—For other cases in this series as to assignment of policy of life insurance to one having no insurable interest, see *Rittler v. Smith*, 2 L. R. A. 844; *Milner v. Bowman*, 5 L. R. A. 95; *Roller v. Beam*, 6 L. R. A. 136, with note as to who has insurable interest; *Johnson v. Alexander*, 9 L. R. A. 680, and 65 L. R. A.

note; *Hewlett v. Home for Incurables*, 17 L. R. A. 447; *Mutual Reserve Fund Life Assn. v. Hurst*, 20 L. R. A. 761; *Clement v. New York L. Ins. Co.* 42 L. R. A. 247; *Steinback v. Diepenbrock*, 44 L. R. A. 417; and *Chamberlain v. Butler*, 54 L. R. A. 338.

In the following cases it is held that an assignment of a policy which has already been issued upon proper consideration, to one having no insurable interest, if made bona fide, and not prohibited by the policy, is valid:

Palmer v. Merrill, 6 Cush. 282, 52 Am. Dec. 782, and note; *St. John v. American Mut. L. Ins. Co.* 2 Duer, 419, 13 N. Y. 31, 64 Am. Dec. 529; *Valton v. National Fund Life Assur. Co.* 20 N. Y. 32; *Olmstead v. Keyes*, 85 N. Y. 593; *Hogle v. Guardian L. Ins. Co.* 6 Robt. 567; *Hearing's Succession*, 26 La. Ann. 326; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496, 17 Am. L. Reg. N. S. 83, and note; *Fairchild v. North-Eastern Mut. Life Asso.* 51 Vt. 613, 624; *Ashley v. Ashley*, 3 Sim. 149; *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Steinback v. Diepenbrook*, 1 App. Div. 417, 37 N. Y. Supp. 279.

In the following cases the contrary is held:

Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924, 4 Morrison, Transcript, 93, 11 Fed. 527, note; *Langdon v. Union Mut. L. Ins. Co.* 14 Fed. 273; *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 116, 13 Am. Rep. 313; *Dungan v. Mutual Ben. L. Ins. Co.* 40 Md. 469; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380; *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722; *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Basye v. Adams*, 81 Ky. 368; *Stevens v. Warren*, 101 Mass. 564; *Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570; *Swick v. Home Ins. Co.* 2 Dill. 160, Fed. Cas. No. 13,692; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Missouri Valley L. Ins. Co. v. McCrum*, 36 Kan. 146, 12 Pac. 517; *Kessler v. Kuhns*, 1 Ind. App. 511, 27 N. E. 980; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Price v. Supreme Lodge, K. of H.* 68 Tex. 361, 4 S. W. 633; *Schonfield v. Turner*, 75 Tex. 324, 7 L. R. A. 189, 12 S. W. 626; *Michigan Mut. Ben. Asso. v. Rolfe*, 76 Mich. 146, 42 N. W. 1094; *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655; *Cooke, Life Ins.* § 73.

Even if the first view be adopted by this court, and if the assignment should be regarded as valid, because executed in pursuance of a valid agreement to assign, the plaintiff must fail because the policy never had a legal inception in Mary Brothers's hands. It was procured for the benefit of Hinton, and paid for with his money, he having no insurable interest.

A person who has no insurable interest in the life of another cannot procure the life of the person to be insured for his benefit, he paying the premiums.

Burbage v. Windley, 108 N. C. 357, 12 L. 65 L. R. A.

R. A. 409, 12 S. E. 839; *Trinity College v. Travelers' Ins. Co.* 113 N. C. 244, 22 L. R. A. 291, 18 S. E. 175; *Keystone Mut. Ben. Asso. v. Norris*, 115 Pa. 446, 2 Am. St. Rep. 572, 8 Atl. 638.

It is against public policy to wager on human life, or to tempt one who will be benefited by the death of another to hasten that death.

It is a fraud upon the insurance company to increase the moral hazard of the risk without notice to it.

Trinity College v. Travelers' Ins. Co. 113 N. C. 244, 22 L. R. A. 291, 18 S. E. 175; *Burbage v. Windley*, 108 N. C. 361, 12 L. R. A. 409, 12 S. E. 839; *Warnock v. Davis*, 104 U. S. 779, 26 L. ed. 926; *Missouri Valley L. Ins. Co. v. McCrum*, 36 Kan. 149, 12 Pac. 517.

The law will not permit itself to be evaded by indirection. It will look beneath the surface and ascertain the truth.

Shilling v. Accidental Death Ins. Co. 2 Hurlst. & N. 42, 26 L. J. Exch. N. S. 266, 5 Week. Rep. 567; *Brookway v. Mutual Ben. L. Ins. Co.* 9 Fed. 249.

Messrs. Pruden & Pruden and Shepherd & Shepherd, for appellees:

Mrs. Brothers had an insurable interest in her own life, and the policy was payable to her estate, and in all respects regular on its face. The action is brought by her administrator, and the proceeds are to be administered in the regular course of administration. It is proposed to defeat this policy entirely by going behind its written terms and showing that, while it purports to have been made for the benefit of the insured, it was intended to be for the benefit of one Hinton, who had no insurable interest in her life. It cannot be defeated in this manner by parol evidence.

Kerr, Ins. p. 132.

Even if Hinton paid the premiums, and it was understood that he was to pay them when the policy was issued, it would not affect the validity of the policy.

May, Ins. 349a; *Mutual L. Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286.

The attempted assignment of the policy to Hinton was void. It left it payable to the estate of the insured, and it is her administrator who brings this suit for the benefit of all the creditors.

Mutual L. Ins. Co. v. Blodgett, 8 Tex. Civ. App. 48, 27 S. W. 286; *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 633, 15 S. W. 478; *Curtiss v. Aetna L. Ins. Co.* 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 389; *Fairchild v. North Eastern Mut. Life Asso.* 51 Vt. 625; *Provident L. Ins. & Invest. Co. v. Baum*, 29 Ind. 236.

By reason of her inchoate right of dower in the land purchased by her husband, and upon which he had given a mortgage for the purchase money, she was so related as to support an insurable interest in the creditor.

Gore v. Townsend, 105 N. C. 228, 8 L. R. A. 443, 11 S. E. 160; *Trade Ins. Co. v. Barraccliff*, 45 N. J. L. 543, 46 Am. Rep. 792; *Harris v. York Mut. Ins. Co.* 50 Pa. 341; *Joyce, Ins.* §§ 895, 1047; *Agricultural Ins. Co. v. Clancy*, 9 Ill. App. 137; *Cone v. Niagara F. Ins. Co.* 60 N. Y. 619; *McDonald v. Black*, 20 Ohio, 185, 55 Am. Dec. 448; *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 2 L. R. A. 64, 9 S. W. 720; *Home Ins. Co. v. Field*, 42 Ill. App. 392.

Connor, J., delivered the opinion of the court:

The plaintiff alleges that on November 8, 1897, the defendant corporation issued its policy to Mary F. Brothers for the sum of \$2,000, payable to her executors or administrators, and that she paid the premiums on it as they fell due; that on the ——— day of July, 1900, the said Mary died intestate, and the plaintiff was duly appointed her administrator; that proper proofs of death were duly forwarded to and accepted by the defendant, and demand made for the payment of the amount of said policy, and refused. The defendant, answering, admitted issuing the policy, denied that Mary F. Brothers paid the premiums, admitted the death, and denied that proper proofs of death were forwarded to and accepted by the defendant. The defendant also alleged that certain statements made by the insured in regard to her health were false; that such statements were by the terms of the policy made a part of the consideration upon which it was issued, etc. For a further defense the defendant alleged that, on and before the date of the policy, Mary F. Brothers was the wife of Joseph S. Brothers; that said Joseph purchased from C. L. Hinton, a son of the plaintiff, a tract of land, which he represented to contain 150 acres, for which the said Joseph promised to pay \$2,000; that said C. L. Hinton executed a deed to the said Joseph, and at the same time, and as a part of the transaction, the said Joseph executed his note to C. L. Hinton for \$2,000, and a mortgage on said land to secure its payment; that the plaintiff was the real owner of the land, and that C. L. Hinton acted for his benefit in the sale thereof; that on November 2, 1897, he transferred said note to the plaintiff; that the tract of land contained only 107 acres, and was not worth more than \$500, as was well known to both parties to said contract; that before November 2, 1897, it was

agreed between said Joseph and the plaintiff that said Joseph should insure his life for the sum of \$2,000 to secure the said indebtedness; that in consequence of said agreement the said Joseph made application for such insurance, but the application was rejected by the company to which it was addressed; that thereafter, and before the 2d day of November, the plaintiff requested the said Mary F. Brothers to insure her life to secure the said indebtedness; that, pursuant to such request, she made application to the defendant for a certificate of membership; that, upon the faith of the representations made in the application, a certificate was issued, payable to the estate of Mary F. Brothers; that the plaintiff, having no insurable interest in the life of said Mary, and well knowing that the defendant would not issue a certificate to said Mary, payable to him as beneficiary, wrongfully and unlawfully entered into an agreement with the said Mary and the said Joseph, before or at the date of the application for said certificate, by which it was agreed that the said policy should, on its face, be made payable to the estate of the said Mary, but that the plaintiff should pay any and all dues and assessments upon said policy, and upon her death the amount of said policy should be paid to the plaintiff in full of the indebtedness of said Joseph, and he would cancel the said mortgage, etc.; that at the time of or before making such application the said Mary promised and agreed to assign said policy to the plaintiff; that, pursuant to said agreement, the plaintiff paid the admission fee, and all dues and assessments levied upon said policy; that in pursuance of said agreement the said Mary on the ——— day of December, 1897, executed an assignment of said certificate or policy to the plaintiff, a copy of said assignment being attached to the answer; that the husband of the said Mary did not sign or consent in writing to the execution of said agreement, and no notice of the assignment was given to the defendant until after the death of the said Mary F. Brothers; that upon the death of said Mary the plaintiff notified the defendant that he was the holder of said policy by assignment, made proof of claim as such, and requested payment of the amount thereof; the defendant refused to pay the amount to the plaintiff, or to recognize him as assignee, whereupon the plaintiff demanded payment to him as administrator; that, while this action is prosecuted by the plaintiff as administrator, the purpose is to secure the payment thereof for his sole benefit, personally, in pursuance of the said agreement; that the plaintiff had no insurable interest in the life of Mary F.

Brothers; and that the agreement between the plaintiff, Joseph S., and Mary F., was a fraud upon the defendant, and the policy was a wager, and, in consequence thereof, void.

It is provided in the policy that no assignment or change of beneficiary shall be valid without the consent of the company; that the assignee must have an insurable interest. The plaintiff filed no reply to the new matter set up in the answer. The defendant made a motion, before answering, to set aside the service of summons on the insurance commissioner. This was refused, and the defendant excepted. This question has been settled adversely to the defendant, and the exception cannot be sustained. *Moore v. Mutual Reserve Fund Life Assn.* 129 N. C. 31, 39 S. E. 637.

When the cause was called for trial, the defendant tendered a series of issues directed to the several matters set up in the answer by way of defense to the action. The plaintiff objected, and the court declined to submit either of the defendant's issues, to which exception was noted. The court thereupon submitted the following issues: "(1) Is defendant company indebted to the plaintiff as alleged in the complaint? (2) If so, in what sum? (3) Did Mary F. Brothers obtain the policy of insurance by fraudulent representation?" The defendant excepted. It was admitted that the said Mary was dead, and the plaintiff was her administrator. The plaintiff introduced the policy and so much of the answer as admitted the receipt of proofs of loss, and rested. The defendant introduced Joseph S. Brothers, and proposed to prove by him each and every allegation in the answer, as a further defense, as above set forth. The questions propounded to the witness are set forth in full in the case on appeal, and cover each and every one of said allegations. To this testimony the plaintiff objected. The objections were all sustained, and the defendant excepted. There were other exceptions to the exclusion of testimony in regard to the physical condition of the insured, and it may be that they will not arise upon another trial.

Without entering into a discussion of the several exceptions bearing upon this phase of the case, we think there was evidence proper to be submitted to the jury, under proper instructions, upon the third or some appropriate issue directed to the questions raised by the defense in regard to the condition of the health of the insured at the time the policy was issued, and the representations made by her in the application.

The defendant also offered to prove that Mary F. Brothers was a woman of no property with which to pay life insurance pre-
65 L. R. A.

miums or assessments, and no capacity or ability to earn any money for that purpose. This testimony, upon objection, was excluded, and the defendant excepted. The defendant offered to read the assignment in evidence. Upon the plaintiff's objection, it was excluded, and the defendant excepted. There was evidence tending to show that Mary F. Brothers worked in the field, did washing, picked cotton, and performed other like labor. She died a few months after giving birth to twins. She was illiterate and unable to sign her name.

The plaintiff's contention is that the entire testimony, if admitted, failed to show any defense to the action. If he is correct in this, of course, such testimony was immaterial, and its rejection harmless. The proposed testimony was clearly relevant to the issue, and the witness competent to testify to such facts as were within his knowledge.

It would seem very clear that if the testimony offered by the defendant is true, as we must, for the purpose of disposing of this appeal, take it to be, a fraud was practised upon the insurance company. It is expressly alleged, and in support of the allegation was proposed to be shown, "that John L. Hinton had no insurable interest in the life of Mary F. Brothers, and, well knowing that the defendant would not issue a certificate of membership on the life of said Mary F. Brothers, payable to him, as beneficiary, entered into an agreement with the said Mary F. Brothers and the said Joseph S. Brothers, her husband, before or at the date of the application for the certificate of membership or policy of insurance, by which it was agreed that the said policy should on its face be made payable to the estate of the said Mary F. Brothers, but that said John L. Hinton should pay any and all dues and assessments upon said policy, and upon her death the amount of said policy should be paid to the said John L. Hinton, who, upon receipt of the amount thereof from the defendant, should receive the same in full payment of the indebtedness of said Joseph S. Brothers to him, and that he should thereupon cancel and discharge the said mortgage upon the said tract of land. . . ." In the light of the further testimony proposed to be introduced that the real value of the land sold was but \$500, and that the plaintiff paid the premiums and assessments, and within a month after the policy was issued the said Mary assigned it to the plaintiff, and that none of these facts were known to the defendant, although there was a plain provision in the policy that no assignment should be valid until notice given to the company, the defendant was entitled to have an issue sub-

mitted to the jury, inquiring as to the truth of the allegations; and, in our opinion, the proposed testimony was material and competent to be heard and considered by them upon such issue.

The defendant further says that the policy was what is known in the books as a wager upon the life of Mary F. Brothers, and therefore void as against public policy. Whatever conflict there may be—and it must be conceded that there is very much—as to what constitutes an insurable interest in the life of a person, this court has adopted a well-defined principle which meets our approval.

Burwell, J., in *Trinity College v. Travelers' Inn. Co.* 113 N. C. 244, 22 L. R. A. 291, 18 S. E. 175, after naming several cases, says: "These instances and others that might be mentioned seem to show that, except in cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contracts between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; it must appear that by the death there may come damage which can be estimated under some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a wagering contract; and, under its rules, made and enforced in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object the parties may really have in view." Merrimon, J., in *Burbage v. Windley*, 108 N. C. 357, 12 L. R. A. 409, 12 S. E. 839, says: "As the assured had no insurable interest in the life of the *cestui que vie*, the contract was simply a wager." In that case the premiums were paid by the beneficiary. In *Albert v. Mutual L. Ins. Co.* 122 N. C. 92, 65 Am. St. Rep. 603, 30 S. E. 327, the policy was taken out by the insured, and premiums paid by her. This court sustained the policy. We have no disposition to question that case. The writer, if the question was an open one in this state, would feel constrained to follow the authorities holding the contrary view. The decision is sustained by the authorities cited. The testimony proposed in this case was that the agreement was made before or at the time of the application, and that the plaintiff was to pay the entrance fee and all further assessments; he not then having, or expecting to have, any insurable interest in the 65 L. R. A.

life of the insured. This is a very different case from one where the insured has taken out a valid policy, paying the premium thereon, and, either as a gift to some friend, or as collateral security to a debt, assigns the policy with the knowledge of the company. The plaintiff was to be paid his debt from the proceeds of the policy, he paying all of the premiums and awaiting her death to reap the profits of his bargain. In *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516, Selden, J., says: "A policy obtained by a party who has no interest in the subject of insurance is a mere wager policy. Wagers in general (that is, innocent wagers) are at common law valid, but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes, then, does a wagering policy of insurance belong? . . . Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptation to the party interested to bring about, if possible, the event insured against." The learned justice traces the history of the law and its development in England, resulting in the passage of the act of Parliament declaring all such policies void, saying: "My conclusion, therefore, is that the statute of 14 George III., avoiding wager policies upon lives, was simply declaratory of the common law, and that all such policies would have been void independently of that act." *Burbage v. Windley*, 108 N. C. 357, 12 L. R. A. 409, 12 S. E. 839.

While there are conflicting decisions in this country, a careful examination of them brings us to the conclusion that the foregoing is the sound view of the subject. "Of all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic, and the most persistent condemnation." *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Price v. Supreme Lodge, K. of H.* 68 Tex. 366, 4 S. W. 633; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251. Mr. Justice Field, in *Warnock v. Davis*, 104 U. S. 775, 779, 26 L. ed. 924, 926, says: "Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy." May, Ins. 4th ed. 44, 45.

The plaintiff, however, says that, conceding this to be the law, the insured had an insurable interest in her own life; the policy was valid when issued; the assignment, being invalid, did not affect the integrity of the policy; that the right to maintain this action by the administrator of the insured is not affected by the void assignment. It is held in many cases, and we have no dis-

position to question the principle, that every person has an insurable interest in his own life, and may insure his life for the benefit of his executors, administrators, or assigns; that such policy, being valid, may be assigned to one having an insurable interest. We do not question the validity of assignments of life insurance policies to a creditor, or the right of the creditor to receive the amount of his debt, together with such sums as he has paid on account of assessments or premiums, or an assignment to one having any other insurable interest. That a creditor has an insurable interest in the life of his debtor is well settled. When the assignment of a policy is made in good faith to secure a subsisting debt, or a present loan, or a debt then contracted, the courts have sustained such assignment, certainly to the extent of such indebtedness and premiums paid out to keep the policy alive. *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; and *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *May, Ins. 80 et seq.* The defense made and the testimony proposed to be introduced go very far beyond the principle upon which these cases rest. The allegation here is that, at and before the application was made, there was an agreement between the plaintiff, the husband, and the insured that the policy, although, in truth and in fact, it was to be for the benefit of the plaintiff, who knew that he had no insurable interest in the life of the wife, and knew that the company would not issue the policy payable to him, should be made payable to the estate of the wife, and immediately assigned to the plaintiff, who was to pay the admission fee and all of the premiums.

In *Keystone Mut. Ben. Asso. v. Norris*, 115 Pa. 446, 2 Am. St. Rep. 572, 8 Atl. 638, application was made by the assured for, and a policy issued on, her life, payable to her son-in-law, Norris. Pursuant to an agreement made before the application, Norris assigned the policy to one Spangler, having no insurable interest in the life of the insured, who paid all of the assessments. Notice of the assignment was given to the company. Spangler was the medical examiner of the company, and it was for that reason the policy was not made payable to him. Suit was brought upon the death of the assured by Norris to the use of Spangler. The court said: "If, now, we admit that Norris had such an interest in the assured as would have warranted him in taking a policy on her life, yet that fact cannot help out the plaintiff's case, since the policy was not founded on that interest, neither was it for the benefit

of Norris, but for the benefit of one who had no interest whatever in the insured's life." The principle upon which the testimony offered by the defendant is made material is thus stated by the supreme court of Texas in *Equitable L. Ins. Co. v. Haslewood*, 75 Tex. 338, 7 L. R. A. 217, 16 Am. St. Rep. 893, 12 S. W. 621, quoting from Bishop on Life Insurance: "The question is whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager. If the plaintiff and the insured confederate together to procure a policy for the plaintiff's benefit, when he is not, and does not expect to be, a creditor of the insured, and with a view of having the policy assigned to him without consideration, the policy is void." There are respectable authorities which hold that the assignment of the policy, without regard to any pre-existing agreement, to one having no insurable interest, is a fraud upon the company, against public policy, and therefore avoids the policy. This view is strongly stated by Horton, Ch. J., in *Missouri Valley L. Ins. Co. v. McCrum*, 36 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517. To the suggestion that the attempted assignment was void, he says: "The law does not tolerate attempted frauds any more than it does those that are consummated. . . . If the beneficiaries can now recover, they are doubly benefited by the questionable transaction in which they were engaged."

The supreme court of Pennsylvania, in *Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570, expresses itself in very vigorous terms regarding wagering life insurance contracts in every form: "The very foundation of that doctrine is that no one shall have a beneficial interest of any kind in a life policy, who is not presumed to be interested in the preservation of the life insured. . . . The beneficiary is directly interested in the death of the assured. Moreover, if such a transaction were permitted, the wager could always be concealed under the mere form of the policy. Nor can we see that, did the defendant's case depend on an assignment directly from Moose to himself, how it would be bettered in the least." The opinion concludes with these words: "So fraught with dishonesty and disaster, and so dangerous even to human life, has this life insurance gambling become, that its toleration in a court of justice ought not for one moment to be thought of." Mr. May, in the last edition of his work on Insurance, comes to the same conclusion: "And although innocent wagers were once sustained, the courts will not now waste their time in discussing the question whether what is substantially a wager

ought or ought not to be held good upon any grounds. Under the influence of a healthy public sentiment, they have become impatient of investigating disputes founded upon any species of gambling, and almost without exception refuse to enforce a contract supported by such a subject-matter." May on Insurance, 74. It is said, however, that the suit is by the plaintiff as administrator, and the recovery will be for the benefit of the estate of Mary F. Brothers. The record shows that the defendant offered to show that, while the action is prosecuted in the name of the plaintiff as administrator, the purpose thereof is to secure the payment of the policy for the sole benefit of the said John L. Hinton personally, in pursuance of the agreement set forth in the answer. This was excluded. If this were proved, it would be a singular result if by this means the plaintiff can reap the profits of a contract denounced by the law as contrary to public policy. If the agreement alleged to have been made by the parties to the transaction is shown by competent evidence, and found by the verdict of a jury, it would be a reproach to the law if the two living parties can use its process to gather the fruits of their illegal agreement after the death of the one who was the ignorant and passive instrument of the scheme to make profit by her death. The testimony was competent. It is said, however, that to permit the testimony to be introduced violates the rule excluding parol evidence to contradict a written instrument. The proposed testimony in no manner contradicted the terms of the policy. It was offered to prove an agreement collateral to the policy. As his honor excluded the entire testimony offered by the defendant, as immaterial, and as the case was argued before us upon that view, we cannot indicate otherwise than by the general principles announced what portions of it are competent.

The extent of our decision is that the defendant is entitled, if it can, to show that the application was made and the policy obtained under the circumstances and for the purposes alleged, and that the defendant had no notice of the agreement or of the assignment of the policy.

For the refusal to submit the issues tendered by the defendant, or such others in lieu thereof as the court may think proper, and to receive testimony material and tending to prove the affirmative of the issues, *there must be a new trial.*

Walker, J., concurring:

I concur in the result of this appeal, upon the ground first stated by the court in its opinion, namely, that the defendant is entitled to a new trial because of the erroneous ruling of the presiding judge upon the question as to the condition of the health of the insured at the time she applied for the policy and the same was issued to her, and as to the representations made in the application. This error extends to all the issues, as a false, fraudulent, and material representation in regard to the state of the insured's health, if found by the jury, will vitiate the policy.

Aldermen, etc., of WINSTON *et al.*, *Appts.*,
v.

Ernest E. BEESON *et al.*

(.....N. C.....)

1. A concern which sells trading stamps to merchants, to be given to customers as an inducement to secure their trade, and which redeems the stamps with articles kept in stock for that purpose, does not conduct a gift enterprise within the meaning of a statute authorizing municipal corporations to impose taxes on such enterprises in the same manner as upon lotteries.
2. The fact that one who sells trading stamps to be given to merchants and redeemed by him may profit by the failure to present same stamps for redemption does not introduce such an element of chance into the transaction as to make it a lottery or gift enterprise.

(May 3, 1904.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Forsyth County in defendants' favor in a prosecution for selling trading stamps without having obtained the license required by a municipal ordinance. *Affirmed.*

Statement by **Walker, J.:**

The defendant the Sperry & Hutchinson Company was tried in the superior court upon appeal from the mayor of Winston, who fined it \$20 for issuing and selling to merchants what are known as "trading stamps," without obtaining a license so to do, contrary to the provisions of an ordinance of that city forbidding the sale of such stamps to merchants or manufacturers, or the use of the same by the latter, without having paid the license tax of \$50 imposed by the ordinance for the privilege; and the defendant Beeson was tried for issuing and sell-

NOTE.—As to constitutionality of statute imposing license tax on merchants using trading stamps, see, in this series, Fleetwood v. Read, 47 L. R. A. 205.

As to constitutionality of statute prohibiting use of trading stamps, see State v. Dalton, 48 L. R. A. 775.

ing trading stamps as manager and agent of his codefendant, in violation of the said ordinance passed under the authority given in the charter of the city of Winston (§ 65, subsec. 11), which is as follows: "Each distiller of fruits or grains, each distiller or compounder of spirituous liquors, each gift enterprise or lottery, each railroad company having a depot or office in town, a license tax of not exceeding \$50 a year." It is not claimed by the state that any other special authority has been given by the legislature, in the charter of Winston, to impose a license tax of \$50 upon the defendants, except that contained in the above extract from the charter. Subsection 13 of § 66 of the charter provides "that the board of aldermen shall have the power to impose a license tax on any business carried on in the city of Winston not before enumerated herein, not to exceed \$10 a year." Priv. Acts 1891, p. 1362, chap. 307, as amended by Priv. Acts 1899, p. 206, chap. 103. No special reference is made in the verdict to the charter of the city as contained in the two chapters of the acts of 1891 and 1899, above referred to, but it was admitted that the present charter is the one to be found in those two chapters; and counsel referred to the charter in the argument, and especially to the provisions of it which relate to taxation. We will therefore consider it as a part of the case. It may be that, as a section of the charter was put in evidence, we should consider the other sections without any agreement; but, however that may be, we hold that, under the circumstances, the charter as a whole is now before us.

The jury returned a special verdict as follows: "That the Sperry & Hutchinson Company is a corporation organized under the laws of the state of New Jersey, and the defendant Ernest E. Beeson is the local agent and manager thereof, located in the city of Winston, North Carolina. That the said defendant Beeson, for and on behalf of his company, located a business in the city of Winston in the following manner: That he first applied to the proper officers, and paid the license fees prescribed by the revenue act for trading stamp companies, and duly received his license for doing business in the said county and state, and then applied to the city of Winston, asking for a license, and offering to pay \$10, as prescribed by the ordinances of the city for advertising businesses, whereupon the city, through its officers, declined to grant said license for less than \$50. Thereupon the defendants began business in the city of Winston. That said Beeson approached a good many merchants in various businesses in the city of Winston, and entered into contracts with them to use what was known as a 'trading

stamp.' That he did on the 30th day of October, 1903, enter into a contract with W. B. Hudson, which contract is hereto attached and made a part of this record, and marked 'exhibit No. 1.' That, in carrying out said contract with said Hudson and with others, the defendants advertised in the newspapers the business of the said parties with whom it had contracted for one week, had books called 'directories' printed, and circulated throughout the town in the various homes and business establishments in the city of Winston, which books contain the names of the various merchants with whom the defendant company had contracted, and containing an explanation of the business, and having blank leaves diagramed for the purpose of pasting thereon stamps, which said book is made a part of this record, marked 'exhibit No. 2.' That the defendant company, in pursuance of this contract marked 'exhibit No. 1,' promises and agrees to advertise the business of the parties with whom it contracts in various forms and ways, and to induce persons to go to the store of the said parties with whom it contracts, and there buy goods and make demand upon the merchants for trading stamps. That the defendants sold to the said W. B. Hudson, and proposes to sell to all others, certain trading stamps, and delivered to the said Hudson one pad of trading stamps, containing 990 trading stamps, which are small stamps, about the size of a postage stamp, containing certain numbers, and the name of the Sperry & Hutchinson Company, which stamps are exact in form as those which will be found pasted on the first blank leaf of exhibit No. 2. That these stamps are sold to the merchants for about one-half cent each, and it contracts that, on demand of customers, the merchants will give, for every ten cents worth of goods which he sells for cash to said customers, one of said stamps. That the customer gathers said stamps in this way, and when he obtains, either through his own purchases, or through the purchases of others, stamps to the number of 990, which are pasted in a book in form as hereto attached, marked 'exhibit No. 2,' he then goes to the storehouse of the Sperry & Hutchinson Company, which is established in the city of Winston, and managed by defendant Beeson, and there selects an article of merchandise. That said articles of merchandise consist of furniture, tableware, and other articles of virtue, which are marked as worth one book, worth two books, etc., meaning that 990 stamps aggregated, and put in a book constitute one book, and entitles the holder thereof to get any article of his own selection in said store, which is valued and labeled for one book, and so on.

That the Sperry & Hutchinson Company purchase their goods and merchandise in large quantities, and the managers of the various stores make requisition to the general house for goods as they are needed in the various establishments. That the said merchandise of the Sperry & Hutchinson Company are such articles as are usually found in stores of general merchandise, and those labeled 'One book' are approximately worth \$4.50, those labeled 'Two books,' \$9.00 etc., and will compare favorably in price with the retail prices of such articles in any other establishment in the city of Winston. That the defendant, in circulating the directory, which is marked 'exhibit No. 2,' in order to induce persons to trade with the merchants using the trading stamps, pastes on the first blank page of said directory ten stamps, which is given by defendant company, without consideration, to the persons having the directory. That these and all other stamps issued by merchants are redeemable by the Sperry & Hutchinson Company at its store in Winston, or at any of its various stores throughout this state or the United States, as above stated. That the defendant company has done business in the city of Raleigh for six months, and at this time fourteen sixteenths of the stamps issued by the merchants have been presented to and redeemed by the defendant company. That no percentage is found of the number of lapsed stamps, or stamps which are not finally redeemed. That in North Carolina there are at this time storehouses of defendant company located and doing business, among others, in the cities of Raleigh, Greensboro, Durham, and High Point. That there is no time limit to the redemption of said stamps. That they are transferable by those who have them, and are bound under the contract, to be redeemed, whenever presented in the number above set forth, to any of the various houses of the Sperry & Hutchinson Company. That the contracts of defendant company made in the city of Winston with others, as above set forth, are for a period of one year, except that the contract which defendant made with E. W. O'Hanlon was as follows: That it differs from the contract marked 'exhibit No. 1,' in that the words, 'parties of the first and second parts mutually agree that this agreement shall be and remain in force for one year from the date of the opening of the store aforesaid of the party of the first part,' were stricken out of the contract, and it was agreed that the contract should continue at the option of either of the parties to said contract, and that the said defendants would not enter into a similar contract with any other

drug store in Winston during the continuance of the contract with the said E. W. O'Hanlon. That the defendant Beeson delivered stamps to W. B. Hudson, a grocery merchant in the city of Winston, and the said Hudson delivered said stamps to one of his customers, according to the terms of the contract as above set forth. Defendant only redeems stamps when presented in a full book, consisting of 990 stamps. The portion of the charter of Winston and the ordinance under which defendant was arrested appear in this record as a part of this verdict. And the jurors say that they find the foregoing facts, and, if upon said facts, the defendant is guilty in law, they find him guilty, and, if upon the foregoing facts, the defendant is not guilty, in law, they find him not guilty."

Messrs. Watson, Buxton, & Watson and **Robert D. Gilmer**, Attorney General, for appellants.

Mr. W. Benton Crisp, with **Messrs. Glenn, Manly, & Hendren**, for respondents:

The business in which the defendant company is engaged is a fair and legitimate advertising business.

People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916; *Young v. Com.* 9 Va. Law Reg. 618, 45 S. E. 327; *State v. Shugart*, 138 Ala. 86, 35 So. 28.

The ordinance in question is *ultra vires* and void.

A "gift enterprise" is "a scheme for the division or distribution of certain articles of property, to be determined by chance amongst those who have taken shares in the scheme."

1 Bouvier, Law Dict. Rawle's Rev. 884; Black, Law Dict. 539; Anderson, Law Dict. 588; *Lohman v. State*, 81 Ind. 17; *State v. Shugart*, 138 Ala. 86, 35 So. 28; *State v. Bryant*, 74 N. C. 207; *State v. Lumsden*, 89 N. C. 572.

The right to have the stamps redeemed depends upon no contingency whatsoever.

The business conducted by these defendants did not constitute a lottery, or a transaction in the nature of a lottery.

State v. Dalton, 22 R. I. 77, 48 L. R. A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; *People ex rel. Madden v. Dycker*, 72 App. Div. 308, 76 N. Y. Supp. 111; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916; *State v. Black*, Circuit Court Baltimore County, Md. May Term, 1902; *State v. Frankel*, Criminal Court Baltimore City, September Term, 1902; *State v. Flaherty*, District Court Lancaster County, Neb. Lincoln Evening News, July 27, 1903; *Young v. Com.* 9 Va. Law Reg. 618, 45 S. E. 327; *State v. Shugart*,

138 Ala. 86, 35 So. 28; *Com. v. Emerson*, 165 Mass. 146, 42 N. E. 559; *Com. v. Sisson*, 178 Mass. 578, 60 N. E. 385; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 L. R. A. 599, 16 Am. St. Rep. 38, 7 So. 338.

The ordinance in question is discriminating, prohibitory, and unreasonable, and is, therefore, unconstitutional and void.

Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; *Nashville v. Althrop*, 5 Coldw. 554; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *State v. Broadbelt*, 89 Md. 579, 45 L. R. A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Walker, J., delivered the opinion of the court:

It is provided by § 3800 of the Code that cities and towns may levy taxes for municipal purposes on all persons, privileges, and subjects within the corporate limits which are liable to taxation for state and county purposes. By the revenue act of 1903, pp. 337, 348, chap. 247, §§ 51, 76, a license tax of \$20 is imposed "on any gift enterprise or any person or establishment offering any article for sale and proposing to present a purchaser with a gift or prize as an inducement to purchase," and a license tax of \$50 in each county where the business is conducted is imposed "upon every person, firm, or corporation, who issues or sells to merchants or manufacturers any trading stamps or other devices to be redeemed by the person issuing or selling the same." The city of Winston could, therefore, have required the defendant corporation to pay a license tax of \$50, under § 3800 of the Code and § 76 of the revenue act, if it were not for the clause in its charter by which the tax on all subjects not otherwise specifically provided for is limited to \$10. It is not provided in § 3800 that cities and towns may lay taxes to the same amount as the state and counties can impose, but upon the same privileges and subjects as are taxed for state and county purposes. The amount of the tax is left to be determined by the charter of the particular city or town, and, if there is no restriction in the charter, then by ordinance; but, whenever such a limitation upon the city or town to tax is inserted in its charter, the power to tax by ordinance or otherwise must be exercised within the limit thus fixed by the law. Municipal corporations can levy no taxes except such as are authorized by their charters, or, where the charters are silent, such 65 L. R. A.

as are otherwise authorized by law. *Winston v. Taylor*, 99 N. C. 210, 6 S. E. 114; *State v. Bean*, 91 N. C. 554; *Latta v. Williams*, 87 N. C. 126. All these cases relate to license or privilege taxes. As to taxes on property, see *Redmond v. Tarboro*, 106 N. C. 122, 7 L. R. A. 539, 10 S. E. 845. By these considerations and authorities we are brought to the conclusion that the city of Winston had no authority to lay a privilege or license tax upon the defendant company exceeding in amount \$10, which is the maximum allowed by its charter, unless it has acquired the power to exact the payment of a higher tax by virtue of the provisions of § 65, subsec. 11, which authorizes it to impose on "each gift enterprise a license tax not exceeding \$50 for each year."

If the business as conducted by the defendant corporation in the city of Winston is a "gift enterprise," the tax was lawfully imposed; but, if it is not such an enterprise, the defendants were justified in refusing to pay the tax, and the judgment below was right. In this contention between the parties, after a careful examination of the authorities and a consideration of the question involved, we are with the defendants, as we think it must be conceded that, unless the city had the power under the provision of the charter last mentioned, it was without power to pass the ordinance under which this prosecution was instituted before the mayor, and we must hold that it had no such power under that provision.

In passing upon the question whether the business of the defendant company falls within the meaning of the term "gift enterprise," we must not confine ourselves solely to any definition of those words which is intended to convey to our minds the meaning they have acquired by mere popular use, nor should we give to those words simply a literal interpretation. We must go deeper than that, and ascertain what were the real purpose and intention of the legislature in using them, or in other words, what are their legal meaning and import. We would fall short of a full and proper investigation of the question if we should be content with saying that the company's business is in a general sense an "enterprise" at which "gifts" are used as an inducement to attract purchasers to the stores of its customers or patrons, and therefore it must be "a gift enterprise." This would be "sticking in the bark." The words had a well-known and definite meaning in the law when the statutes we have mentioned were passed, and, by a well-settled rule of statutory construction, they must have that meaning in any interpretation we may give to those statutes. The law lexicographers define a "gift enterprise" as a scheme for the divi-

sion and distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme. Black, Law Dict. p. 539; 1 Bouvier, Law Dict. p. 884; Anderson, Law Dict. p. 488. In *Lohman v. State*, 81 Ind. 17, it was said, in approving the definition just given, that the words "gift enterprise," as thus understood, had attained such notoriety that the courts would take judicial notice of what is meant when they appear in legislative enactments. It has been said in some of the books and by several of the courts that while the word "lottery" is not a technical term of the law, and to dispose of property of any kind by lottery is not an offense which has a recognized and established legal definition, and that the meaning of the word must be determined by reference to its popular sense and the mischief intended to be redressed by the statutes, yet, when thus construed, it indicates a scheme for the distribution of prizes and for the obtaining of money or goods by chance. The word "lottery" has been variously defined as a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or other articles, a distribution of prizes won by lot or chance, a kind of game of hazard, wherein several lots of goods or merchandise are deposited in prizes for the benefit of the fortunate, or a sort of gaming contract, by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks. *State v. Mumford*, 73 Mo. 650, 39 Am. Rep. 532; *State v. Clarke*, 33 N. H. 334, 66 Am. Dec. 723. Tested by any one of these approved definitions, a lottery always involves the element of chance, fortune, or hazard. It is gaming, pure and simple.

This being established, let us see if it assists us in arriving at the meaning of the words "gift enterprise" as used in the charter of Winston. The rule of construction is that associated words explain and limit each other. When a word used in a statute is ambiguous or vague, its meaning may be made clear and specific by considering the company in which it is found, and the meaning of the terms which are associated with it. This idea is expressed in the maxim, *Noscitur a sociis*. Black, Interpretation of Laws, 135; Sutherland, Stat. Constr. § 262. We find, not only in the charter under consideration, but in other statutes of the state relating to revenue, that the words "gift enterprise" are used in close and intimate association with the word "lottery." In the revenue act passed at the same session as the charter of Winston, it was provided (Acts 1891, p. 293, chap. 323, § 15) that a

tax should be laid on every gift enterprise, or on any person or establishment offering any article for sale, and proposing to present purchasers with any gift or prize as an inducement to purchase, and on any lottery, whether known as a "beneficial association," "gift concern," or otherwise, provided that the section should not be construed as giving license or as relieving such persons or establishments from any penalties incurred by a violation of the law. This provision has been retained, we believe, in every revenue act passed since that year. It would seem plain, from the connection in which the words are used, and also by the very use of the words themselves, that the legislature intended to tax only those enterprises, schemes, and offers of bargains which involve substantially the same sort of gambling upon chances as in any other kind of lottery, and which appealed to the disposition or propensity for engaging in hazards and chances with the hope that luck and good fortune may give a good return for a small outlay. The provision refers to gifts or prizes, the precise nature of which are not known at the time, and to cases in which the element of uncertainty is always present. It is restricted, therefore, to the kind of enterprises which appeal to the gambling instinct. The legislature has not looked upon the business of the defendant company as a gift enterprise, for in the revenue acts of 1901 (Acts 1901, p. 137, chap. 9) and 1902 it was not taxed as such, but was excluded from that class (§ 51), and placed in a class by itself (§ 76), and so taxed as to indicate that it was considered a perfectly legitimate and proper business. There is no saving in § 76 concerning criminal prosecution, as there is in § 51. A statute of similar import to the provision in this charter was held in *Com. v. Emerson*, 165 Mass. 146, 42 N. E. 559, to embrace such a scheme or offer of bargains into which chance entered as one of its elements, and by which persons are induced to buy what they do not want in the hope or expectation or upon the hazard of getting something else as a gratuity, which it might turn out they did want, but the exact character of which they do not at the time know. It would be strange indeed that the legislature should link two such terms together in many statutes, without intending that they should have a kindred meaning, but intending, on the contrary, that they should be diversely construed. We prefer to conclude that the purpose was not to impose a tax upon a perfectly innocent and harmless business, and to place it in the same class and category with lotteries, which have fallen under the ban of an enlightened public sentiment and under the condemnation of the law, but

to tax such "enterprises" as partake of the nature of lotteries, and hold out temptations and allurements to the unwary and credulous, or to those who are willing always to take chances on results, in the hope of getting a great deal for a very little.

Having reached the conclusion that the words "gift enterprise," as used in the charter, refer only to such a one as includes the element of chance, we must next inquire whether the business of the defendant company comes within the meaning of those words as thus construed. From the definitions we have already given of a lottery or scheme for the disposition or distribution of prizes or property by chance, it appears that three things must concur in order to constitute it: (1) There must be the purchase of a right; (2) the right must be a contingent one to receive something greater than that which is purchased; and (3) the contingent right must depend upon a lot or chance. We have not been able to discover any one of these elements in the plan devised by the defendant company for the conduct of its business. The right to have the stamps redeemed depends upon no contingency, chance, or lot whatsoever. The person receiving the stamps upon the purchase of goods is not in any degree deprived of his choice or will. Indeed, by the contract he is given full and free exercise of his choice and will. The right of selection among the articles kept by the stamp company in its store is expressly given, and the stamp collector may choose the best or the most valuable, or such a one as may be most useful to him or pleasing to his taste, as he may be minded. The articles are all publicly exhibited, and, before the purchases are made or the stamps collected, any person proposing to buy and to receive the stamps from the merchant has free access to the store, where he may see and examine the goods from which his selection may be made. There is therefore no uncertainty as to the nature, character, or value of the premium, if we may so call it, with which the stamps will be redeemed. The fact that the stamps are redeemed at a place other than the one where they are issued certainly does not introduce into the scheme any element of chance. We can discern no practical difference between this arrangement between the parties and one by which the merchant agrees to discount his bills where cash is paid by his customer at the time of the purchase; and the giving of stamps redeemable at a store of another in goods to be selected by the holder, instead of an actual discount by the merchant, does not, in law, vary the case, or change the real and substantial character of the transaction. The plan, as outlined in the verdict, seems to be 65 L. R. A.

one for advertising the merchant's business and his wares, and enabling him to sell his goods for cash instead of on time. This, it must be conceded, is an advantage to him. It is also a benefit to the customer, who practically receives a discount, and who will buy more cautiously and judiciously if he pays cash, and will spend only according to his means. The stamp company is undoubtedly benefited, also, by the sale of its goods, and anything it may gain by the failure to present stamps for redemption. But where is there anything in the transaction, from first to last, that bears any likeness or resemblance to a lottery or an enterprise of chance? What declared policy of the state or law forbids it? It was suggested that the gain to the stamp company by the failure to present stamps at the store for redemption in goods involved an element of chance. If this is so, the government and the banks are engaged in a prohibited business, for both benefit by the loss of bills and currency which they put in circulation. The same may be said of railroad companies who issue tickets which may not be used, and never come back to them for redemption. Can it be correctly said that this is the result of chance? Many other similar instances might be mentioned, but it has never been supposed that the business in which such gains are made was for that reason unlawful. Nor does the fact that the defendant's business is novel make it unlawful or subject it to taxation.

We turn now to the books and find that the decisions of the courts of other states are in perfect accord with the view we take of this matter. The court of appeals of Virginia has recently considered the same question in *Young v. Com.* 9 Va. Law Reg. 618, 45 S. E. 327, in which the court says: "We can find nothing in the contract between the Sperry & Hutchinson Company and the defendant, nor the transactions with customers in pursuance of such contract, that is not a legitimate exercise of one's right to prosecute his business in his own way. As already said, 'it appears to be simply one of many devices fallen upon in these days of sharp competition between tradespeople' to attract customers, or to induce those who have bought once to buy again, and in this respect is as innocent as any other of the many forms of advertising." Substantially the same is said in *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916. "It appears," says the court, "to be simply a device to attract customers, or to induce those who have bought once to buy again, and in this respect is as innocent as any form of advertising." In *State v. Shugart*, 138 Ala. 86, 35 So. 28, the business of the defendant is thus described: "The scheme,

if such it may be termed, was only a mode of advertising by those merchants who entered into it. The articles of property given away by the company, of which appellee was the manager, was not by lot or chance, nor by way of distribution of prizes among share or ticket holders in any chance scheme. We are quite clear that there was nothing in the transaction offensive to the statute against 'lotteries' and 'gift enterprises.' In *State v. Dalton*, 22 R. I. 77, 48 L. R. A. 775, 84 Am. St. Rep. 818, 46 Atl. 234, will be found an able and elaborate discussion of the question, and an unanswerable argument sustaining the defendant's contention that there is no element of chance in its enterprise, if it may be so called. In that case the court says: "In other words, the act recognizes the right of a person to give away an article of merchandise in connection with, and as an inducement to, the making of a sale of some other article, but provides, in effect, that the giving of such additional article must be done by him directly, and not through a third person. We fail to see that there is any substantial difference in principle between the two methods, or that either bears any resemblance to a lottery. The element of chance, which is the basal principle in every scheme in the nature of a lottery, is wholly wanting." See also *People ex rel. Madden v. Dycker*, 72 App. Div. 308, 76 N. Y. Supp. 111; *Com. v. Emerson*, 165 Mass. 146, 42 N. E. 559; *Com. v. Sisson*, 178 Mass. 578, 60 N. E. 385; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268, 22 Atl. 4. Several cases have been decided the same way in the lower courts of some of the other states. They involved the very question we have under consideration, but, as they have not been reviewed by the courts of last resort, we will not make further reference to them.

Since this opinion was prepared, we have read the case of *Lansburgh v. District of Columbia*, 11 App. D. C. 512, which has been called to our attention. We do not think anything said in that case, which was necessary to its decision, conflicts with what we have herein decided. The only point in that case was whether the business of the defendants came within the meaning of a "gift enterprise," as defined by the statute of the District. This will appear from the following passage in the opinion of the court: "Without the necessity of declaring that the acts proved in this case constitute the conduct of a lottery or gift enterprise, as those words are commonly understood, or even of finding that the element of chance operates intentionally and distinctively in the scheme of the trading stamp company, we think, nevertheless, that they come within the prohibition of the statute, which, as before said, furnishes its own definition of 'gift enterprise.'"

The defendant's counsel also contended that the ordinance is not a legitimate exercise of the police power, is discriminating, prohibitory, and unreasonable, and is unconstitutional and void. We need not consider this sweeping attack upon the validity of the ordinance, though it is supported by a very learned and able argument, for we have concluded that the business of the defendant, as described in the special verdict, does not come within the meaning of the term "gift enterprise," as used in the charter. The city of Winston, being limited in the power to pass ordinances by its charter and the general law, was without the necessary authority to pass the ordinance upon which this prosecution is based.

The court properly adjudged, upon the special verdict, that the defendants are not guilty.

Affirmed.

OKLAHOMA SUPREME COURT.

S. H. MILLER, Trustee in Bankruptcy of
J. R. Graham, *Plff. in Err.*,

v.

DELAWARE INSURANCE COMPANY OF
PHILADELPHIA.

(.....Okla.....)

*Where an insurance policy is issued,

*Headnote by PANCOAST, J.

and different classes of property are insured, each class being separated from the others, and insured for a specific amount, and there is a breach of the conditions of the contract as to one class of the property insured, the contract should be considered, not as one entire in itself, but as one which is severable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more of them without regard to the other; pro-

NOTE.—For other cases in this series as to severability of insurance in the same policy, see *Wright v. Fire Ins. Asso.* 19 L. R. A. 211, and *note*; *Carey v. German American Ins. Co.* 20 L. R. A. 267; *Trabue v. Dwelling House* 65 L. R. A.

Ins. Co. 23 L. R. A. 719; *Bills v. Hibernia Ins. Co.* 29 L. R. A. 706; *Agricultural Ins. Co. v. Hamilton*, 30 L. R. A. 633; and *Dumas v. Northwestern Nat. Ins. Co.* 40 L. R. A. 358.

vided the contract is not affected by any question of fraud, act condemned by public policy, or any increase of the risk of the company on the whole property insured because of the breach.

(March 4, 1904.)

ERROR to the District Court for Custer County to review a judgment in favor of defendant in an action brought to enforce payment of the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. Shartel, Keaton, & Wells and R. N. McConnell, for plaintiff in error:

An insurance contract is divisible where separate amounts are stated in the policy upon the building and its contents.

Western Assur. Co. v. Stoddard, 88 Ala. 606, 7 So. 379; *Manchester F. Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 514; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 117; *Havens v. Home Ins. Co.* 111 Ind. 90, 60 Am. Rep. 689, 12 N. E. 137; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 547; *Rogers v. Phenix Ins. Co.* 121 Ind. 570, 23 N. E. 498; *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586; *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079; *Kansas Farmers' F. Ins. Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983; *Speagle v. Dwelling House Ins. Co.* 97 Ky. 646, 31 S. W. 282; *Landman v. Hartford Ins. Co.* (La.) 19 Ins. L. J. 574; *Bullman v. North British & M. Ins. Co.* 159 Mass. 118, 34 N. E. 169; *Ætna Ins. Co. v. Resh*, 44 Mich. 55, 38 Am. Rep. 228, 6 N. W. 114; *Mitchell v. Mississippi Home Ins. Co.* 72 Miss. 53, 48 Am. St. Rep. 535, 18 So. 86; *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247; *Trabue v. Dwelling House Ins. Co.* 121 Mo. 75, 23 L. R. A. 719, 42 Am. St. Rep. 523, 25 S. W. 848; *Wright v. Fire Ins. Co.* 12 Mont. 474, 19 L. R. A. 211, 31 Pac. 87; *State Ins. Co. v. Schreck*, 27 Neb. 527, 6 L. R. A. 524, 20 Am. St. Rep. 696, 43 N. W. 340; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711; *Johansen v. Home F. Ins. Co.* 54 Neb. 548, 74 N. W. 866; *Home F. Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 839; *Merrill v. Agricultural Ins. Co.* 73 N. Y. 452, 29 Am. Rep. 184; *Schuster v. Dutchess County Ins. Co.* 102 N. Y. 260, 6 N. E. 406; *Coleman v. New Orleans Ins. Co.* 49 Ohio St. 310, 16 L. R. A. 174, 34 Am. St. Rep. 565, 31 N. E. 279; *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 35 S. W. 955; *Sun Mut. Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. 181; *McGowan v. People's Mut. F. Ins. Co.* 54 Vt. 211, 41 65 L. R. A.

Am. Rep. 843; Loomis v. Rockford Ins. Co. 77 Wis. 87, 8 L. R. A. 834, 20 Am. St. Rep. 96, 45 N. W. 813.

Mr. W. H. Oriley also for plaintiff in error.

Messrs. Howard & Ames for defendant in error.

Pancoast, J., delivered the opinion of the court:

This action was brought in the court below by the plaintiff in error as trustee of the bankrupt estate of one J. R. Graham. The defendant, the insurance company, wrote a policy of insurance on the property of Graham, insuring him in the sum of \$1,725 against loss by fire for one year, and apportioned the insurance as follows: \$225 on his one-story building, \$250 on his store furniture and fixtures, counters, shelves, etc., and \$1,250 on his stock of general merchandise located in the building. The entire property was destroyed by fire. It is agreed that at the time of the fire the building was of the value of \$1,200, furniture and fixtures \$400, and the stock of merchandise \$8,500. All conditions as to proof of loss and other matters are agreed upon, leaving in the case but one proposition to be decided, which arises out of one of the provisions of the policy, which is as follows:

"(1) The assured will take an itemized inventory of the stock hereby insured at least once in each calendar year, and, unless such inventory shall have been taken within twelve (12) calendar months prior to the date of this policy, the same shall be taken in detail within thirty days after said date or this policy shall be null and void from and after the expiration of said thirty days, and upon demand of the assured within three months from the date of this policy, the unearned premium for the unexpired time of this policy shall be returned.

"(2) The assured will keep a set of books which shall clearly and plainly present a complete record of the business transacted, including all purchases as well as shipments of said stock, both for cash and credit, from the date of the inventory, provided for in the first section of this clause, and during the continuance of this policy.

"(3) The assured will keep such books and inventories, and also the last preceding inventory, securely locked in a fireproof safe at night and at all times when the building mentioned in this policy, or the portion thereof containing the stock described therein, is not actually open for business; or, failing in this, the assured will keep such books and inventories at night and at all such times in some place, not exposed to fire, which would ignite or destroy the aforesaid building; and in case of loss, the assured

specifically warrants, agrees, and covenants to produce such books and inventories for the inspection of this company. In the event of failure on the part of the assured to keep and produce such books and inventories for the inspection of said company, this entire policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

It is not contended here that the stipulation contained in the record upon which the case was tried shows a compliance with the clause of the policy just set forth, and, by reason of the failure of the assured to comply with this clause of the policy it is claimed on behalf of the insurance company that the entire policy became null and void, and that no recovery whatever can be had thereon; while, on the other hand, it is conceded that nothing can be recovered on account of the loss of the stock of merchandise, but it is contended that the policy is severable, and, while no amount can be recovered because of the loss of merchandise, yet the plaintiff in error is entitled to recover for the loss of the building and the furniture, counters, shelves, etc. An examination of the authorities shows that courts are to some extent at variance upon this proposition, one line holding that the general rule, "Void in part, void *in toto*," should apply to these cases, while another line holds that forfeitures are not favored in the law, and will not be enforced if any reasonable interpretation can be made which will prevent them. The authorities applying this last rule hold that a policy insuring various classes of property, describing it separately, and specifying separate amounts on each class, is not avoided by a breach of the contract as to any property included therein except that covered by the forfeiture clause, which in this case is that which was required to be inventoried, and a record made of the business concerning which books of account were required to be kept. This question is presented for the first time in this court, and a rule must be laid down which will probably be followed hereafter in this territory. The question is, therefore, one of more than ordinary importance.

It seems that this forfeiture clause is not embodied in the main printed matter of the policy, but is contained in what is termed "the inventory and iron-safe clause," which is attached to all policies covering stocks of merchandise; and when policies are issued which do not cover stocks of merchandise this "inventory and iron-safe clause" is not attached. This "inventory and iron-safe" provision is intended to have reference only to such articles of merchandise as constitute stock in trade, and the purpose of the

clause is to provide evidence from which to determine what the actual loss sustained is in case of fire. The store fixtures and furniture, as well as the building were never designed to be inventoried or covered by the inventory clause. To make an inventory of the furniture, fixtures, and building would in no way furnish any evidence of the amount of the loss sustained. General merchandise, however, is a character of property which is at all times changing. The amount of stock in trade on hand one day is but little, if any, evidence of what may be on hand at another time. Upon the one hand, the stock is being depleted by sales made, while, upon the other, it is being replenished by purchases. All business men know that the amount of stock kept by any merchant fluctuates very materially, and it is but a reasonable business requirement that proper inventories be made and proper books of account be kept, in order that in case of loss there may be some satisfactory evidence as to what was the value of the property destroyed. On the other hand, buildings and other property which is not being depleted and restored, as is the case with merchandise, do not require the making of inventories and keeping books of account. Hence, when policies are issued which do not cover merchandise, this "inventory and iron-safe" clause is not attached, because it would be of no benefit whatever to either party to the contract. This being so, and forfeitures not being favored in the law, a large majority of the courts have held policies to be severable which cover different classes of property, and in which there is a distinct and separate amount placed upon each separate class, when the contract is not affected by any question of fraud, unlawful act condemned by public policy, or increase of the risk, on account of the breach, on the whole property insured; and that no recovery can be had on such policies, in case of a breach, for that part of the property covered by the forfeiture clause, but that recovery can be had for all other property covered by the policy. The cases which uphold the rule last mentioned are *Western Assur Co. v. Stoddard*, 88 Ala. 606, 7 So. 379; *Manchester F. Ins. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 514; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 547; *Rogers v. Phenix Ins. Co.* 121 Ind. 570, 23 N. E. 498; *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586; *Continental Ins. Co. v. Ward*, 50 Kan. 346,

31 Pac. 1079; *Kansas Farmers' F. Ins. Co. v. Saindon*, 53 Kan. 623, 38 Pac. 983; *Mitchell v. Mississippi Home Ins. Co.* 72 Miss. 53, 48 Am. St. Rep. 535, 18 So. 86; *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247; *Trabue v. Dwelling House Ins. Co.* 121 Mo. 75, 23 L. R. A. 719, 42 Am. St. Rep. 523, 25 S. W. 848; *Wright v. Fire Ins. Co.* 12 Mont. 474, 19 L. R. A. 211, 31 Pac. 87; *State Ins. Co. v. Schreok*, 27 Neb. 527, 6 L. R. A. 524, 20 Am. St. Rep. 696, 43 N. W. 340; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711; *Johansen v. Home F. Ins. Co.* 54 Neb. 548, 74 N. W. 866; *Home F. Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 839; *Merrill v. Agricultural Ins. Co.* 73 N. Y. 452, 29 Am. Rep. 184; *Coleman v. New Orleans Ins. Co.* 49 Ohio St. 310, 16 L. R. A. 174, 34 Am. St. Rep. 565, 31 N. E. 279; *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 35 S. W. 955; *Sun Mut. Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. 181; *Loomis v. Rockford Ins. Co.* 77 Wis. 87, 8 L. R. A. 834, 20 Am. St. Rep. 96, 45 N. W. 813. The principal courts holding the contrary doctrine are those of Minnesota and Iowa, while Vermont has also held that, where the contract is affected by some "all-pervading vice, it is void *in toto*."

We think that the rule should be established here that where, by a policy, different classes of property are insured, and each class is separated from the others, and insured for a specific amount, and there is a breach of the contract as to one class of the property insured, the contract should be considered, not as one entire in itself, but as one which is severable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more of them without regard to the other, provided the contract is not affected by any question of fraud, unlawful act condemned by public policy, or any increase of the risk to the company on the whole property insured, because of the breach. Some of the cases cited above do not arise out of a condition entirely parallel with the one under consideration, but the principle is the same in all. In those cases in which the question of fraud, acts condemned by public policy, or increase of risk, was involved, the court discusses the proposition arising in cases similar to the one here. This rule, we think, is sound, just, and fair to all parties. In this case separate policies could have been written covering the several classes of property insured, but for convenience sake different classes of property are covered by the one policy, and specific amounts placed thereon. When property is listed and insured in this way, the contract should be

considered as to each specific amount, as though that were the only amount contained in the policy. It follows that the trial court erred in rendering judgment in this case. The judgment should have been for the plaintiff in error in the sum of \$475, being the amount in the policy apportioned to and covering the building, furniture, fixtures, counters, shelves, etc.

We perhaps ought not to conclude this opinion without noticing more specifically the contention of defendant in error as to the word "entire," contained in the "inventory and iron-safe" clause, if for no other reason than for the energy displayed by counsel in his argument on this provision of the contract. After admitting that it would be futile to do otherwise than to admit that by far the greater number of cases to be found in the books hold that a contract of insurance is divisible, counsel's every sentence glistens with the energy displayed in treating the subject, and he plainly shows that he has no patience at all with the courts which have held against his contention on this subject. Beyond that, he says the contract as contained in this record has never been construed, to his knowledge; that the wording of the contracts under consideration by the courts in several cases cited did not contain the language used in this contract, in this: That because of the use of the clause, "This entire policy shall become null and void," the contract is not divisible; and that because of this clause the meaning of the contract as a whole is changed from those considered by the several courts referred to. He argues that the word "entire" has no limitation, as here used, and that no qualification can be found; that all of the words which were previously held to qualify had been omitted, and that it stands without limitation or qualification, meaning the whole and every part of the contract; that it was framed expressly for the purpose of making it free from doubt; that it belongs to the entire policy; that it is of recent origin, and is attached to every country risk, and is stripped of every word that has previously been held to warrant the courts in holding the contract divisible. We think that the word "entire," as here used, does not warrant a change of construction in this class of contracts from that laid down by the courts referred to and that which we have used here, and we feel quite sure that this clause is contained in the policies in the cases considered by some of the courts, particularly in *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247. In that case the court says a policy insuring separate amounts on a building and its contents is not avoided as to the personalty by a forfeiture of the insurance on the realty,

caused by a change in the title thereto, though it provided that the entire policy be avoided by any change in the title to the subject of insurance. If, as is indicated by counsel's argument, this clause was placed in this slip of paper for the purpose of avoiding the construction placed upon those clauses used for a similar purpose, and it was calculated that this peculiarly worded clause would carry greater protection to the insurance company than was fair, just, and equitable, then the courts will hesitate to so construe the language as to give an insurance company an unfair advantage. If the building, stock of merchandise, and store fixtures in this case had each been covered by separate policies, two of those policies would not have carried this clause, and two of those policies could have been recovered upon, even though the third could not. As stated before, the purpose of the clause evidently was to provide evidence to show the loss sustained, and counsel is in error when he claims that the purpose of

the clause was to provide against fraud. Fraud would vitiate the contract regardless of any such provision, and a proper protection to the company would not require any such condition to be inserted in the contract. So far as this record shows,—and no doubt it is a fact,—the failure to make this inventory and to keep the books of account as provided in the contract was an act of negligence on the part of the assured. He was the only person who suffered thereby. A failure to observe that feature of the contract in no way added to the liability of the company or its risk.

Having reached the conclusion herein stated, *the judgment of the trial court must be reversed*. The trial court is therefore directed to vacate the judgment rendered, and to enter judgment in favor of the plaintiff in error for the sum of \$475 and costs.

All the Justices concur, except **Irwin, J.**, who tried the case below, not sitting, and **Burford, Ch. J.**, absent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Frank IRVING

v.

Leonard A. FORD, Admr., etc., of Sheridan W. Ford, deceased.

(183 Mass. 448.)

A statute legitimating all children of slaves which have been recognized by the man as his, although the father and mother have ceased to cohabit prior to the passage of the act, is not binding on a man who has become domiciled in another state.

(May 23, 1903.)

NOTE.—*Conflict of laws as to legitimacy.*

I. Legitimacy.

a. In general, 177.

b. Applicability of *lex rei sitæ* or *lex domicilii decedentis*.

1. Legitimacy dependent upon validity of marriage, 177.

2. Legitimacy dependent upon acts subsequent to birth, 178.

c. What is proper law after eliminating *lex domicilii decedentis* and *lex rei sitæ*, as such, 182.

II. Adoption, 186.

1. Legitimacy.

a. In general.

The question as to the governing law with respect to the legitimacy or adoption of children has usually arisen in cases involving the right of the child to share in the distribution of personal property, or the descent of real property. Since the general principle is well established that the distribution of personal

RESERVATION by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of an appeal by petitioner from a decree of the Probate Court in defendant's favor in a proceeding to establish a right as heir at law. *Affirmed*.

The facts are stated in the opinion.

Messrs. Butler R. Wilson and William H. Lewis, for petitioner:

A person who has the status of a child of another person in the country of his domicile has the same status here, and shares in his father's personal property according

property is governed by the law of the deceased's domicile, and the descent of real property by the *lex rei sitæ*, the first inquiry is whether the child's status, as legitimate or illegitimate for such purposes, is to be referred to the *lex domicilii decedentis* or *lex rei sitæ*, as the case may be, to the exclusion of all other possible applicatory laws.

b. Applicability of *lex rei sitæ* or *lex domicilii decedentis*.

1. Legitimacy dependent upon validity of marriage.

So far as the question of legitimacy depends upon the validity of the marriage of the parents, it is clear that it is not, even for the purposes under consideration, to be referred to the *lex domicilii decedentis* or *lex rei sitæ*, as such. Upon the other hand, as a general principle, if the marriage was valid where celebrated, the issue thereof will be deemed legitimate for the purposes in question, though the marriage would have been invalid tested by the *lex rei sitæ* or *lex domicilii decedentis*. In

to the law of the domicil, and in real estate here, the same as a child takes by the laws of this commonwealth, unless excluded by some positive rule of our law.

Ross v. Ross, 129 Mass. 246, 37 Am. Rep. 321; *Adams v. Adams*, 154 Mass. 293, 13 L. R. A. 275, 28 N. E. 260; *Polson v. Stewart*, 167 Mass. 214, 36 L. R. A. 771, 57 Am. St. Rep. 452, 45 N. E. 737; *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669; *Wheaton*, International Law, p. 172; *Story*, Conf. L. § 93; *Re Dons*, 4 Drew. 194.

The petitioner is legitimate and capable of inheriting from his father, under the statute of Virginia, which provides that the issue of marriages deemed null in law, or dissolved by a court, shall, nevertheless, be legitimate.

this view, the question becomes simply one as to the applicability of the rule that the validity of a marriage is to be determined by the law of the place where it was celebrated. (See upon this question, *note to Hills v. State*, 57 L. R. A. 155.) The only exceptions to the rule that the legitimacy, so far as it depends upon the validity of the marriage, is to be referred to the law of the place where the marriage was celebrated, are cases in which the marriage itself, for some reason, comes within an exception to the general rule that a marriage, valid where celebrated, is valid everywhere.

Thus, in *Fenton v. Livingstone*, 5 Jur. N. S. 1183, 3 Macq. H. L. Cas. 497, 7 Week. Rep. 671, the decision against the legitimacy of the children of a marriage celebrated in England, for the purpose of taking an entailed estate in Scotland, was upon the ground that the marriage (which was celebrated between a man and his deceased wife's sister) was not really valid, even according to the law of England, though it was admitted that, the wife having died before the passage of the English statute allowing such a marriage to be attacked after the death of one of the parties to it, the children would be regarded as legitimate in England. The court, however, took the position that, even if the marriage must be regarded as valid in England, it came within an exception to the rule, that a marriage valid where celebrated is valid everywhere, and, therefore, would not be recognized as valid in Scotland.

So, in *Shaw v. Gould*, L. R. 3 H. L. 55, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833, where it was held that the children of a Scotch marriage, born in Scotland, where the parents were domiciled, could not be recognized as legitimate in England for the purpose of taking under an English will bequeathing personal estate to "the children" of the mother, the decision was upon the ground that the marriage, though valid in Scotland, where celebrated, could not be recognized as valid in England, because a Scotch divorce obtained by the wife from a former husband, though valid in Scotland, could not be recognized in England.

The general rule was, however, applied in *Re Hall*, 61 App. Div. 266, 70 N. Y. Supp. 400, to a state of facts very similar to that involved in the last case. It was held in the Hall Case 65 L. R. A.

1 Va. Rev. Code 1819, chap. 96, § 19; Va. Code 1849, chap. 123, § 7; *Stones v. Keeling*, 5 Call (Va.) 144; *Bennett v. Toler*, 15 Gratt. 623, 78 Am. Dec. 638; *Morris v. Williams*, 39 Ohio St. 554; *Wright v. Lore*, 12 Ohio St. 619; *Hartwell v. Jackson*, 7 Tex. 576; *Graham v. Bennet*, 2 Cal. 503; *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359; *Watts v. Owens*, 62 Wis. 512, 22 N. W. 720; *Brower v. Bowers*, 1 Abb. App. Dec. 214; *Earle v. Dawes*, 3 Md. Ch. 230; *Glass v. Glass*, 114 Mass. 563.

The legislature of Virginia has the power to legitimate children.

4 Co. Inst. 36; *Brower v. Bowers*, 1 Abb. App. Dec. 214; *Goshen v. Stonington*, 4 Conn. 210, 10 Am. Dec. 121; *McKamie v. Baskerville*, 86 Tenn. 459, 7 S. W. 194;

that the child of a marriage celebrated in North Dakota, where the marriage was valid, would be recognized as legitimate in New York for the purpose of taking under the will of a testator domiciled in the latter state, notwithstanding that a decree of divorce, obtained by the wife from a former husband in North Dakota, valid in that state, could not be recognized as valid in New York. The decision is upon the ground that the status of the child only, and not the status of his parents, was involved, and that his status, having been fixed by the law of North Dakota, where he was born and where his parents were domiciled at the time of his birth, was to be accepted by the courts of New York.

In *VanVoorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, it was held that the children of a remarriage celebrated in another state, after a divorce obtained by the husband from a former wife, forbidding him to remarry, were legitimate in New York, the remarriage being valid where celebrated, although it would have been invalid if celebrated in New York.

2. Legitimacy dependent upon acts subsequent to birth.

When a child is born out of lawful wedlock, and its legitimacy depends upon a law which presupposes the invalidity or nonexistence of a marriage before his birth, there is a conflict of authority whether the question of legitimacy for the purposes under consideration shall or shall not be referred to the *lex domicilii decedentis* or the *lex rei sitæ*, as such, to the exclusion of all other laws. Thus, it has been held that a child born out of wedlock cannot inherit real property unless legitimate according to the *lex rei sitæ*, whatever his status elsewhere. *Doe ex dem. Birtwhistle v. Vardill*, 5 Barn. & C. 438, 8 Dowd. & R. 185, 7 Clark & F. 895, West, 500, 4 Jur. 1076, 6 Bing. N. C. 385, 1 Scott, N. R. 828; *Lingen v. Lingen*, 45 Ala. 410; *Williams v. Kimball*, 35 Fla. 49, 26 L. R. A. 764, 48 Am. St. Rep. 238, 16 So. 783; *Barnum v. Barnum*, 42 Md. 251; *Smith v. Derr*, 34 Pa. 126, 75 Am. Dec. 641.

So, it has been held, conversely, that if legitimate by the *lex rei sitæ*, he may inherit, although illegitimate elsewhere. *Sneed v. Ewing*, 5 J. J. Marsh. 480, 22 Am. Dec. 41.

In *Harris v. Harris*, 85 Ky. 49, 2 S. W. 549, also, it was held that the children of an invalid marriage celebrated in Ohio were legit-

Rice v. Efford, 3 Hen. & M. 225; *Monson v. Palmer*, 8 Allen, 551; *Miller v. Miller*, 91 N. Y. 319, 43 Am. Rep. 669.

Legitimation by the law of the domicile of origin of the person claiming the status of child of another will be enforced by the law of the forum.

Ross v. Ross, 129 Mass. 246, 37 Am. Rep. 321; *Adams v. Adams*, 154 Mass. 291, 13 L. R. A. 275, 28 N. E. 260; *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669; *Higgins v. Central New England & W. R. Co.* 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 353, 7 N. E. 773; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349, 172 Mass. 39, 42 L. R. A. 396, 70 Am. St. Rep. 232, 51

N. E. 207; *Wylie v. Cotter*, 170 Mass. 357, 64 Am. St. Rep. 305, 49 N. E. 746; *Howarth v. Lombard*, 175 Mass. 573, 49 L. R. A. 301, 56 N. E. 888; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263.

The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

U. S. Const. art. 4, § 2; 2 Story, Const. Law, § 1806; *Adams v. Adams*, 154 Mass. 295, 13 L. R. A. 275, 28 N. E. 260; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Lemmon v. People*, 20 N. Y. 607; *Coryfield v. Coryell*, 4 Wash. C. C. 380, Fed. Cas. No. 3,230; *Paul v. Virginia*, 8 Wall. 180, 19 L. ed. 360.

imate and capable of inheriting from their father by virtue of an act of Kentucky, where the land was situated, making the children of invalid or void marriages legitimate. It would seem from the facts of the case that the law of Kentucky might well have been regarded as the proper law by which to determine the status of the children for all purposes; but the decision appears to have been put upon the ground that the *lex rei sitæ*, as such, governed. This, also, seems to be the implication in *Smith v. Thornton*, 5 W. N. C. 372, where the court said that, without a statute of Pennsylvania to change their condition, the illegitimacy of children according to the law of Virginia, where they were born and where their parents were domiciled, followed them into Pennsylvania, and rendered them incapable of inheriting real property in that state.

So, in *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78, it was said, in effect, that the legitimacy of a child born out of lawful wedlock, for the purpose of inheriting real property in Indiana, was to be determined by the law of Indiana, although the subsequent intermarriage of the parents took place in Kentucky while they were domiciled in that state. It appeared, however, that the intermarriage of the parents, and acknowledgment of the child, had the effect to render him legitimate according to the law of either state.

Stolts v. Doering, 112 Ill. 234, is clearly distinguishable from the foregoing cases, for, in this case, the foreign law which the court refused to enforce with reference to real property in Illinois merely gave illegitimates the right to inherit, and did not purport to make them legitimate.

Petit's Succession, 49 La. Ann. 626, 62 Am. St. Rep. 659, 21 So. 717, is distinguishable upon the same ground, the court there refusing to give effect to a law of France (which seems to have been the personal law of the claimant, as well as the law of the deceased's domicile) putting illegitimate children on the same footing as the brothers and sisters of deceased.

It would be possible, so far as the facts are concerned, to distinguish *Barnum v. Barnum*, 42 Md. 251, *supra*, upon the same ground, since the statute there relied upon merely purported to constitute one person an heir of another; but the court said that the decision would have 65 L. R. A.

been the same, even if the act had professed to legitimate the former.

Obviously, the right of illegitimates, conceding them to be such, to inherit real property, is governed by the *lex rei sitæ*. The difficulty arises when it comes to the question, What law determines whether a certain individual is legitimate or illegitimate for the purpose of inheriting real property?

Long v. Hess, 154 Ill. 482, 27 L. R. A. 791, 45 Am. St. Rep. 143, 40 N. E. 335, is also distinguishable from the cases that apply the *lex rei sitæ*, as such, to the status of a person as a legitimate or illegitimate for the purpose of inheriting real property. In that case the court did not deny that the legitimation of children under a foreign law would fix their status for the purpose of inheriting real property in Illinois, but merely held that the foreign law would not prevent the father from cutting the children off by a will disposing of real property in Illinois, since, even assuming that they had the status of heirs, his right to cut them off was governed by the *lex rei sitæ*, and this right could have been exercised, even against children born in lawful wedlock.

Keith v. Eaton, 58 Kan. 732, 51 Pac. 271, is not relevant on this point. The decision was merely to the effect that the phrase "heirs of his body," in a will executed in Missouri, by a person domiciled there, devising a life estate in lands in that state and in other states, including Kansas, to the testator's son, with remainder to the "heirs of his body," was to be interpreted according to the law of Missouri, which disables an illegitimate child from inheriting from the father, except under the conditions of intermarriage of the parents, and recognition of the child by the father; and, therefore, that an illegitimate child of the son, who was domiciled in Kansas, born after the testator's death, was not entitled, as remainderman, to share in the real property in Kansas, notwithstanding that he had been duly recognized by his father (the life tenant), which recognition by the law of Kansas invested him with the right of inheritance from the latter.

The cases that decline to apply the *lex rei sitæ* to the status of the child for this purpose, and adopt his status as fixed by the proper law,—that is, by the law which would govern, assuming that no property rights were involved,—are subsequently cited in this subdivision.

This court, in construing the Virginia statute, will follow the construction put upon it by the Virginia court.

Hackett v. Potter, 135 Mass. 349; *Minor v. Jones*, 2 Redf. 289.

The enabling acts have been construed and upheld by the supreme court of appeals of Virginia in the following cases:

Fitchett v. Smith, 78 Va. 524; *Francis v. Francis*, 31 Gratt. 283; *Scott v. Raub*, 88 Va. 721, 14 S. E. 178; *Smith v. Perry*, 80 Va. 563.

It is not necessary that both parties be domiciled in Virginia to make the statute operative.

Minor, Conf. L. § 1, p. 219, footnotes 1, 2; *Dacey*, Domicil, 185; *Minor v. Jones*, 2 Redf. 289; *Loring v. Thorndike*, 5 Allen,

257; *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915.

Mr. David F. Kimball, for respondent:

The descent and heirship of real estate are exclusively governed by the law of the country within which it is actually situate.

Williams v. Kimball, 35 Fla. 52, 26 L. R. A. 746, 48 Am. St. Rep. 238, 16 So. 783.

Inasmuch as legitimation deals with a relation, both parties to the relation must be subject to the power of the legislature that seeks to affect it, before a statute can do so in a way that will be recognized beyond the territorial limit of its power.

Irving v. Ford, 179 Mass. 216, 60 N. E. 491; *Minor*, Conf. L. § 98, pp. 213, 214, § 100, pp. 218, 219.

A contract valid where it is made, and

It has also been held that the status of a child born out of lawful wedlock, for the purpose of sharing in the distribution of personal property, is to be determined by the law of the domicil of the deceased. Thus, a child born out of wedlock cannot share in the distribution of personal property of deceased unless legitimate by the law of the deceased's domicil. *Lingen v. Lingen*, 45 Ala. 410; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41; *Jackson v. Jackson*, 82 Md. 17, 34 L. R. A. 773, 33 Atl. 317.

And it has been held, conversely, that, if he is legitimate by the law of deceased's domicil, he may take, though illegitimate elsewhere. *Leonard v. Braswell*, 99 Ky. 528, 36 L. R. A. 707, 36 S. W. 684.

In the last case it was held that a child of a void marriage, celebrated in Illinois, was entitled to take by virtue of the Kentucky statute making the children of invalid marriages legitimate. It is true that the parties were domiciled in Kentucky at the time of the marriage, and at the birth of the child; so, it would seem that even the child's purely personal status would be determined by the law of Kentucky; but the decision is clearly upon the ground that the law of the deceased's domicil governs so far as the status of the child affects his right to share in the distribution of personal property.

In *Dannell v. Dannell*, 4 Bush, 51, the words "children or heirs," in a will making a bequest to the children or heirs of a deceased brother of the testator, were held to include a child born out of wedlock in Lombardy, of parents domiciled there, who subsequently intermarried. The decision is upon the ground that such intermarriage would, under the law of Kentucky, the domicil of the testator, legitimate the child, and, although the rule may have been different in Lombardy, the persons who are to take under a will designating a particular class or description of persons are to be ascertained by the law of the place where the will is made and the testator domiciled. There were, however, other circumstances in the case tending to show that the testator intended to include the child in question. And it will be observed that, in case of a will, unlike the case of intestacy, the question is not one of positive law, but of the intention of the parties.

The cases in which the courts decline to ap-
65 L. R. A.

ply the *lex domicilii decedentis*, and apply another law, to the question of the status of the child as affecting his right to share in the distribution of personal property, are subsequently discussed in this subdivision.

It might seem that the reason for applying the *lex rei sitæ* to the legitimacy of a person claiming as heir to real property should be equally persuasive for applying the *lex domicilii decedentis* to the legitimacy of a person claiming the right to share in the distribution of personal property; but, as a matter of fact, there is much more authority for the application of the *lex rei sitæ* in the one case, than for the application of the *lex domicilii decedentis* in the other. This apparent anomaly is traceable to a peculiar construction of the English statute of Merton, governing the inheritance of real property, restricting the class who may take as heirs to persons born in lawful wedlock.

The doctrine that the *lex rei sitæ* necessarily determines the status of a person born out of wedlock, for the purpose of inheritance of real property, was first announced in the celebrated case of *Doe ex dem. Birtwhistle v. Vardill*, 5 Barn. & C. 438, 8 Dowl. & R. 185, 7 Clark & F. 895, West, 500, 4 Jur. 1076, 6 Bing. N. C. 385, 1 Scott, N. R. 828. It is apparent, however, from the opinions in that case, and from the criticisms thereof by the later English cases, that the decision was upon the ground that the statute of Merton must, in view of its history, be construed to require birth in lawful wedlock, and that it is not satisfied by legitimacy alone. Indeed, it was admitted in that case that the claimant, who was legitimate by the law of Scotland, had, even in England, the status of the oldest legitimate son of his father; but it is apparent that, under the foregoing construction of the statute of Merton, that fact did not give him the status of an heir. The decision was, therefore, based upon the construction of a local statute,—though such construction was determined in part by historical considerations,—and the case, instead of being authority against, is indirect authority for, the proposition (as a general principle of private international law when its operation is not interfered with by a local statute) that the status of a person as legitimate, as fixed by the proper law, may be accepted in other jurisdictions for the purpose of determining his property rights, though, by reason of the restricted construction of the

valid everywhere, is not necessarily enforceable everywhere. It may be contrary to the law of the forum.

Emery v. Burbank, 163 Mass. 327, 28 L. R. A. 57, 47 Am. St. Rep. 456, 39 N. E. 1026.

Mr. L. A. Ford also for respondent.

Lathrop, J., delivered the opinion of the court:

The question which arises in this case is that left undecided when the parties were before us on a petition to the probate court to amend the record of a petition for administration of the estate of Robert Irving, otherwise known as Sheridan W. Ford, by substituting the name of the petitioner and his mother as the next of kin, and to re-

move the administrator appointed on an earlier petition. See *Irving v. Ford*, 179 Mass. 216, 60 N. E. 491. The case is now before us on an appeal from a decree of the probate court on a petition asking that the petitioner be allowed one third of the estate of Sheridan W. Ford, claiming to be entitled thereto as a son.

For the purposes of this case, it must be considered as settled by the previous decision that the so-called marriage between the petitioner's father and mother in Virginia while both were slaves was void, and that the marriage of the common father of the petitioner and of the respondent in Massachusetts was valid, and that the respondent, and not the petitioner, is the legitimate son of Sheridan W. Ford, unless the stat-

local statute of inheritance, the principle cannot be applied to the inheritance of real property in England.

Some of the American decisions, above cited, that apply the *lex rei sitæ* expressly proceed upon the theory that the local statute of descent was based upon the statute of Merton, and should receive a similar construction; and all of such cases were undoubtedly influenced by the decision in *Doe ex dem. Birtwhistle v. Vardill*, 5 Barn. & C. 438, 8 Dowl. & R. 185.

Obviously, if a statute, by express terms or clear implication, restricts the heirs of real property to persons born in lawful wedlock, the legitimacy, according to his proper personal law, of a person born out of lawful wedlock, cannot avail him, and that would be so even if he were legitimate according to the law of the place where the property is situated.

In the absence of such a local statute or public policy, the better reasoning and the weight of authority establish, as a general principle of private international law, the proposition that the status of a person as legitimate or illegitimate, fixed by the proper law, is to be accepted in other jurisdictions for the purpose of descent of real property and the distribution of personal property.

This doctrine was expressly adopted in *Re Goodman*, L. R. 17 Ch. Div. 266, 50 L. J. Ch. N. S. 425, 44 L. T. N. S. 527, 29 Week. Rep. 586, as applied to the distribution of the personal estate of a decedent domiciled in England. It was held in that case that a person born out of wedlock, who, by the law of Holland, where the parents were domiciled, became legitimate by their subsequent intermarriage, was legitimate for the purposes of the English statute of distribution, notwithstanding that the subsequent marriage would not have had that effect by the law of England.

So, upon the same reasoning, it was held in *Andros v. Andros*, L. R. 24 Ch. Div. 637, 52 L. J. Ch. N. S. 793, 49 L. T. N. S. 163, 32 Week. Rep. 30, that a bequest of personality in an English will to the children of a foreigner contemplated children born out of wedlock, who, by the law of their father's domicile, had become legitimated through a subsequent intermarriage of their parents.

And a similar decision was made in *Grey v. Stamford* [1892] 3 Ch. 88, 61 L. J. Ch. N. S. 622, 41 Week. Rep. 60, even with reference to a devise of real property in England. The court 65 L. R. A.

held that the rule laid down in *Doe ex dem. Birtwhistle v. Vardill* relates only to the descent of real property in a case of intestacy, and does not affect a devise in a will to "children."

So, it was held in *Skottowe v. Young*, L. R. 11 Eq. 474, 40 L. J. Ch. N. S. 866, 24 L. T. N. S. 220, 19 Week. Rep. 583, that a child born out of wedlock, to a British citizen domiciled in France, having been legitimated according to the law of France by the intermarriage of his parents, was not "a stranger in blood" to his father within the meaning of the English legacy duty act.

While, for the reasons already stated, this doctrine is not applicable to the inheritance of real property in England, it has been applied to real property in Scotland, with the result of excluding from the inheritance persons born out of lawful wedlock, who, by the subsequent intermarriage of their parents, would be legitimate according to the law of Scotland (*lex rei sitæ*), because the marriage did not have that effect according to their appropriate personal law. *Shedden v. Patrick*, 1 Macq. H. L. Cas. 535; *Munro v. Saunders*, 6 Bligh. N. R. 468.

So, while it was held in *Dalhousie v. M'Douall*, 7 Clark & F. 817, and *Munro v. Munro*, 7 Clark & F. 842, that a child born out of wedlock, whose parents subsequently intermarried, was entitled to inherit real property in Scotland, the inquiry was not directed to the question whether the *lex rei sitæ*, as such, gave a legitimating effect to marriage, but whether the law of Scotland could be regarded as the appropriate personal law of the claimant, it being apparently assumed that the mere fact that the *lex rei sitæ* gave such effect to the marriage would not have rendered the child legitimate for the purpose of inheriting real property.

In the United States the doctrine has been applied by recognizing the legitimacy, for the purpose of inheriting real property, of persons born out of wedlock, who, according to the proper law, had been legitimated by the intermarriage of their parents, notwithstanding that such intermarriage would not have that effect according to the *lex rei sitæ*. *Dayton v. Adkisson*, 45 N. J. Eq. 603, 4 L. R. A. 488, 14 Am. St. Rep. 763, 17 Atl. 964; *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669; *Bates v. Virolet*, 33 App. Div. 436, 53 N. Y. Supp. 803;

ute of Virginia passed on February 27, 1866, makes him a legitimate child in this state. The statute declared that all colored persons cohabiting together on February 27, 1866, should be deemed husband and wife, and all their children legitimate, whether born before or after the passage of the act. The father and mother of the petitioner were not then cohabiting together, and the petitioner's claim is based upon the last clause of the act, which reads as follows: "And when the parties have ceased to cohabit before the passage of this act, in consequence of the death of the woman, or from any other cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate." Acts 1865-66, chap. 18, § 2, p. 85. At the time of the

passage of this act the petitioner's domicile was in Virginia, and the domicile of Sheridan W. Ford was in Massachusetts. We are unable to see any ground upon which the state of Virginia can impose upon a person having his domicile in Massachusetts a legitimate son, when by our law he is illegitimate. By our law it is provided: "An illegitimate child whose parents have intermarried, and whose father has acknowledged him as his child shall be considered legitimate." Pub. Stat. 1882, chap. 125, § 5 (Rev. Laws, chap. 133, § 5). The Virginia act makes mere acknowledgment sufficient, while our law requires both marriage and acknowledgment. The law which governs this case is well stated by Mr. Minor in his treatise on the Con-

Stack v. Stack, 6 Dem. 280; De Wolf v. Middleton, 18 R. I. 810, 31 L. R. A. 146, 26 Atl. 44, 31 Atl. 271.

So, in Scott v. Key, 11 La. Ann. 232, the doctrine was applied to the inheritance of real property in Louisiana by a person legitimated by special statute in another state.

The doctrine was also approved in Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321, where there was a thorough examination of the subject, though the actual case before the court was one of adoption by a court decree.

In McDeed v. McDeed, 67 Ill. 545, it seems to have been assumed that the legitimacy of children, born before the repudiation of the marriage by the husband, who was below the age of consent when he contracted it, would be governed by the law of Ohio, and that such children being legitimate according to the law of that state notwithstanding the invalidity of the marriage, would be recognized as legitimate for the purpose of inheriting real property in Illinois.

And, conversely, it was held in Smith v. Kelly, 23 Miss. 167, 55 Am. Dec. 87, that the subsequent intermarriage of the parents did not make the child legitimate for the purpose of inheriting real property in Mississippi, or sharing in the distribution of personal property of a person domiciled in that state, although it would have that effect by the law of Mississippi (*lex rei sitæ* and *lex domicilii decedentis*), it not having that effect by the law of South Carolina, where the parents were domiciled at the time of the birth of the child, and at the time of the subsequent intermarriage.

So, in Hazzard's Estate, 8 W. N. C. 485, it was held that the rule that the distribution of a personal estate is governed by the law of decedent's last domicile did not operate to legitimate, for such purpose, a person who, by his proper personal law (in this case Virginia), was illegitimate.

In Caballero's Succession, 24 La. Ann. 573, it was held that a child born out of wedlock, having been legitimated according to the law of Spain by the subsequent intermarriage of his parents, had the status of a legitimate child in Louisiana for the purpose of taking as a forced heir in that state.

Besides the foregoing cases, which have expressly adopted the status of the claimant as fixed by the proper law for the purposes in 65 L. R. A.

question, in opposition to the status that he would have according to the *lex domicilii decedentis* or the *lex rei sitæ*, it is assumed, by the cases cited in the subsequent division upon the question, What is the proper law by which to ascertain the status of the child? that it will, when ascertained, prevail over the *lex domicilii decedentis* or the *lex rei sitæ*, as the case may be, though in some cases it happened that the proper law was coincident with one or the other of those laws. Thus, for instance, in Blythe v. Ayres, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915, it was held that the law of California, where, as a matter of fact, the land was situated, fixed the status of the child for the purpose of inheritance; but the decision was upon the ground that the father was domiciled there, and it was assumed throughout that, if he had been domiciled in England, the law of England would have governed.

Of course, as already pointed out, a statute of another state or country which does not purport to affect the status of the child as legitimate or illegitimate, but merely prescribes the rights of illegitimate children, will not prevail over the *lex rei sitæ* or *lex domicilii decedentis*. (See *Petit's Succession*, 49 La. Ann. 626, 62 Am. St. Rep. 659, 21 So. 717, *supra*.)

c. What is proper law after eliminating *lex domicilii decedentis* and *lex rei sitæ*, as such.

Conceding that the *lex domicilii decedentis* and *lex rei sitæ* may be eliminated as the criterion of the child's status as a legitimate or illegitimate, there remains the question, which, under some circumstances, is an exceedingly perplexing one: What is the proper law by which to determine the status of a person born out of lawful wedlock as legitimate or illegitimate?

If the child is an adult, and has an independent domicile, a general or special statute of that domicile—which, in effect, declares him to be legitimate—would probably establish his status as such for all purposes that do not involve the correlative status of his parents domiciled elsewhere; and perhaps that status would avail the parents for the purpose of any beneficial right or interest that they might claim under or through the child. But such a status, as shown in *Irving v. Ford*, cannot avail the child for the purposes of a beneficial right or interest which he

flict of Laws, § 100. After stating the question, which domicil should govern when the act of legitimation is not marriage, but mere acknowledgment, or a statute of a state, and the bastard has his domicil in one state, and his father in another, he proceeds: "Two points should be noticed in this connection, which will aid us to determine the proper law in this case. The first is that the legitimation of a bastard is the creation of a status which is beneficial to him, and it should be presumed in his favor whenever adequate reason exists for such a course. The second is that this beneficial status cannot be accorded the infant at the expense of a change of status on the part of the father not warranted by his domiciliary law. Applying these two principles, it fol-

lows that the law of the father's domicil at the time of the legitimating act will be the proper law to determine the status of both parties. If by that law the act in question legitimates the bastard, the beneficial status thus created will in general be recognized everywhere, including the bastard's domicil, though by the law of the latter state the act would not suffice to create a legitimation. On the other hand, if, by the law of the father's domicil, legitimation is not the result of the act claimed to have that effect, though, under the bastard's domiciliary law, legitimation would result therefrom, the status of legitimation should not be conferred upon the bastard, for that would be to subject the status of the father to a law to which it is not properly subject." In

claims under or through one of his parents, and which depends upon a change of such parent's status relatively to the child, since the state of the child's domicil, while it may impose a new status upon him, cannot impose a new status, *in invitum*, upon the parent domiciled elsewhere.

The same principle would seem to apply assuming that the child, at the time of the alleged legitimation, is an infant (and, being illegitimate, has the mother's domicil), when some act other than the intermarriage of the parents, *e. g.*, subsequent recognition or acknowledgment by the father, is relied upon. Applying the principle stated in *IRVING v. FORD*, it would seem that the legitimating effect of the law of the child's domicil (which is *ex necessitate* the mother's domicil) cannot avail to establish the legitimacy of the child to the detriment of the estate of the father, when a mere acknowledgment of the child's paternity by the father while domiciled elsewhere is relied upon. Perhaps the result would be different if there were, not only an acknowledgment of the child's paternity, but a recognition of his legitimacy,—especially if such recognition occurs while the father is transiently within the state or country where the mother and infant child are domiciled, notwithstanding that he is domiciled elsewhere. That was substantially the state of facts in *Lingen v. Lingen*, 45 Ala. 410, where the father (who was at the time domiciled in Alabama), while temporarily in France, where the mother (and therefore the child) was domiciled, recognized the child as his legitimate son, whereby the latter, according to the law of France, became legitimate. The son, by virtue of such acknowledgment, claimed to inherit the real property, and to share in the distribution of personal property, of the father who died while still domiciled in Alabama. The decision went against the son, but was upon the ground that the *lex rei sitæ* and *lex domicilii decedentis* necessarily governed, to the exclusion of all other laws. If the court had, in accordance with the weight of authority, eliminated those laws as the criterion, the question would have been presented, whether the law of the domicil of the mother and child, or that of the father, would have prevailed. In that situation the case might, perhaps, be distinguished from *IRVING v. FORD* upon the ground that the father acknowledged the child to be his legitimate son, and that

such acknowledgment took place in the country where the child was domiciled; whereas, in *IRVING v. FORD* so far as appears, there was merely a recognition by the man that he was the father of the child, not an acknowledgment that the child was his legitimate child, and that recognition did not take place in Virginia, where the child was domiciled.

It was held in *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915, that the bastard child of a domiciled citizen of California was made a legitimate child, under the Code provision of that state, by the father's public acknowledgment and adoption of her as such, although the mother had always been domiciled in England where the child was begotten and born, and continued to live until after the father's death. This decision is put upon the general ground that the law of the domicil of the father, rather than that of the mother, or of the child, determines the question of legitimation by the father's acknowledgment and other acts, the same as in case of a subsequent intermarriage of the parents. In that case the child was claiming the right of heirship and title to the estate of the father, who died while domiciled in California; and it would seem that the decision upholding the right of the child might have been put upon the ground that, since the status was beneficial to the child, she could avail herself of the legitimating effect of the acknowledgment according to the law of the father's domicil, though it did not have such effect according to the law of the mother's domicil (which was also her own domicil). It is difficult to understand how the general principle, which applies when a subsequent intermarriage of the parents is relied upon, that the law of the domicil of the father prevails over that of the mother, can be applied if mere acknowledgment by the father is relied upon. Until the legitimation is perfected, the child, being illegitimate, has the mother's domicil, which, in the absence of an intermarriage, may, as in the case under consideration, be in a different state or country than the domicil of the father. To hold that the law of the father's domicil governs makes such law prevail over that of the child's domicil; and while, as above suggested, that result may be admissible in case the child is claiming a beneficial right or interest in the father's estate, the principle would, at least, be open to serious objection as applied to a

Lingen v. Lingen, 45 Ala. 410, the domicile of the father was in Alabama. The illegitimate child was born in France, having a French woman for its mother. The father, while in France, acknowledged the child to be his, but he did not marry the woman. This acknowledgment was sufficient in France to make the child legitimate, but not in Alabama. It was held that the legitimation was governed by the law of the father's domicile, and not by that of the bastard. See also *Wharton*, Conf. L. § 246. So in *Loring v. Thorndike*, 5 Allen, 257, 263, where a citizen of this commonwealth had an illegitimate child born in Germany, and afterwards married the mother in that country, and acknowledged the child there, the legitimacy of the child was determined by the provision of Rev. Stat. 1836, chap. 61, § 4. See also *Morris v. Williams*, 39 Ohio St. 554; *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915.

It may be conceded that if the father of

the petitioner had been domiciled in Virginia in 1866, when the statute in question was passed, or when he acknowledged the petitioner as his son, the petitioner would have acquired a status as a legitimate son which would be recognized here. *Scott v. Key*, 11 La. Ann. 232; *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669. See also *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321. There are, however, decisions to the contrary. *Smith v. Derr*, 34 Pa. 128, 75 Am. Dec. 641; *Williams v. Kimball*, 35 Fla. 49, 26 L. R. A. 746, 48 Am. St. Rep. 238, 16 So. 783.

But as the petitioner's father, when the statute was passed and when the acknowledgment was made, was domiciled in this commonwealth, the question of the petitioner's legitimacy must be determined by our law, which does not recognize acknowledgment alone as legitimation; and the order must be: *Decree of Probate Court affirmed.*

case where the child is claiming under the mother's estate or the father is claiming under the child's estate. The difficulty does not arise when a subsequent intermarriage of the parents is relied upon as legitimating the child, since, at the very instant of the marriage, the mother, and therefore the child, takes the father's domicile. In such a case, therefore, it is not necessary to assume, in advance, the legitimating effect of the marriage in order to attribute to the child the domicile of the father. But an acknowledgment of the child by the father does not change the domicile of the mother, and, in order to give it the effect of changing the domicile of the child, its legitimating effect must be assumed, which, of course, involves a *petitio principii*.

When subsequent intermarriage of the parents during the infancy of the child is relied upon as legitimating the child, it must, at least, have that effect according to the law of the domicile of the father at the time of the marriage; and the English rule requires that it shall have that effect, not only by the law of the father's domicile at the time of the marriage, but also by the law of his domicile at the time of the birth of the child.

The ground upon which the English doctrine rests is summarized in *Re Grove*, L. R. 40 Ch. Div. 218, 232, 58 L. J. Ch. N. S. 57, 59 L. T. N. S. 587, 37 Week. Rep. 1, as follows: "What is really necessary, I think, is that the father should, at the time of the birth of the child, be domiciled in a country allowing legitimation so as to give to the child the capacity of being made legitimate by a subsequent marriage. But it is the subsequent marriage which gives the legitimacy to a child who has, at its birth, in consequence of its father's domicile, the capacity of being made legitimate by a subsequent marriage." The justification for the assumption that the child takes its capacity to be legitimated in consequence of its father's domicile is not apparent. Upon the other hand, it would seem that the child has such capacity, if at all, in consequence of the mother's domicile, since an illegitimate child takes, at birth, the mother's domicile, rather than the father's. 65 L. R. A.

To support the doctrine upon the theory suggested, it would seem to be necessary to indulge, in addition to what is above said, the fiction that the subsequent marriage relates back to the time of the birth of the child. In the case from which the quotation is taken, the domicile of the mother and of the father at the time of the child's birth was the same, and the court was merely considering the general question whether it is necessary that the marriage shall have the legitimating effect by the law of the domicile at the time of the birth of the child and at the time of the subsequent marriage.

While the foregoing case states and assumes that the marriage must have had such effect according to the law of the father's domicile at the time of the child's birth, its value as a new precedent was its addition of the requirement that the marriage shall have a legitimating effect according to the law of the father's domicile at the time of the marriage. Even before this decision, it was well established in England that a child legitimated according to the law of the domicile of the father at the time of the intermarriage of the parents would not be recognized as legitimate in England if, at the time of the child's birth, the domicile of the father was in England, the law of which denies the legitimating effect of the marriage. *Re Wright*, 2 Kay & J. 595, 25 L. J. Ch. N. S. 621, 2 Jur. N. S. 485, 4 Week. Rep. 541; *Re Goodman*, L. R. 17 Ch. Div. 266, 50 L. J. Ch. N. S. 425, 44 L. T. N. S. 527, 29 Week. Rep. 586; *Udny v. Udny*, L. R. 1 H. L. Sc. App. Cas. 441. A contrary position was taken in *Boyes v. Bedale*, 1 Hem. & M. 798, but the decision was expressly disapproved in *Re Goodman*. These cases, however, left open the question whether, if the law of the domicile at the time of birth gave legitimating effect to the marriage, the child would be regarded as legitimate in England, irrespective of the domicile at the time of the marriage; and this question, as already stated, was afterward decided in the negative by *Re Grove*.

It is to be observed that in the English

cases above cited, which refused to recognize the legitimating effect of the marriage according to the law of the domicile of the father at the time it took place because it did not have that effect according to the law of his domicile at the time of the birth of the child, the domicile at the latter period was in England, and therefore the courts in these cases were giving effect to the English rule, which denies the legitimating effect of the intermarriage of the parents. Possibly they would have been more inclined to acknowledge the legitimating effect of the law of the father's domicile at the time of the marriage if the law of England had concurred on this point with that law, even though the domicile at the time of the birth had been outside of England, and in a country whose law denied the legitimating effect of the marriage.

There are very few American cases in which there was a conflict on this point between the law of the father's domicile at the time of the birth of the child and at the time of the subsequent intermarriage of the parents.

In *Caballero's Succession*, 24 La. Ann. 573, however, the court gave effect to the legitimating law of the domicile of the father at the time of the marriage, although, at the time of the birth, the domicile was in Louisiana, where the legitimating effect of marriage is denied. The rule applied by this case, which regards the domicile of the father at the time of the marriage and disregards his domicile at the time of the birth of the child, is probably the one which will ultimately prevail in the United States.

In *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669, it is intimated that it is sufficient if the subsequent marriage has a legitimating effect according to the law of the domicile of the parents at the time of the child's birth, although not by the law of their domicile at the time of the marriage. The point, however, was not decided, as the law of the domicile at both periods gave the marriage that effect, though the law of New York, *lex rei sitæ*, did not.

In *Fowler v. Fowler*, 131 N. C. 169, 59 L. R. A. 317, 42 S. E. 563, *infra*, the court, following the English decisions, states the rule in a form requiring the concurrence of the law of the domicile at the time of birth and at the time of the subsequent intermarriage; but the domicile was the same at the time of both events.

In *Adams v. Adams*, 154 Mass. 290, 13 L. R. A. 275, 28 N. E. 260, where the father at the time of the birth of his illegitimate child was domiciled in Texas, and at the time of his intermarriage with the mother was domiciled in California, the court said: "The Texas statute may be laid on one side. For, even if we should hold that the Texas law imparted to the plaintiff [the child] his capacity for legitimation, which, under the facts of this case, we do not intimate, still, subject to the qualifications heretofore stated, the effect of his parents' marriage upon him must be determined by the law of California, where it took place, and where they and he then were domiciled." This was said in view of a *dictum* of the supreme court of Texas that even a void marriage would legitimate a previously born child; and it was held in this case that the child was not legitimated because the marriage was void, and its effect must be determined by the law of California, the domicile of the father at the time of the marriage.

65 L. R. A.

So far as the legitimacy of the child depends upon the validity of the subsequent intermarriage of his parents, it must, of course, be referred to the law of the place where the marriage was celebrated; but, assuming that the marriage was valid by the law of that place, the law of that place with reference to the effect of the marriage upon the legitimacy of the child is immaterial. *Munro v. Munro*, 7 Clark & F. 842; *Dalhousie v. M'Douall*, 7 Clark & F. 817; *Re Wright*, 2 Kay & J. 595, 25 L. J. Ch. N. S. 621, 2 Jur. N. S. 465, 4 Week. Rep. 541; *Re Grove*, L. R. 40 Ch. Div. 216, 58 L. J. Ch. N. S. 57, 59 L. T. N. S. 587, 37 Week. Rep. 1; *Lauderdale Peerage Case*, L. R. 10 App. Cas. 692.

Besides the foregoing cases which have expressly held that the place of marriage was immaterial, that seems to be assumed by all the cases on the subject; for, while the general rule is that the validity of a marriage is to be tested by the law of the place where it was celebrated, the effect of the marriage is, in general, to be determined by the domicile of the parties.

Again, the law of the place of the child's birth, as such, is immaterial. *Re Wright*, 2 Kay & J. 595, 25 L. J. Ch. N. S. 621, 2 Jur. N. S. 465, 4 Week. Rep. 541; *Dalhousie v. M'Douall*, 7 Clark & F. 817; *Munro v. Munro*, 7 Clark & F. 842; *Re Grove*, L. R. 40 Ch. Div. 216, 58 L. J. Ch. N. S. 57, 59 L. T. N. S. 587, 37 Week. Rep. 1; *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915; *Ives v. McNicoll*, 59 Ohio St. 402, 43 L. R. A. 772, 69 Am. St. Rep. 780, 53 N. E. 80. It is true that in *Re Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406, the court said that the legitimacy of a child, wherever questioned, is determined by the legitimacy at the time and place of its birth, but it is apparent from the context that the court really meant the domicile of the parents at the time of the birth.

Again, the domicile of the father at the time of the marriage, rather than that of the mother, governs,—at least when a subsequent marriage during the infancy of the child is relied upon. *Re Wright*, 2 Kay & J. 595, 25 L. J. Ch. N. S. 621, 2 Jur. N. S. 465, 4 Week. Rep. 541; *Munro v. Munro*, 7 Clark & F. 842; *Udny v. Udny*, L. R. 1 H. L. Sc. App. Cas. 441; *Lauderdale Peerage Case*, L. R. 10 App. Cas. 692; *Loring v. Thorndike*, 5 Allen, 257.

As above shown, the foregoing rule was applied in *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915, notwithstanding that a subsequent acknowledgment by the father, without any intermarriage, was relied upon; but this application of the rule for the reasons above stated is of doubtful correctness.

No adoption or legitimation is effected under the North Dakota statute providing that the father of an illegitimate, by publicly acknowledging it as his own, and receiving it into his family, and otherwise treating it as if it were a legitimate, thereby adopts it as such, and such child is thereupon deemed legitimate, where both father, mother, and the illegitimate were domiciled in a foreign kingdom at the time of the acts and conduct relied upon, and such acts and conduct were entirely discontinued after the father left the foreign country and came to North Dakota. *Eddie v. Eddie*, 8 N. D. 376, 73 Am. St. Rep. 765, 79 N. W. 856.

But it is otherwise when the statute does not undertake to legitimate the child, but

merely to enable him to inherit from his father. Thus, in *Van Horn v. Van Horn*, 107 Iowa, 247, 45 L. R. A. 93, 77 N. W. 846, it was held that the general and notorious recognition of an illegitimate son by his father, which will entitle him to inherit real and personal property of the father under the Iowa Code, may be sufficient, although it took place in another state where the parties resided at the time, and in which the son may have had no right to inherit. It will be observed that in this case the right to inherit did not depend upon the status of the child as a legitimate child, which fact distinguishes the case from the preceding case.

If, by the law of the domicile of the parents at the time of the child's birth and at the time of their subsequent intermarriage, such intermarriage had the effect to legitimate the child, the status thus acquired is not lost by the subsequent removal of the parents and child to another state, by the law of which the marriage would not have had that effect. *Fowler v. Fowler*, 131 N. C. 109, 59 L. R. A. 317, 42 S. E. 563.

II. Adoption.

As in case of property rights dependent upon legitimation, so in case of property rights dependent upon adoption, two distinct questions are involved: One as to the personal status of the child; and the other as to the acceptance of that status outside of the jurisdiction in which it originated for the purposes of the particular property rights in question. As adoption, however, is frequently effected by decree of court rendered with reference to the particular case, the inquiry affecting personal status is directed to the jurisdiction of the court, and not, as in the case of legitimation by general law, to the question what law governs, though undoubtedly the principles of private international law that have been applied in the determination of the latter question are instructive upon the question as to which of the parties concerned must be domiciled in a particular state or country to give its courts jurisdiction to render a decree of adoption. In most of the cases in which foreign adoption has been recognized, the child and the adoptive parents were domiciled in the state where the decree was rendered.

In *Foster v. Waterman*, 124 Mass. 594, the court refused to recognize a decree of a court of New Hampshire because the adoptive parents were, at the time, domiciled in Massachusetts, notwithstanding that the child and its natural parents were domiciled in New Hampshire. The decision was formally based upon the ground that the New Hampshire statute did not contemplate such a case; but doubtless this construction of the statute was influenced by the idea that, from an international point of view, the domicile of the adoptive parents ought to be in the state where the adoption occurs.

In *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71, where acknowledgment of the child, without any adoption proceedings, was relied upon, it was held that the law of Iowa governed, the child and the adoptive parents being domiciled there until after the marriage of the child, whose parentage was unknown. It was accordingly held there was no adoption, because the statute of Iowa on the subject was not complied with.
66 L. R. A.

In *Wolf's Appeal* (Pa.) 12 Cent. Rep. 426, 13 Atl. 760, however, the Pennsylvania supreme court, construing the statute of that state, held that the temporary residence of the adoptive parent in that state was sufficient to confer jurisdiction; and in *Van Matre v. Sankey*, 148 Ill. 536, 23 L. R. A. 665, 36 N. E. 628 (a case involving the effect of the adoption proceedings considered in the last case upon the right of the child to inherit real property in Illinois), the court regarded such construction of the statute as conclusive upon it, and accordingly recognized the status of the child as fixed by the Pennsylvania decree, though it was intimated that, as an independent proposition, it might have been held otherwise.

Assuming that the court which rendered the decree of adoption had jurisdiction, it may be argued that, as between the states of the Union, the recognition in other states of the status of the child as fixed by the decree does not depend upon principles of international law or comity, but would be compelled by the provision of the Federal Constitution requiring each state to give full faith and credit to the judicial proceedings of every other state. Perhaps this constitutional requirement would be satisfied by recognizing the status of the child as an adopted child, without conceding to him in another jurisdiction all the property rights of a natural child which attach to the status of an adopted child according to the law of the state where the adoption proceedings were had. Aside from this distinction, there is authority for the position that a decree affecting the status of a person, even if rendered by a court of competent jurisdiction, only affects his status within the state in which it is rendered; and that the constitutional provision referred to is satisfied by conceding his status, as established by the decree, within that state, without conceding that it follows him when he goes outside of the state.

Thus, in *Smith v. Derr*, 34 Pa. 126, 75 Am. Dec. 641, it was held that legitimation, even by decree of a court of competent jurisdiction in another state, would not be recognized in Pennsylvania for the purpose of descent of real property in that state. This principle was applied in *McCreery v. Davis*, 44 S. C. 195, 28 L. R. A. 635, 51 Am. St. Rep. 794, 22 S. E. 178, to a decree of divorce rendered in another state, even upon the assumption that the court had jurisdiction to render the decree.

In either view, the question as to whether the status of a person, as established by a decree of adoption rendered by a court of competent jurisdiction, will be recognized in another state,—at least for the purposes of a particular property right which does not, by the law of the latter state, attach to such status,—is one of comity, depending upon principles of private international law. The courts before which the question has arisen seem to have so regarded it, and none of them make any reference to the constitutional provision.

Considering the question as one of comity, the public policy of the forum is to be consulted. The Illinois supreme court has expressly adopted the rule that the status as established by adoption in another state will be recognized only to the extent that it is consistent with the laws and public policy of Illinois; and, upon that ground, it is held in *Keegan v. Geraghty*, 101 Ill. 26, that a child adopted in Wisconsin could not inherit real property in Illinois from a natural child of the

adoptive father, although, by the law of Wisconsin, she had the status of a sister of such natural child, and, as such, the capacity to inherit from the latter in that state. The decision is upon the ground that the statute of Illinois regulating adoption denies the right of an adopted child to take by representation from the collateral or lineal kindred of the adoptive parents.

Upon the other hand, it has been held that the rights of the adopted child with reference to inheritance, as fixed by the law of the state where the adoption proceedings were had, cannot be enlarged or extended by the law of the state where the property is situated and the question arises. Thus, in *Sunderland's Estate*, 60 Iowa, 732, 13 N. W. 655, it was held that a child adopted in Louisiana, the adoption laws of which were construed to exclude adopted children from representing their adoptive parents, could not take the share of her adoptive father in the estate of his father, who was domiciled in Iowa and survived his son (the adoptive father), though it was apparently assumed that she could have taken such share if she had been adopted in Iowa. A dissenting opinion in the case, without disputing the correctness of the majority's position that the adopted child would be excluded from such inheritance in Louisiana, held that since, by the law of Louisiana, she was entitled to inherit from her adoptive father, she had the status of an heir of such father within the Iowa Code, providing that if any one of the children of an intestate be dead, the heirs of such child shall inherit her share.

While the *lex rei sitæ* or *lex domicilii decedentis* may operate to restrict the status of an adopted child as established in another jurisdiction, and withhold from it some of the property rights that would attach thereto under the law of the latter jurisdiction, there is no doubt as to the general principle that the status acquired by adoption in a state or country having jurisdiction will be recognized, both for the purpose of the descent of real property, and the distribution of personal property, in other states or countries,—at least in those whose laws also provide for adoption.

This rule has been expressly applied to the descent of real property by *Van Matre v. Sankey*, 148 Ill. 536, 23 L. R. A. 665, 36 N. E. 628; *Gray v. Holmes*, 57 Kan. 217, 33 L. R. A.

207, 45 Pac. 596; *Ross v. Ross*, 129 Mass. 246, 37 Am. Rep. 321; *Melvin v. Martin*, 18 R. I. 650, 30 Atl. 467; *McColpin v. McColpin* (Tex. Civ. App.) 77 S. W. 238.

And, conversely, the *lex rei sitæ* or *lex domicilii decedentis*, as such, cannot be looked to to create the status. *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71.

Or to enlarge the status beyond the limits fixed by the law of the place where it originated,—at least unless the *lex rei sitæ* expressly so provides. *Sunderland's Estate*, 60 Iowa, 732, 13 N. W. 655.

In *Markover v. Krauss*, 132 Ind. 204, 17 L. R. A. 806, 31 N. E. 1047, it was assumed that the question whether a child adopted in another state was embraced by the expression "children by former wife," in an Indiana statute limiting the dower of the second wife to a life estate when her husband leaves "children by a former wife," was the same as if the children had been adopted in Indiana; but the Indiana statute expressly provided that a child adopted in another state should have the same rights as if the adoption had occurred in Indiana; and, so far as appears, the child, even by the law of the place where the adoption occurred, had the full status, for all purposes, of a natural child of the adoptive parents.

A distinction is to be observed between those cases in which the question involved depends upon the legal status of the adopted child, and those which do not necessarily involve, or depend upon, such status. Thus, in *New York Ins. & T. Co. v. Vele*, 161 N. Y. 11, 76 Am. St. Rep. 238, 55 N. E. 311, the court held that, even conceding, for the purposes of the case, that a child adopted in a foreign country had, for all purposes, the legal status of a lawful child of the adoptive parents, she was not entitled to take, under a bequest to the lawful issue of her adoptive mother, in a will made by a person domiciled in New York. The decision is upon the ground that the will must be interpreted according to the law of New York, by which the words "lawful issue" are ordinarily, and in the absence of a contrary intention manifested by the will, taken to mean descendants.

The domicil of an adopted child while a minor follows the domicil of the adoptive parents when they remove to another state. *Woodward v. Woodward*, 87 Tenn. 644, 11 S. W. 892. G. H. P.

NORTH DAKOTA SUPREME COURT.

Mabel MANNING, *Resp't.*,
v.

City of DEVILS LAKE *et al.*, *Appts.*

(.....N. D.....)

*1. The validity of a contract of a municipal corporation, which can be performed only by a resort to taxation, depends

*Headnotes by YOUNG, Ch. J.

NOTE.—As to taxation to pay for county bridge bonds, see, in this series, *Burnett v. Maloney*, 34 L. R. A. 541.

As to public purposes generally, for which money may be raised by taxation, see *note to Daggett v. Colgan*, 14 L. R. A. 474. 65 L. R. A.

upon the power of such corporation to levy and collect a tax for that purpose.

2. The taxing power of a city cannot be lawfully invoked by it to raise funds to construct a bridge which is not located upon a street or highway having a legal existence.

3. The taxing power of a city corporation can be exercised only for corporate purposes. The construction and maintenance of a bridge outside of its territorial boundaries, the purpose of which is not to serve the convenience of its inhabitants, but the convenience of the inhabitants of an outlying district, and to promote the business and commercial interests of the city by increasing the trade of its business men,

is not such a corporate purpose as will sustain the exercise of the power of taxation.

4. **The incidental and indirect benefits which accrue to the inhabitants of a city from the development of its commercial interests will not sustain the power of taxation.**

(January 20, 1904.)

A PPEAL by defendants from a judgment of the District Court for Ramsey County granting a temporary injunction restraining the issuance and negotiation of certain bonds. *Affirmed.*

The facts are stated in the opinion.

Mr. B. D. Townsend for appellants.

Mr. John C. Adamson, for respondent:

A municipal corporation has no power to make gifts or donations of property or money; hence the attempted donation of the city's money to the citizens' committee in the case at bar is clearly void.

See N. D. Const. § 185.

If the possession or right to use any corporate power is in doubt, the doubt prevails, and the power is denied.

Van Antwerp v. Dell Rapids Twp. 3 S. D. 305, 53 N. W. 82; *Minturn v. Larue*, 23 How. 435, 16 L. ed. 574; *Hanger v. Des Moines*, 52 Iowa, 193, 35 Am. Rep. 266, 2 N. W. 1105; *Dill. Mun. Corp.* 4th ed. § 89.

Young, Ch. J., delivered the opinion of the court:

The defendants appeal from an order of the district court of Ramsey county continuing a temporary injunction, made upon an order to show cause. The action in aid of which the restraining order was issued is brought for the purpose of permanently enjoining the defendants from issuing and negotiating certain bonds which it proposes to issue for the purpose of constructing and maintaining a certain road or bridge across an arm of Devils Lake. The plaintiff alleges in her complaint that she is a resident, property owner, and taxpayer in the city of Devils Lake; that said city is a municipal corporation organized under the laws of this state; that, at a city election called for that purpose, a majority of the electors voted to issue bonds of said city, in the sum of \$6,500, for the purpose of paying the cost of construction and maintenance of a certain bridge, known as the "Pelican Point bridge," and for paying outstanding warrants of the city of Devils Lake, issued in aid of such purpose; that the defendant Ole Skratass, the auditor of said city, has advertised for bids for said bonds; that said Pelican Point bridge is located several miles outside of the corporate limits of said city; that the acts of the defendant and its officers in attempting to is-

sue and dispose of said bonds for the purpose aforesaid are *ultra vires* and wholly void. The complaint further alleges that the officers of said city have issued a large number of city warrants, to wit, in the sum of at least \$6,000, to aid in the construction of said bridge, and that the same are unpaid, and are about to issue other warrants and expend the moneys of the corporation for said purpose, and prays that defendants be restrained and enjoined from disposing of and issuing said bonds, and from diverting any funds of the corporation to said purpose, and from paying the outstanding warrants. Upon the foregoing complaint and upon plaintiff's affidavit a temporary restraining order was issued, together with an order to show cause why defendants should not be restrained from negotiating said bonds and paying said warrants during the pendency of the action. At the hearing of the order to show cause, the defendants filed a number of affidavits setting forth the importance of the object of the proposed expenditure to the business interests of the city of Devils Lake. The court made an order that the temporary restraining order theretofore issued be continued until the final determination of the action. From this order the defendants appeal.

We are of opinion that the trial court did not err in refusing to vacate the restraining order. The question involved is one entirely of corporate power. The facts are not in dispute. From the statement of facts prefixed to appellants' brief, it appears that the so-called Pelican Point bridge is situated in Lake township, between 4 and 5 miles southwest of, and outside of the corporate limits of, the city of Devils Lake, and consists of an embankment of earth and stone, connecting the north and south shores of Devils Lake at its narrowest point. In the center, where the water is deepest, there is a pontoon bridge or barge, about 100 feet in length, connecting the embankments. The affidavits show that the construction of this so-called bridge was commenced in the spring of 1900 by the business men of the city of Devils Lake, acting through a citizens' committee, and that a large sum of money was raised by private subscription and expended upon its construction. The land on the north side of the lake belongs to the state military reservation, and by chapter 134, p. 173, Laws 1901, the legislature granted the right to locate a highway thereon, and a highway was located by the township of Lake, in which said military reservation is situated, connecting the embankments with the public highways leading to the city of Devils Lake. The land on the south side is included in the Ft. Totten Indian reservation. The affidavits state that

the city of Devils Lake acquired a right of way over the tract of land abutting on the south side from the allottee Indian owning the same, with the consent of the United States government. The road, as constructed by the citizens' committee, aside from the pontoon bridge in the center, extended about 3 feet above the surface of the water. Since 1901 the waters of Devils Lake have risen about 38 inches, necessitating the raising of the embankments. Some \$12,000 have been expended. The expenditures now proposed are necessary to put the road in permanent and safe condition. The affidavits filed by the defendants show that there is a large territory south of the city of Devils Lake, and a large number of people tributary, who will do their trading at that city if the bridge is constructed and maintained; that "the amount of increased trade and business brought to the city of Devils Lake during the time said highway was passable in the summer of 1901 . . . aggregated an average of approximately \$250 a day; that said increased business was general in character, and a direct benefit to all engaged in business in said city of Devils Lake at said time." The affidavits also show that there are more than 1,000 allottee Indians residing on the Ft. Totten Indian reservation, on the south side of the lake, who are largely engaged in agricultural pursuits, and who will do their trading at the city of Devils Lake, providing the highway in question is maintained; that there are a large number of persons in "the Cheyenne River country" who are "naturally tributary to the city of Devils Lake," and who would "market their wood and purchase their supplies at Devils Lake if the bridge were maintained;" that there are a large number of instructors in the industrial school on the Indian reservation; that said school consumes a vast amount of all kinds of merchandise and supplies, a large portion of which would be purchased at said city if said highway is opened for travel; that there is approximately 100,000 acres of unoccupied and unallotted land on the Indian reservation, which it is proposed to open to settlers, and that this, when occupied and cultivated, will increase the commercial importance of the city of Devils Lake if said highway is maintained; that the completion and maintenance of said highway communicating with the land south of Devils Lake "will greatly increase the amount of marketing and trading done at said city of Devils Lake, and otherwise greatly improve and extend its commercial relations." It is also stated that "the construction, completion, and maintenance of said highway known as 'Pelican Point bridge' is a commercial necessity to said city, and that it will greatly ex-

tend the commercial importance and trade relations of the said city; that it will greatly increase the amount of grain marketed in said city, and very materially increase and extend the territory tributary to the said city of Devils Lake, and will be a direct benefit, to a very appreciable extent, to every merchant, property owner, taxpayer, and resident of said city."

There are two sufficient reasons why the proposed expenditure is illegal. It must be conceded that the validity of the bonds and warrants in question cannot be sustained unless the city has power to provide for their payment by taxation. It has been properly said that "the issue of bonds by the city, whatever provision may be made for their redemption, involves the possible, and not improbable, consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds, or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized." *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39. The validity of a contract of a municipal corporation which can only be fulfilled by resort to taxation depends on the power to levy a tax for that purpose. *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Sharpless v. Philadelphia*, 21 Pa. 147, 167, 59 Am. Dec. 759; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Allen v. Jay*, 80 Me. 127, 11 Am. Rep. 185; *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 188, 3 Am. Rep. 30. It is proposed to expend funds derived from a sale of these bonds upon a road or bridge which is not a legal highway. Such an expenditure will not authorize the imposition of a tax. "It has been decided that an assessment for making and opening a road, where no road has in fact been laid out, and where, consequently, the land is the subject of private ownership, and no highway would exist when the money was expended, would be illegal and void." 1 *Coolsey*, Taxn. 3d ed. 216; *Philbrook v. Kennebec County*, 17 Me. 196; *People ex rel. Butler v. Saginaw County*, 26 Mich. 22; *Pacific Bridge Co. v. Kirkham*, 54 Cal. 558; *Snyder v. Foster*, 77 Iowa, 638, 42 N. W. 506. See also *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366. Bridges constitute a part of the public highway. § 1091, Rev. Codes. Section 1053, Rev. Codes, which is a part of chapter 17 of the Political Code of 1899, commits the power to open highways outside of the limits of incorporated cities, villages, or towns, "all proceedings relative thereto," and "all matters connected therewith," to the board of county commissioners or board of township supervisors. Section

1114, Rev. Codes 1899, charges township supervisors with the care and supervision of roads and bridges within their respective townships. It is not claimed that the county commissioners of Ramsey county, or the supervisors of Lake township, in which the "bridge" is situated, have taken any action whatever either to locate it or recognize it as a highway. It has not acquired a legal character as a public highway by user, under § 1050, Rev. Codes 1899, and there is no pretense that it was laid out and established as a highway under chapter 17 of the Political Code of 1899. On the contrary, it was constructed, as we have seen, by private individuals and by private subscription. The duty of maintaining and keeping in repair a public highway, regularly established (that is, a legal highway), may be enforced, and the public interests thereby protected. See 2 Cooley, Taxn. 3d ed. 1293, and cases cited. The construction of this road imposed no such obligation upon the individuals who constructed it, or upon the county or township in which it is situated. In short, there exists no duty to maintain and keep it in repair which the public can enforce. *Travis v. Skinner*, 72 Mich. 152, 40 N. W. 234; *Anthony v. Adams*, 1 Met. 284; *Goshen v. Myers*, 119 Ind. 196, 21 N. E. 657; *Owen County v. Washington Twp.* 121 Ind. 379, 23 N. E. 257; *Houfe v. Fulton*, 34 Wis. 608, 17 Am. Rep. 463; *State ex rel. Neeves v. Wood County*, 41 Wis. 28. If, therefore, no other objection existed than that just considered, it alone would be sufficient to render the proposed expenditure illegal.

But aside from the fact that it is proposed to expend funds derived by local taxation upon a bridge which is not located upon a legal highway, the proposed expenditure is illegal for another reason. It is not for a corporate use or purpose, but is, on the contrary, for private benefit. The doctrine of the cases on this point is stated in 2 Dillon on Municipal Corporations, 4th ed. § 736 (587), as follows: "The taxing power of the state consists in its authority to levy and collect taxes and assessments, which are in the nature of special taxes. Taxes (including in the term assessments) are burdens or charges imposed by the legislature, or under its authority, upon persons and property, to raise money for public, as distinguished from private, purposes, or to accomplish some end or object public in its nature. There can be no legitimate taxation to raise money, unless it be destined for the uses or benefit of the government, or some of its municipalities or divisions invested with the power of auxiliary or local administration. A public use or purpose is of the essence of the tax." Again 65 L. R. A.

it is said in 2 Beach on Public Corporations, § 1440, that "municipal taxation must be for local purposes only, and for a public use, and the rule of strict construction should always be applied." The development of the commerce or trade of a city is not a corporate purpose. Instances are numerous where cities have attempted to promote their commercial importance by aiding manufacturing and industrial enterprises through the aid of local taxation, and in every instance the attempted exercise of power, when called in question, has been condemned as unlawful. To bring any particular subject within the description of a corporate purpose, "it must appear to be money necessary to the execution of some corporate power, the enjoyment of some corporate right, or the performance of some corporate duty, as established by law or by long usage." *Spaulding v. Lowell*, 23 Pick. 71. Municipal corporations "possess only a limited right to bind themselves and the inhabitants and property within their respective limits by civil contracts. . . . Their contracts will be valid when made in relation to objects concerning which they have a duty to perform, an interest to protect, or a right to defend; but here is the extent at once of their right and their power. They cannot engage in enterprises foreign to the purposes for which they were incorporated, nor assume responsibilities which involve undertakings not within the compass of their corporate powers." *Vincent v. Nantucket*, 12 Cush. 103. Neither will they be bound by the express vote of the majority to the performance of contracts or other legal duties not coming within the scope of the objects and purposes for which they are incorporated. *Anthony v. Adams*, 1 Met. 284. In *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361, it was said that the power to govern a city does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes. "The charter confers all the powers usually granted to a city for the purposes of local government, but that has never been supposed, of itself, to authorize taxes for everything which, in the opinion of the city authorities, would 'promote the general prosperity and welfare of the municipality.' Undoubtedly, the development of the water power in the rivers that traverse the city would add to the commerce and wealth of the citizens; but certainly power to govern the city does not imply power to expend the public money to make the water in the rivers available for manufacturing purposes." In 1 Cooley on Taxation, 3d ed. 206, it is said that, "however important it may be to the community that individual citizens

should prosper in their industrial enterprises, it is not the business of government to aid them with its means. Enlightened states, while giving all necessary protection to their citizens, will leave every man to depend for his success and prosperity in business on his own exertions, in the belief that by doing so his own industry will be more certainly enlisted, and his prosperity and happiness more probably secured. It may, therefore, be safely asserted that taxation for the purpose of raising money from the public, to be given or even loaned to private persons, in order that they may use it in their individual business enterprises, is not recognized as an employment of the power for a public use. In contemplation of law, it would be taking the common property of the whole community and handing it over to private parties for their private gain, and consequently unlawful. Any incidental benefits to the public that might flow from it could not support it as legitimate taxation." See also cases cited at note 1.

It may be safely stated that no case can be found sustaining an expenditure by a city, as for a corporate use and purpose, when the principal object of the expenditure is to promote the trade and business interests of the city, and the benefit to the inhabitants is merely indirect and incidental. The cases condemning such efforts are almost numberless. In 1872 the business and manufacturing district of Boston was destroyed by fire. The legislature of Massachusetts, called in special session for that purpose, passed an act authorizing the city of Boston to issue bonds to the amount of \$20,000,000 to render aid in the way of loans in rebuilding the burned district. In a well-reasoned opinion, the soundness of which has never been questioned, but always approved, the supreme court of that state held that the proposed expenditure was not for a public use or purpose, and would not sustain the power of taxation, and that the act was unconstitutional and void. We quote at length from the very lucid opinion in that case: "The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private, and not a public, object. However certain and great 65 L. R. A.

the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public or to the state which results from the promotion of private interests and the prosperity of private enterprises or business does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion. . . . The power of the government, thus constituted, to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to wit, public uses and the public service. This power, when exercised in one form, is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to wit, the necessities of organized society, and in the end by which alone the exercise of either can be justified, to wit, some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will justify the exercise of these sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control in each. An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. . . . The individual, by reason of his capacity, enterprise, or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital, and entrust it to others who will use it to better advantage for the interests of the community. But it needs

no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation." [*Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.] See also *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 167, 3 Am. Rep. 30; 1 Dill. Mun. Corp. 4th ed. § 159, and cases cited; also *State v. Osawkee Twp.* 14 Kan. 419, 19 Am. Rep. 99; *Central Branch Union P. R. Co. v. Smith*, 23 Kan. 745; *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423; and particularly *Jacksonport v. Watson*, 33 Ark. 704.

The facts of this case bring it within the principle of the cases to which we have just referred. The proposed expenditure is not for a bridge upon the streets of the city, nor at or near its boundaries, for the convenience of its inhabitants. On the contrary, the "bridge" in question is almost 5 miles from the city limits, and is neither a necessity, nor even a convenience, to the inhabitants of the city for traveling purposes. Its utility and avowed purpose is to provide the inhabitants of an outlying and remote district lying south of the lake with a convenient mode of reaching the city of Devils Lake to do their trading, and thereby increase the trade of the merchants and business men of the city. The direct purpose of the expenditure is for the benefit of those who will travel the road, and the business men who will profit by their trade. The benefit which will accrue to the inhabitants of the city is merely incidental and indirect. As has already been pointed out, such benefits do not constitute a public purpose for which a tax may be imposed. The expenditure is essentially for a private purpose. For this reason, and independent of all other considerations, the bonds in question are unauthorized and void.

In reaching this conclusion, we do not un-

65 L. R. A.

qualifiedly assent to the contention of plaintiff's counsel that the boundaries of a city mark the limits of the lawful exercise of its corporate power, and that there can be no expenditure for a corporate purpose, the object of which is located outside of its boundaries. For obvious reasons, the exercise of its political and governmental powers is restricted by its boundaries. But, in the exercise of other corporate functions, which affect the health, safety, and convenience of its inhabitants, and may be said to be of a private nature, the reason for the limitation which rests upon the exercise of its governmental and political power does not exist. For this reason it has been generally held that a city can expend corporate funds for parks, drains, sewers, waterworks, breakwaters, pesthouses, and cemeteries. It has also been held that they may construct bridges at or immediately outside of their boundaries, when necessary to serve the convenience of their inhabitants. Such was the holding in the *Brooklyn Bridge Case* (*People ex rel. Murphy v. Kelly*, 76 N. Y. 475), and for the same reasons the right has been sustained in numerous other cases. The power of a city corporation to exercise functions of a private nature outside of its limits is recognized to some extent by the statute in enumerating the powers of city councils. See subdivisions 7, 60, § 2148, and § 2503, Rev. Codes 1899. But as already stated, the "bridge" here in question cannot be said to be a convenience to the inhabitants of the city of Devils Lake. The proposed expenditure cannot, therefore, be sustained as for a corporate purpose.

The order appealed from will be affirmed.

All concur.

Application for rehearing denied April 11, 1904.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania *ex rel.* Arthur WADSWORTH

v.

William SHORTALL.

(206 Pa. 165.)

1. A condition of qualified martial law exists where the governor is compelled to call out the militia, and direct it to restore order, when rioting and disorder exist in certain counties of the state by reason of a strike.
2. The authority of the ordinary civil officers of the government is subordinated to that of military officers when the governor, in response to a call for military aid to restore order, which the civil officers are not able to do, details a military officer with troops at his command to perform that duty.
3. While the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war, although their acts

are subject to review by the civil authorities, which is not the case where actual war exists.

4. A military officer charged with the duty of suppressing a riot cannot be punished by the civil authorities for acts which, at the time, seemed necessary for the accomplishment of his commission.
5. A private soldier who has been stationed to guard a residence, which, during a time of rioting and disorder, has been dynamited, and against which threats have been made to repeat the offense, with orders to shoot to kill any person found prowling about the house, is guilty of no crime if he shoots a person who approaches the building and refuses to obey his command to halt.
6. The supreme court has both the authority and the duty, on habeas corpus in favor of a private soldier held on a criminal charge for acts performed in the course of his duty, to see that at least a prima facie case of guilt is supported by the evidence against him.

(April 17, 1903.)

NOTE.—Martial law when there is no actual war.

- I. Scope of note, 193.
- II. Definition of martial law, 193.
- III. Power to proclaim and maintain martial law, 195.
- IV. Discretion and authority of military when called to aid civil power, 198.
- V. Power of military, in time of actual war, to arrest and punish citizens in places where civil courts are open, 200.
- VI. Conclusion, 207.

I. Scope of note.

Cases which involve the right of the military, in time of actual war, invasion, or insurrection, in places where the same actually exists and is present, will not be considered in the note; nor will those which relate to arrest, trial, or judgment of those in any way connected with the military service; but the note will be confined strictly to those cases which have arisen out of domestic troubles calling for the aid of the military, and also those cases where citizens have been arrested, tried, convicted, and punished in time of actual war or insurrection, but in places where the courts were open and running freely and without hindrance, for the transaction of ordinary criminal business.

II. Definition of martial law.

As will be seen by the cases which form this subdivision, and to a certain extent by the cases throughout the note, there has been some slight difference among the authorities, both civil and military, as to what is martial law. A few have contended that it includes that law which governs persons actively engaged in, or connected with, the military service, and one or two of such authorities have insisted that it relates exclusively to such. But the better opinion seems to be that it is that law which, of necessity, obtains in and governs a tract of country in which there are active military operations, or

a tract, province, or country after it has been subjugated by military power and before civil authority has been formed and been enabled to exert itself. The cases which follow are mainly those in which such law is defined.

In *Re Egan*, 5 Blatchf. 319, Fed. Cas. No. 4,303, Judge Nelson of the Supreme Court of the United States, in defining martial law, said: "All respectable writers and publicists agree in the definition of martial law,—that it is neither more nor less than the will of the general who commands the Army. It overrides and suppresses all existing civil laws, civil officers, and civil authorities, by the arbitrary exercise of military power; and every citizen or subject—in other words, the entire population of the country within the confines of its power—is subjected to the mere will or caprice of the commander. He holds the lives, liberty, and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge, and executioner. His order to the provost-marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing or not, at his will. If permitted, it may be before a drum-head court-martial, or the more formal board of a military commission; or both forms may be dispensed with, and the trial and condemnation be equally legal, though not equally humane and judicious."

He further stated that Lord Wellington, in one of his despatches from Portugal, in 1810, in speaking of martial law, observes that, as applied to persons, excepting officers and soldiers and followers of the Army, it is neither more nor less than the will of the general of the Army, and that he punishes, either with or without trial, for crimes either declared to be so, or not so declared by any existing law, or by his own order; and that, in a speech in the House of Lords, he afterwards expressed the same opinion, and added: "In fact, martial law means no law at all." He further said: "This be-

APPPLICATION for a writ of *habeas corpus* to secure the release of petitioner from the custody of a constable who had placed him under arrest under a warrant charging him with manslaughter. *Petitioner discharged.*

The facts are stated in the opinion.

Messrs. Frederic W. Fleits and John F. Whalen for relator.

Messrs. M. P. McLoughlin and George Dyson for respondent.

Mitchell, J., delivered the opinion of the court:

A somewhat full statement of the facts will be conducive to the proper understanding of the case.

During the summer of 1902 a strike, be-

ginning with a labor union known as the United Mine Workers of America, spread through nearly the whole of the anthracite coal region in Pennsylvania. As time progressed it was accompanied with increasing disorder and violence on the part of the strikers and their sympathizers, so that threats and intimidation, not only of men, but of their women and children, rioting, bridge burning, stoning and interference with railroad trains, destruction of property, and killing of nonunion workmen, became of frequent occurrence. The communities affected were either in secret sympathy with these acts, or lacked the courage to put an end to them. Among the places where the disorder was greatest was Shenandoah, in Schuylkill county. There

ling the nature and extraordinary character of martial law, which, as observed by Sir Matthew Hale, is not law, but something indulged rather than allowed as law, all authorities agree that it can be indulged only in case of necessity; and that, when the necessity ceases, martial law ceases." He quoted from one whom he characterized as "a distinguished civilian," that, "when foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community; and, while the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society; but no longer." He further said that the nature of this responsibility was explained by the Judge Advocate General of England, before a committee of the House of Commons, in the case of martial law declared in Ceylon, and the explanation had been approved by the law officers of the Crown. That, in answer to a question put by Sir Robert Peel, he observed: "I believe the law of England is, that a governor, like the Crown, has vested in him the right, where the necessity arises, of judging of it, and being responsible for his work afterwards, so to deal with the laws as to supersede them all, and to proclaim martial law for the safety of the colony." And again, in answer to a question put by Mr. Gladstone: "I say he is just as responsible as I am responsible for shooting a man on the King's highway who comes to rob me. If I mistake my man, and have not, in the opinion of the judge and jury who try me, an answer to give, I am responsible." *Ibid.*

There is this difference between the position of a sheriff and that of a commanding officer in the ordinary course of a campaign: The force used by the sheriff is on persons who, though acting illegally, are entitled to the protection of the law; while the general employs force against an enemy whom it is his mission to destroy, and is responsible for what he does to the President or to a military tribunal, and not to the courts. If rioters are followed and cut down needlessly after they have dispersed, it is murder; but a general owes no account, save to his own conscience, for denying quarter to a flying enemy. The rule holds good when insurgents take the

field against the government; and they may be dealt with in any way which the laws of war permit in the case of a foreign enemy. There is, and from the nature of the case can be, no distinction in this regard between an intestine and a foreign war, because the government would otherwise be at a disadvantage in dealing with rebellion. But the rule is confined to the forces arrayed on either side, and does not extend to the citizens who take no part in the military operations, though they may sympathize with the insurgents. Such is the doctrine of the common law as given by Sir Matthew Hale, with the aid of an experience gathered from the protracted struggle which, fought out in every county in England, ended in the deposition of the King, and placed Cromwell in his seat. "Martial law is something indulged, rather than allowed, as law, the necessity for discipline in our Army being that which alone can give it countenance. And this indulged law was only to extend to members of the Army, or those of the opposite Army, and was never so much indulged as to be executed upon others; for others who are not listed under the Army had no color or reason to be bound by military constitutions applicable only to the Army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were subject, though it were a time of war." Hare, *Am. Const. Law*, Lecture XLII.

The above author then proceeds to say: "This statement implies that an indictment could not have been sustained or damages recovered against the officers on either side for acts done for the maintenance of discipline in their respective armies, nor, as it would seem, against them, or the men under their command, for death or wounds inflicted in the prosecution of hostilities. Such clearly would have been the case as regards the commanders of the royal forces; and, had the rebellion been subdued, its leaders would presumably have been tried and convicted for treason, and not for the acts which went to make up the sum of that offense. The line is distinctly drawn in Chief Justice Cockburn's charge to the grand jury with reference to the indictment for murder preferred against Colonel Nelson and Lieutenant Brand, as members of the court-martial which had condemned George Gordon and Samuel Clark, . . . during the negro rebellion in Jamaica: 'A rebel in arms stood in the position of a public

the police and the sheriff, in attempting to preserve the peace, were overpowered and beaten by mobs of strikers, and several citizens killed. The sheriff having called upon the governor, the latter first ordered out a portion of the militia, and subsequently, on further call, the entire division of the National Guard, on October 6, 1902, by general order No. 39.

The text of this order, which is important, is as follows: "In certain portions of the counties of Luzerne, Schuylkill, Carbon, Lackawanna, Susquehanna, Northumberland, and Columbia, tumult and riot frequently occur, and mob law reigns. Men who desire to work have been beaten and driven away, and their families threatened. Railroad trains have been delayed and

stoned, and tracks torn up. The civil authorities are unable to maintain order and have called upon the governor and commander-in-chief of the National Guard for troops. The situation grows more serious each day. The territory involved is so extensive that the troops now on duty are insufficient to prevent all disorder. The presence of the entire division, National Guard of Pennsylvania, is necessary in these counties to maintain the public peace. The major general commanding will place the entire division on duty, distributing them in such localities as will render them most effective for preserving the public peace. As tumults, riots, mobs, and disorder usually occur when men attempt to work in and about the coal mines, he will

enemy. You might kill him, refuse him quarter, and deal with him in all respects as a public enemy. The jury must not confound with martial law applied to civilians what had been commonly done at many epochs of English history in the treatment of rebels taken in the field or in pursuit. . . . It was an egregious mistake to suppose that the punishment which might be inflicted' if a mutiny broke out in a ship or in a regiment 'formed any part of martial law. There was one law paramount to all other laws, and this was, where illegal violence is used you may defend yourself, and repress that violence by any amount of force necessary for that purpose. You were not bound to submit to injuries inflicted by a man who attacks you with murderous intent, and wait for the redress which might afterwards follow. To use a common expression, you at once take the law in your own hands, and kill the offender by any means in your power. . . . But that was not martial law; it was part and parcel of the law of England. It was a paramount right, recognized by all civilized countries,—the right, when violence is threatened, to quell it at once by any force which may be necessary. . . . Now the question before the jury was whether, for the suppression of rebellion, you might not subject persons who are not actively engaged in it, and whom you could not kill upon the spot, to a law which was in this sense entirely exceptional, and to be carried into execution in an exceptional way. There was no authority for the support of any such proposition.' Annual Register N. S. for the year 1867 (London, pp. 230, 234)." *Ibid.*

After giving this quotation from the charge of the chief justice, Hare says: "Earnest as was the chief justice, the grand jury ignored the bill,—as English and American jurors are apt to do when they believe that soldiers have acted in good faith for the defense of society under difficult circumstances and in seasons of extreme peril." *Ibid.*

In the proceedings in Parliament relating to the liberty of the subject, which resulted in the allowance of the petition of right by King Charles the First, one of the grievances mentioned in the 7th preamble was that divers commissions, under His Majesty's Great Seal, had issued forth, by which certain persons had been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against 65 L. R. A.

such soldiers and mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanor whatsoever; and, by such summary course and orders as are agreeable to martial law, and are used in armies in time of war, to proceed to the trial and condemnation of such offenders, and then to cause to be executed and put to death according to the martial law, and that as by preamble 8; that, by pretext whereof, some of His Majesty's subjects had been, by some of said commissioners, put to death; when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to, have been adjudged and executed; and prayed, among other things, that no freeman in any such manner as before-mentioned should be imprisoned or detained. Darnel's Case, 3 How. St. Tr. 223.

In *Grant v. Gould*, 2 H. Bl. 69, 3 Revised Rep. 342, Lord Loughborough said that martial law, such as is described by Hale, and as is also marked by Mr. Justice Blackstone, does not exist in England at all. That where martial law is established and prevails in any country it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in the Kingdom of Great Britain; which was contrary to the Constitution, and which had been for a century previous to 1792 totally exploded. In this case the King's bench denied a prohibition to prevent the execution of a sentence imposed upon the prisoner by a court-martial after a trial according to military law, the court having found and decided that he was a soldier, and therefore subject to its jurisdiction.

III. Power to proclaim and maintain martial law.

The power to proclaim and maintain martial law in the United States generally resides only in the Congress, and, in each of the several states, in the legislature thereof. Some judges, however, have asserted that, in the absence of the legislature, in a case of necessity both the Federal and state executive may temporarily declare the same to exist, and the opinion in *Com. ex rel. WADSWORTH V. SHORTALL* states that the executive of Pennsylvania has the power to is-

see that all men who desire to work, and their families, have ample protection. He will protect all trains and other property from unlawful interference, will arrest all persons engaging in acts of violence and intimidation, and hold them under guard until their release will not endanger the public peace, and will see that threats, intimidations, assaults, and all acts of violence cease at once. The public peace and good order will be preserved upon all occasions and throughout the several counties, and no interference whatsoever will be permitted with officers and men in the discharge of their duties under this order. The dignity and authority of the state must be maintained, and her power to suppress all lawlessness within her borders be asserted."

sue a proclamation or declaration which he denominates "qualified martial law."

The state of Rhode Island, either previous to, or after, her admission to the Union, and by her adoption of the Constitution of the United States, did not form a state constitution, but continued as a state under the provisions of her provincial charter from the English King in 1663, with such alterations as the legislature of the state deemed necessary to adapt it to its conditions as an independent state. This continued till 1841, the legislature of the state having had presented to it memorials asking for the formation and adoption of a state constitution, which up to that time it had ignored. Thereupon certain so-called "suffrage associations" were formed, and the result of their action was that a mass convention was called at which a constitution was adopted and provisions made for voting for its adoption by the people of the state, and its supporters claimed that it had been adopted by the people, and, under an election held by virtue of it, one Dorr had been elected governor, and he asserted his right to act as such, and, it being disputed by the hitherto regular authorities under the old charter, he proceeded to raise an armed force to assert the right. Thereupon the general assembly, acting under the old charter, passed an act declaring that "the State of Rhode Island and Providence Plantations is Hereby Placed under Martial Law, and the Same is Declared to be in Full Force until Otherwise Ordered by the General Assembly, or Suspended by Proclamation of His Excellency the Governor of the State;" and on the day following the governor of the state, who had been elected under the provisions of the charter, issued his proclamation reciting the act declaring martial law, and, among other things, warning "all persons against any intercourse or connection with the traitor, Thomas Wilson Dorr, or his deluded adherents, now assembled in arms against the laws and authorities of this state," and commanding Dorr and his adherents to throw down their arms and disperse. In *Luther v. Borden*, 7 How. 1, 12 L. ed. 581, these facts appeared; and it further appeared that the defendant, acting under the authority of the original governor, and claiming that the plaintiff was an adherent of the traitor, Dorr, for the purpose of arresting him, broke into and entered his house; and in an ac-

Under this order the Eighteenth Regiment, being part of the troops under command of Brigadier General Gobin, was stationed in and near Shenandoah. Several houses occupied by nonunion men had been dynamited, and attempts made upon others. On October 8th, therefore, General Gobin issued the following order: "At 5:30 P. M. a detail of one corporal and six men should be put at the house of Barney Bucklavage, No. 1118 West Coal street; this house was dynamited on the night of October 6th and is occupied by a woman and four small children, and for the present I deem it best to guard it; my instructions to the guard have been that they shall keep a sentry at the front door sitting inside the house with the door ajar, and one sentry sitting just outside the rear door under the porch, and

tion by him for the trespass the foregoing facts were set up as a justification. In delivering the judgment of the Supreme Court of the United States affirming the judgment of the circuit court, which had received evidence of the facts stated as a justification, Chief Justice Taney said: "Unquestionably, a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands. And, if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the state, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority.

And in that state of things the officers engaged in its military service might lawfully arrest anyone who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it."

Despan v. Olney, 1 Curt. C. C. 306, Fed. Cas. No. 3,822, was a case arising out of the same "Dorr insurrection," so called. The defendant held a commission as captain in the forces of the charter government after martial law had been declared by the assembly as stated in *Luther v. Borden*, 7 How. 1, 12 L. ed. 581. He received an order from the major general commanding those forces which were highest in military command at the time and place to arrest the plaintiff, and executed the order without unnecessary violence; and it was admitted that he bore no personal malice against the plaintiff, with whom he did not have any acquaintance. The plaintiff was held in confinement a few hours in a tavern, afterwards conveyed to the city of Providence and confined for several days, and then permitted to return home. It was held that, in view of the facts that the defendant acted under an order from

if any attempt is made to dynamite them, or they are shot at, or stoned, or any suspicious characters prowl around, particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot, and shoot to kill."

The relator, Arthur Wadsworth, was a private in Company A of the Eighteenth Regiment, in service there, and in the evening of October 8th was posted as sentry in the front yard of the Bucklavage house, just outside the door with orders to halt all persons prowling around or approaching the house, and if the persons so challenged failed to respond to the challenge after due warning "to shoot, and shoot to kill." About 11:30 o'clock he discovered a man approaching along the side of the road nearest the house, and called, "Halt!"

The man continued to advance toward the gate. Wadsworth called again, "Halt!" The man continued to advance. Wadsworth then touched the door, and said, "Corporal of the guard." He then called, "Halt!" and again, "Halt!" The man by this time had opened the gate, and was coming into the yard, when Wadsworth, in accordance with his orders, fired, and the man, whose name was afterwards found to be Durham, fell to the ground dead.

A coroner's inquest was held, and the jury found that "the shooting was hasty and unjustifiable," and recommended that the matter be placed in the hands of the district attorney for investigation. In the meantime, on complaint before a justice of the peace, a warrant had been issued for the arrest of Wadsworth, and after the re-

his commander, which he was bound to obey, and of the existence of the martial law, the order was a complete justification and defense to the action.

The governor of a state, in one or more of the counties of which there has for months been maturing a dangerous secret insurrection, continued in defiance of proclamation, after proclamation to the people to break up the unlawful combinations existing; where such executive has brought to bear every civil power to restore peace and order, but in vain, and the Constitution provides that such executive shall have power to call out the militia to execute the law, suppress riots or insurrections, etc.—may declare such locality in his state to be in a state of insurrection, take military possession, and order the arrest and detention of persons engaged in such evil practices, and hold them as military prisoners; and, upon the refusal of the commandant of the military forces claiming to act by order of the governor to deliver up the prisoners in answer to a writ of habeas corpus, which refusal the governor of the state, in a communication to the court, approves and confirms, the court will not, during the continuance of such insurrection, take further steps to enforce the execution of the writ. *Ex parte* Moore, 64 N. C. 802; *Ex parte* Kerr, 64 N. C. 816.

Where the Constitution of a state provides that "no power of suspending the laws of this state shall be exercised, unless by the legislature, or under its authority," a proclamation of martial law, if intended to suspend the functions of the supreme court of the state or of its members, is an attempt to exercise powers thus exclusively vested in the legislature, and is in that respect null and void. *Johnson v. Duncan*, 3 Mart. (La.) 530, 6 Am. Dec. 675.

The Constitution of the United States, however, and the laws thereof, are paramount to those of the state, and must regulate the decision of the supreme court of the state as to whether the Federal Constitution or laws authorize the commanding officer of a military district to suspend the laws of the state, and declare the existence of martial law. *Ibid.*

In *Lamb's Case*, 4 N. C. (1 Car. Law Repos.) 814, where the petitioner had been tried and convicted for disobedience of orders by a court-martial, Judge Bay, after holding that the 11th clause of the state militia act had omitted to 65 L. R. A.

provide an adequate remedy for the disobedience of an order of the governor and commander in chief on the occasions and emergencies mentioned in that clause, and that the 12th clause was also deficient in not providing adequate remedies for the disobedience of the orders of major generals, brigadier generals, and commanding officers of regiments, and that from these sources all the evils complained of had originated, further decided that the petitioner must be discharged, as he could not be punished under what was claimed to be martial law, or, as was claimed on the part of the counsel representing the military authorities of the state, by the articles of war of the United States.

Previous to the cession by Spain of Florida to the United States a lawless mob had possessed itself of an island at the northern extremity of East Florida, put at defiance the constituted authorities of the province, and threatened the peace of the United States; and the general government thought proper to take military possession of that part of Florida which was immediately contiguous to Georgia. The government of Spain was satisfied that the United States acted in good faith, and subsequently the treaty of cession was signed and ratified by the United States, provision being made for a ratification by Spain in six months thereafter, but it was not done until some twenty months after; and during this interval the governor of Florida and the magistrates were unable to afford protection to the inhabitants living to the north of St. Johns river, and they were referred to the United States Army for protection, accompanied with an acknowledgment of their imbecility, and the request to the officer commanding the United States troops that he would afford protection. In *Payne v. Robinson*, Harp. L. 279, it was held that, as the power of Spain had ceased, and that of the United States had commenced, it was, therefore, incumbent upon the latter to afford protection, because wherever sovereign power exists there the subject has the right to look for protection. And, as a government can only act by its agents, and the agents of the United States in Florida were the Army, the Army was, therefore, bound to afford the protection required; and further, that the plaintiff, who was a foreigner to both governments, and who had, in violation of United States laws, landed slaves in the province, and placed them in the possession of another, which slaves had committed and

turn of the regiment from service he was arrested at his home in Pittsburg by the respondent, a constable of the borough of Shenandoah. A writ of habeas corpus was allowed by the presiding justice of this court, and, the commonwealth not making any charge higher than manslaughter, the relator was admitted to bail pending the argument of the case.

These are all the material facts, and they are undisputed. The only appearance of question is in the testimony of some of the witnesses at the inquest that the deceased was outside the gate when they saw him after he had fallen. The relator and some others of the guard testified that the deceased had opened the gate and entered, but staggered back several steps after the shot was fired.

were likely to commit outrages upon the inhabitants, could not maintain an action against an officer who had arrested such slaves and detained and refused to give them up until instructed by his superior officer. The plaintiff had recovered in the trial court, and, on a motion for a new trial, the court said: "No more force was used than was sufficient to quell the insurrection, and their detention lasted no longer than the government supposed necessary to the occasion. The unfortunate accident which happened was the effect of an attempt to escape, on the part of one of the prisoners, for which the defendant is not answerable. The motion must, therefore, be granted."

IV. Discretion and authority of military when called to aid civil power.

A colored man had been arrested in Boston by the United States marshal, and was held by him pending the decision of the United States commissioner, as to whether he should be returned to servitude in a slave state under the fugitive act of Congress of 1850, commonly known as the "fugitive slave law." The marshal had notified the mayor of Boston to call out the militia to suppress riots or insurrections; that, in case the commissioner should decide that the alleged fugitive must be rendered up under the law, he feared there might be danger of a riot; that he asked no assistance from the civil or military authorities of the city or state to aid him in the execution of his process, which he considered he was fully able to do by aid, if necessary, of the United States forces and his *posse comitatus*. Thereupon the mayor, as he might under the statute, having ground to fear such riot, called out the militia and issued a proclamation addressed to the citizens of Boston, a copy of which was sent to the major general commanding the state military forces, in which it was stated that the general and the chief of police were "clothed with full discretionary powers to sustain the laws of the land." By virtue of the discretion thus given, the division of the militia marched from the Common, where it was duly assembled and acting, solely under the proclamation mentioned, and proceeded to clear and guard the streets. It was held that in doing so it acted without any lawful authority, and that the defendants in the action—the mayor, the general commanding, and the sub-

The issue of general order No. 39 by the governor was a declaration of qualified martial law in the affected districts. In so characterizing it we are not unmindful of the eminent authorities who have declared that martial law cannot exist in England or the United States at all, or, at least, according to the more moderate advocates of that view, not in time of peace. Thus, in *Ex parte Milligan*, 4 Wall. 2, 127, 18 L. ed. 281, 297, it is said in the opinion of the majority of the court: "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." But, in the dissenting opinion in the same case, Chief Justice Chase convincingly distinguished three classes of military rule, which are thus summarized by Judge Hare in his lectures

ordinate officer in immediate command—were legally responsible to the plaintiff, who was injured in attempting to pass down a street which the soldiers were guarding, by being pushed back and knocked down by the soldiers and cut over the head by the subordinate officer. This was on the theory that, as the words of the statute authorizing the calling out of the militia were, "to aid the civil authority," and not to usurp its functions or take its place, they were to act as an armed police only, subject to the absolute and exclusive control and direction of the magistrates and other civil officers designated in the statute, as to the specific duty or service which they were to perform. But it was held that the mayor and commanding general would not be liable to the plaintiff for any force and violence used upon him, beyond that which was necessary to carry into effect the order for clearing and guarding the streets, even if such order was not legally given according to the rules and principles stated, as, not having been present at the alleged assault, they could not be held liable for any unauthorized violence of their soldiers; and that the same rule would apply to the subordinate officer, if he did not authorize or participate in the alleged violence offered to the plaintiff. *Ela v. Smith*, 5 Gray, 121, 68 Am. Dec. 356.

A military officer, when called in aid of the civil authorities, has no power to act independently of the civil authority, as the military are called out to aid the civil authority, not to usurp its functions, or to take its place. They are to act as armed police only, subject to the absolute and exclusive control and direction of the magistrates and other civil officers designated in the statutes, as to the specific duty or service which they are to perform; nor can the sheriff or magistrate delegate his authority to the military force which he summons to his aid, or vest in the military authorities any discretionary power, or take any step or do any act to prevent or suppress a mob or riot. But the military officers have a discretion, which they may freely use, as to the best methods and most effectual means to be employed to carry out an order received by them from the civil magistrate, the purpose of which is to prevent or suppress a riot, or protect property or life when a riot actually exists. The colonel of a regiment by virtue of his military office as colonel, when called to the aid of

on American Constitutional Law (p. 930): "Military law, then, consists of the rules prescribed legislatively for the government of the land and naval forces, which, operating both in war and peace, and defined by Congress, are an offshoot of the civil or municipal law. Military government is the dominion exercised by a general over a conquered state or province. It is therefore a mere application or extension of the force by which the conquest was effected, to the end of keeping the vanquished in subjection, and, being a right derived from war, is hardly compatible with a state of peace. Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite measures to repel the enemy, and depends for its extent, existence, and oper-

ation on the imminence of the peril and the obligation to provide for the general safety. As the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens."

Many other authorities of equal rank hold that martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace. So far as any of the questions in the present case are concerned, the difference is one of terms rather than of substance, and is material chiefly in regard, first, to the jurisdiction of courts martial or military commissions over citizens not in the military or naval service, nor engaged in recognized war; or secondly, to the responsibility of officers or sol-

the civil authority, becomes no more a public officer than any member of his command, or of the sheriff's posse, and is entitled to none of the usual presumptions in favor of the legality of the acts of public officers. *State v. Colt*, 8 Ohio S. & C. P. Dec. 62.

And so in a prosecution of the colonel of a regiment of the state militia for having ordered the militia to fire on a mob which threatened to break in the door of a courthouse in an attempt to lynch a negro, the court charged the jury that, if they found beyond a reasonable doubt that a person was killed by a bullet fired from within a door of the courthouse, by a person acting under the command of the defendant to fire in case such door was broken open, it then devolved upon the defendant to satisfy the jury, by a preponderance of the evidence, that he was legally justified or excused in giving the order to fire, unless the circumstances of justification or excuse appeared in the testimony adduced against him. *Ibid.*

And also that, if they found that the defendant, in doing things performed by him under the order which sent him to the courthouse, acted solely in his capacity as a military officer of the state national guard, and not as an individual in self-defense, or in preventing a felony or dispersing a riot, then the rightfulness or wrongfulness of any conduct of his is to be measured by the rules which govern the conduct of a military officer while acting in aid of the civil authority. *Ibid.*

Christian County v. Merrigan, 191 Ill. 484, 61 N. E. 479, Affirming 92 Ill. App. 428, was an action commenced by a deputy sheriff against the county to recover compensation under an appointment by the sheriff, and for services performed, under such appointment, in the county during a disorderly assemblage or a riot. Besides the general issue, the defendant filed a special plea, which averred that the governor of the state, because of riotous conditions, by which the courts and civil authorities were overthrown, had issued his proclamation, and thereby declared and established martial law in the district comprising the territory wherein, and during the time, the services sued for were performed, and that a large military force took possession of said territory, and that thereby the duties and functions of the sheriff as a peace and executive officer under the laws of the state

were suspended, and particularly his power to appoint a deputy under the statute; and that plaintiff's appointment was illegal. The court, after quoting from the state Constitution that "the military shall be in strict subordination to the civil power;" and also from the act "to secure the peace and good order of society, to quell riots, etc.," § 6 of which provided that "whenever the military forces shall be ordered out by the governor on any application of a civil officer as aforesaid, or otherwise, they shall report to such civil officer as the governor shall designate, and shall act in strict subordination to such civil authority, in preserving the peace, quelling riots, or executing the law;" and also from § 7 of the same act, which authorizes the governor, in such cases, of riot, tumult, etc., to order such military force as he may deem necessary to aid the civil authorities in suppressing violence and in executing the law,—further said: "It sufficiently appears from these provisions that civil authority was not suspended, nor was the power of the sheriff to appoint special deputies to aid him to preserve the peace and protect persons and property; but, on the contrary, the military authority of the state was called on to aid the civil authorities, including the sheriff and his deputies, to suppress riot and to preserve peace and good order."

In *Re Boyle*, 6 Idaho, 609, 45 L. R. A. 832, 96 Am. St. Rep. 286, 57 Pac. 708, it was held that, in case of insurrection or rebellion, the governor or military officer in command, for the purpose of suppressing the same, may suspend the writ of habeas corpus, or disregard such writ, if issued; and that the proclamation of the governor declaring a county in the state to be in a state of rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, had the effect to put into force, to a limited extent, martial law in said county; and that such act is not in violation of the Constitution, but in harmony with it, being necessary for the preservation of the government, and in its necessary self-defense.

In the above case it appeared that the United States troops, sent to suppress the rebellion proclaimed by the governor of Idaho at his request, had arrested one of the persons charged as being guilty of riot, murder, etc., and lodged him in prison to await the subsequent action of the civil authorities. There was no attempt on the

diers giving or acting under military orders, when not in actual war, to be called to account in the civil or criminal courts. With the first of these matters we are not now concerned, and the second will be discussed in its due order.

Order No. 39 was, as said, a declaration of qualified martial law. Qualified, in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open, and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose, it was martial law, with all its

powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence, and danger in special directions, which, though not technically war, has in its limited field the same effect, and, if important enough to call for martial law for suppression, is not distinguishable, so far as the

part of the military to try or punish him according to martial law, and the court, in justifying the act of the military in so aiding and denying to the imprisoned party a writ of habeas corpus, claimed to be acting under § 7405 of the Revised Statutes, which provides: "When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, and is placed under the temporary direction of any civil officer, it must obey the orders in relation thereto of such civil officer." It also appeared that the county officers whose duty it was to make an application to the governor, were either in league with the insurrectionists, or else, through fear of the latter, such officers refrained from doing their duty; and the court held that, under the circumstances, it was the duty of the executive to act without any application from any county officer of the county; and it would seem that the military power acted under the direction of the governor as such, *viz.*, as the civil executive officer of the state, and not as a commander in chief of its military.

V. Power of military, in time of actual war, to arrest and punish citizens in places where civil courts are open.

In *Mostyn v. Fabrigas*, 1 Cowp. 161, which was an action for assault and false imprisonment, brought by the plaintiff, and the defense was a plea of not guilty, and under justification that the defendant was governor of the island of Minorca under letters patent from the Crown: that plaintiff did raise sedition and mutiny, in consequence of which he did necessarily imprison him and send him out of the island.—in delivering the judgment of the court affirming a substantial verdict for the plaintiff, to the effect that a sufficient justification had not been proved, Lord Mansfield said that he could conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace, as, if he should judge it proper to send an hundred of the inhabitants out of the island during a siege or upon an invasion, he acting from motives of real and genuine expediency; or suppose, upon a general suspicion, he should take people up as spies, upon proper circumstances laid before the court, it would be very fit to see whether he had acted as the governor of the garrison ought, according to the circumstances of the case.

65 L. R. A.

Where a naturalized citizen of the United States, residing some 15 miles distant from the place where the United States Army was stationed during the War of 1812, and not being in any way connected with the Army, was arrested by two officers of the Army, charging him in writing with having excited mutiny among the citizens of the United States, violating his parole as a prisoner, and engaging in illicit trade, and furnishing the enemy with necessities from the United States, and being the enemy's spy in the time of the War between Great Britain and the United States,—all persons concerned in his arrest and detention were liable to him in an action therefor, as none of the offenses charged were cognizable by a court-martial, except that which related to his being a spy; and, if he was an American subject, he could not be charged with such an offense, as, though he might be amenable to the civil authority for treason, he could not be punished, under martial law, as a spy; and, where the commanding officer at the place where he was detained affirmed the arrest, and, on application being made to him in behalf of the plaintiff, said he had such a man in the provost guard, and that he should not release him until he saw one of the men who arrested him; that he knew the martial law, and must be governed by it; thus claiming the right to hold and try him by a court-martial; and ordered the plaintiff to be brought before him, and, after making some examination and inquiry, remanded him to the custody of the provost marshal,—this was a direct and positive exercise of authority and restraint, and rendered him liable for the consequences of the detention. *Smith v. Shaw*, 12 Johns. 267.

In *Ex parte Vallandigham*, Fed. Cas. No. 16,816, the circuit court of the southern district of Ohio held that the commander of the military department, as the agent and representative of the President, in a time of civil war when the very existence of the government is threatened, has authority, under the constitutional provisions making the President the Commander in Chief of the Army and Navy, even in a locality where martial law is not in force, to arrest citizens, not in the military or naval forces, for mischievous acts of disloyalty which impede or endanger the military operations of the government. Such arrests are justifiable on the ground of military necessity; and of the existence of that necessity, the commanding gen-

powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve and operating only by its moral influence, but now brought into active exercise, just as the ordinary criminal tendency in the community is held in check by the knowledge and fear of the law, but the overt lawbreaker must be taken into actual custody.

When the mayor or burgess of a municipality finds himself unable to preserve the public order and security, and calls upon the sheriff with the *posse comitatus*, the latter becomes the responsible officer, and therefore the higher authority. So if, in turn, the sheriff finds his power inadequate, he calls upon the larger power of the state to aid with the military. The sheriff may retain the command, for he is the highest executive officer of the county, and if he does so ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the state, the governor intervenes as the supreme executive, and he or his military representative becomes the superior and com-

eral, as the agent of the President, is the exclusive judge, and the courts have no authority, by writ of habeas corpus, to inquire into it. On petition for a writ of certiorari to the Judge Advocate General of the Army of the United States, the Supreme Court of the United States held that a military commission was not a court within the meaning of the 14th section of the judiciary act of 1789, and that there is no jurisdiction in the United States Supreme Court to issue a writ of habeas corpus ad subjiciendum to review or reverse the writ of certiorari to reverse the proceedings of a military commission. 1 Wall. 243, 17 L. ed. 589.

In the official report of the case it is stated that Nelson, J., Grier, J., and Field, J., concurred in the result of the opinion, and that Miller, J., was not present at the argument, and took no part.

In *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281, the Supreme Court of the United States, by a bare majority, held that a military commission had no jurisdiction legally to try and sentence one not a resident of one of the rebellious states, nor a prisoner of war, but a citizen of a state, who never was in the military or naval service, but was, while at home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission organized under the military commander of the military district of Indiana. The court held, further, that in a state where Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances, no usage of war could sanction a military trial for any offense whatever of a citizen in civil life, in no wise connected with the military service; and that Congress could grant no such power. That the right to trial by jury is preserved to everyone accused of crime, who is not attached to the Army, or Navy, or Militia in actual service. That martial law cannot arise from a threatened invasion; but the necessity must be actual and present,—the invasion real, such as effectually closes the courts and deposes the civil administration. That if, in foreign invasion or civil war, the courts are actually closed, then, on the theater of active military operations, where war really prevails, as no power is left but the military, it is allowed to govern by martial rule until the laws can have 65 L. R. A.

their full course; but that martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. That the United States circuit court has authority to certify questions in a proceeding for a writ of habeas corpus to inquire into a sentence of a military commission, and the Supreme Court has jurisdiction to hear and determine that a proceeding by habeas corpus is a cause as that term is used in the 25th section of the judiciary act. That the act of Congress "relating to habeas corpus," approved March 3, 1863, conferred jurisdiction on the United States circuit court to hear such a case; that the suspension of the privilege of the writ of habeas corpus does not suspend the writ itself, but the writ issues as a matter of course, and, on the return made to it, the court decides whether the party applying is denied the right of proceeding any further with it. If a military trial of a citizen of a state under the circumstances herein mentioned was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from the custody by the terms of the act of Congress of March 2, 1863, as he could not be treated as a prisoner of war when he had lived in the state for the past twenty years, was arrested there, and had not been, during the troubles between the states, a resident of any of the states in rebellion. Probably in no case, either in England or the United States, has the right of the citizen to be tried in the courts, and the right that may be asserted by martial or military power in a locality where those courts are open and running for the transaction of business, been more thoroughly and ably discussed than in this. Able counsel on the part of both the petitioner and the respondent, representing some of the most noted lawyers in the land, discussed both of these questions with the most eminent ability, and both the prevailing and minority opinions go deeply into both subjects. The minority did not dissent from all the propositions laid down by the majority of the court. Chief Justice Chase, in delivering the opinion of the dissentients, said: "We do not doubt that the circuit court for the district of Indiana had jurisdiction of the petition of Milligan for the writ of habeas corpus . . . The circuit court was bound to hear Milligan's petition for the writ of habeas corpus, called in the act an order to bring the prisoner before the judge or the court, and to issue the writ, or,

manding officer. So, too, if the sheriff relinquishes the command to the military, the latter has all the sheriff's authority, added to his own powers as to military methods.

The resort to the military arm of the government, therefore, means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military, and then have them stand quiet and helpless, while mob law overrides the civil authorities, would be to make the government contemptible, and destroy the purpose of its existence.

The effect of martial law, therefore, is to

put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.

"Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and, although ordinarily dormant in peace, may be called

in the language of the act, to make the order. The first question, therefore—Ought the writ to issue?—must be answered in the affirmative. And it is equally clear that he was entitled to the discharge prayed for." The point upon which the dissenting judges differed from the majority was chiefly where it was asserted in the judgment of the court, not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it; "from which," said Chief Justice Chase delivering the opinion of the minority, "it may be thought to follow that Congress had no power to indemnify the officers who composed the commission against liability in civil courts for acting as members of it. We cannot agree to this." The chief justice further said that he and his dissenting brethren concurred in what had been said in the prevailing opinion of the writ of habeas corpus and of its suspension, with two reservations: "(1) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention." As illustrating the theory of the minority on the whole subject, at the conclusion of his opinion the chief justice further said: "There are, under the Constitution, three kinds of military jurisdiction: One to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within the states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the national government when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; while the third

may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights. We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces." The five justices of the Supreme Court who constituted the majority uniting in the decision in this case were acting justices at the time of the decision in *Ex parte Vallandigham*, 1 Wall. 243, 17 L. ed. 589, and it would seem that, if the counsel for the petitioner in the latter case had a mistaken idea of his remedy, and that if he had, instead of applying for a writ of certiorari to the Judge Advocate General, applied for and obtained a writ of error to review the decision of the circuit court, he would have been likely to have accomplished his object, as the act of Congress approved March 3, 1863, was in force at the time of the making of the political speech by Vallandigham, for which he was tried and sentenced by the military commission.

Where a declaration alleged that on a certain day in a county in Illinois the defendants with force and violence assaulted and arrested the plaintiff, and conveyed him on board the railway cars; transported him by the cars to Chicago, where they restrained him of his liberty for the space of two days, and then conveyed him by force to the city of New York; there imprisoned him in a fort for the space of two months; and he was then taken to another fort in the state of Delaware, where he was imprisoned for the further space of three months; when he was set at liberty without trial or examination, or any offense charged against him, and the defendants made a special plea in which they set up the then existence of the rebellion, and averred that the plaintiff was an active member of a disloyal secret society which was in league and sympathy with the rebels, and was a co-operating branch of the rebellion in the Northern states, and plotting with the rebels for the overthrow of the govern-

forth by insurrection or invasion. War has exigencies that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject loyal citizens, or persons who, though believed to be disloyal, have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal; and he must then depend for his justification, not on the laws of war, but on the necessity which, as has been here seen, may warrant the taking of life, and will therefore excuse any minor deprivation." Hare, Am. Const. Law, Lecture xlii, p. 924.

"When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life or

property, the sheriff may call forth the *posse comitatus* and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance, and if loss of life ensues the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sheriff delegates his authority to the commanding officer. As Lord Mansfield showed in the debate on the Lord George Gordon riots in

ment; and the plaintiff was deeply engaged in aiding said society in their treasonable purposes, and was in fact levying war against the United States; and further averred that one of the defendants was at the time United States marshal, and that the other defendants were his deputies, and as such marshal he was ordered by the President to arrest the plaintiff, as a measure proper for the suppression of the rebellion, and convey him to the main fort; and that he did so arrest and convey him to said fort in a comfortable manner, and there delivered him to the custody of the officer in command of said fort, after which time plaintiff was not in the custody of the defendant; and another plea alleged the issuance of the President's proclamation calling for volunteers, and averred that the plaintiff was actually engaged in discouraging volunteering; to which pleas the plaintiff demurred,—the demurrer was overruled, and, in reversing the judgment overruling the demurrer, the supreme court of Illinois said, that martial law must be permitted to prevail on the actual theater of military operations in time of war, is an unavoidable necessity which results from the very nature of war, which is simply an appeal to force; and, where it is being waged, it necessarily suspends and displaces the ordinary laws of the land by those usages which are known as the laws of war, and a commanding officer, if he finds within his lines a person, whether citizen or alien, giving aid or information to the enemy, can arrest and detain him so long as may be necessary for the security or success of his army. That this is the power of a military commander on the actual scene of military operations, and where hostile armies are confronted with each other. The court said that, for the purposes of the present case, it might go further, and admit that if, in a district remote from the theater of military operations, the popular sentiment is so disloyal to the government that one who aids and abets the public enemy cannot be rendered powerless for mischief and brought to justice by the arm of the civil law, that fact would justify the government in treating such district as virtually attached to the theater of military operations, and in enforcing therein martial law or the laws of war, so far as might be necessary to the public safety; and that, whether this right belonged to the President as Commander in Chief, or whether he must receive authority 65 L. R. A.

thus to act from Congress, was a question that it was not necessary to consider. But that beyond the enforcement of martial law on the actual field of military operations, which is the result of an overmastering necessity, and its establishment in districts which, though remote from the seat of war, are yet so far in sympathy with the public enemy as to obstruct the administration of the laws through the civil tribunals, and render a resort to military power a necessity, as the only means of restraining disloyalty from overt acts, and preserving the authority of the government, the court knew of no ground upon which its exercise could be defended. That it was the result of an absolute necessity during a period of war, and should terminate with the necessity itself. That the doctrine that a state of war of itself suspends, at once and everywhere, the constitutional guarantees of liberty and property, finds no support in the Constitution, and is inconsistent with every principle of civil liberty and free government. That, in face of the facts that these pleas do not aver that the plaintiff was arrested where the war was raging, or that the civil courts were not in the peaceful and uninterrupted exercise of their jurisdiction, or that the civil authority was in any degree impaired, or that martial law had been proclaimed, it was impossible to hold that the plaintiff was legally subjected to the administration of martial law. That, under the decision of the Supreme Court of the United States in *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281, the plaintiff could not have been legally brought to trial before a military tribunal. The majority in that case held the imprisonment of Milligan illegal, and discharged him, on the ground that in a state where no war prevailed, and the jurisdiction of the civil courts was undisturbed, neither Congress nor the President, nor both united, could constitutionally create a military tribunal or enforce martial law. And that the minority of the court, while they dissented from this proposition in its full extent, did, nevertheless, concur in the judgment of the court discharging Milligan, on the ground that Congress had not in fact authorized the creation of military tribunals in Indiana, and because the sentence of such a tribunal, passed upon Milligan, was void, and his imprisonment illegal; and that the power of the executive department to try and imprison Milligan by virtue of the laws of

1780, soldiers are subject to the duties and liabilities of citizens, although they wear a uniform, and may, like other individuals, act as special constables, or of their own motion, for the suppression of a mob, and, if the staff does not suffice, employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments, and even by some distinguished jurists, because agreeably to the same great magistrate and the settled practice in England and the United States, they are liable to be tried and punished for any excess or abuse of power, not by the Martial Code, but under the common and statute law." Hare, Am. Const. Law, Lecture xli, p. 906.

war, and in the absence of congressional authorization, was directly denied by the entire court. The court then held that the Milligan Case was decisive of this, and was, in comparison, the weaker of the two, in this,—that at the time of the arrest and trial of Milligan in 1864 the writ of habeas corpus had been suspended by authority of Congress, which furnished the counsel for the government an argument in support of the theory of martial law. *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159, Adopted and followed in *Sheean v. Jones*, 44 Ill. 167; *Carver v. Jones*, 45 Ill. 334.

In *McLaughlin v. Green*, 50 Miss. 453, the destruction of the plaintiff's whisky occurred just at the close of the active hostilities of the Civil War. The defendants justified the act by reason of an order issued by the general commanding the district including the city where the plaintiff's property was situated, to the defendant commanding a militia company, directing him to destroy the spirituous liquor in that city. The order was given as a necessary precaution for the safety of the city, and the protection of its citizens from the violence of drunken soldiers who had been paroled and were in large numbers in the city, threatening to burn down the town, were searching for liquor, and, when under its influence, were utterly uncontrollable. When the whisky was destroyed active hostilities had ceased; all the Confederate armies east of the Mississippi river had surrendered, and the whisky was not exposed to capture, nor necessary for the commanding general's military uses. It was held that the order from the general was no justification, and that the defendant was liable to the plaintiff for the destruction of his whisky. The court cited and followed the Supreme Court of the United States in *Milligan's Case*, 4 Wall. 124, 18 L. ed. 281, and in doing so, among other things, said that, in defining where martial law may rightfully obtain, it is limited to the theater of active military operations, where no civil authority remains, and there is a necessity to furnish a substitute to preserve the safety of the Army and society; and martial rule can only prevail until the laws can have their free course. That in the present instance martial law did not prevail, nor did there exist that state of things in which it could rightfully exist.

In *Re Egan*, 5 Blatchf. 319, Fed. Cas. No. 4,303, it was held that a citizen of the state 65 L. R. A.

This last quotation illustrates and explains the difference in the application of the term "martial law," which has given so much apparent trouble to some of the text writers. There is no real difference in the commander's powers in a public war and in domestic insurrection. In both he has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts, and by civil action at the instance of parties aggrieved. On this all the authorities

of South Carolina, eighty years of age, who had never engaged in military service, or been connected with the Army of the United States, or of the so-called Confederate states, who had been arrested and sentenced to be tried before a military commission for murder, and convicted and sentenced to be imprisoned for life in a penitentiary in New York state, where the alleged crime took place five months, and his trial seven months, after the termination of hostilities and the surrender of the rebel army to the authorities of the United States, and the trial was not had under the rules and articles of war, as established by the United States,—is entitled to be discharged on habeas corpus on the ground that the conviction was illegal for want of jurisdiction in the tribunal. The decision was made by Associate Judge Nelson, of the Supreme Court of the United States, and in the opinion, which is a learned dissertation upon martial law, Judge Nelson said that this trial must have been had under what is known as "martial law," and the question in the case was, whether or not the conviction and punishment could be upheld by reason of that authority.

In *Bean v. Beckwith*, 18 Wall. 510, 21 L. ed. 849, which came before the Supreme Court of the United States on the certificate of division of opinion of the judges of the circuit court for the district of Vermont, and was an action in trespass for an alleged assault and battery and false imprisonment of the plaintiff, the pleas of the defendant set up that at the time of the commission of the alleged grievance rebellion existed against the laws and government of the United States, and that the public safety was greatly imperiled; that it became necessary to raise troops to suppress the rebellion and insure the public safety; and for that purpose troops were raised in the Northern states and in the military district embracing the second congressional district of Vermont; that one of the defendants was a provost marshal and the other an assistant provost marshal within that district; and that the plaintiff was charged with having been guilty of enticing soldiers to desert from the Army of the United States, and the defendants thereupon arrested him and delivered him to the keeper of the state prison for safe custody until he could be brought before the civil tribunals of the United States upon the charges. These were held bad for the reason that, while

agree, and the result flows from the view that martial law in this sense is merely an extension of the police power of the state, and therefore, as expressed by Judge Hare in the quotation *supra*, an "offshoot of the common law, and, although ordinarily dormant in peace, may be called forth by insurrection or invasion." See *Respublica v. Sparhawk*, 1 Dall. 357, 1 L. ed. 174; *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75; *Ford v. Surget*, 97 U. S. 594, 24 L. ed. 1018; and English cases cited in 2 Hare on Const. Law, Lecture xli.

In determining the responsibility for such acts, the courts proceed upon the principle of the common law as applied in issues of false imprisonment, self-defense, etc., that the acts must be judged by the

appearance of things at the time. "It is not less clear that, although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a different and less extreme course might have been pursued with safety." Hare, Am. Const. Law, Lecture xli, p. 917.

"It is the emergency that gives the right, and the emergency must be shown to exist,

asserting that the acts which were the subject of complaint were done under the authority and by the order of the President, the pleas did not set forth any order, general or special, of the President, directing or approving of the acts in question. Upon this all the judges were agreed, and Mr. Justice Field, who delivered the judgment of the court, said further: As will be observed, "there is no averment in the pleas that at the time the plaintiff was arrested any rebellion existed in the state of Vermont against the laws or government of the United States; or that any military operations were being carried on within its limits; or that the courts of justice were not open there, and in the full and undisturbed exercise of their regular jurisdiction; or that the plaintiff was in the military service of the United States, or in any way connected with that service."

The purpose of the express power to suspend the privilege of the writ of habeas corpus, and the object to be obtained, being, to authorize, for the time being, imprisonment of persons without giving any reason for so doing, and without legal cause or warrant, as a means of preserving the public from imminent danger, it follows, as a necessary consequence, that, under the clause giving power "to make all laws which shall be necessary and proper for carrying into execution" the power of suspension, Congress may pass any law necessary and proper to secure or obtain this end, unless expressly prohibited therefrom by the Constitution itself. *McCall v. McDowell*, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673.

The Constitution expressly authorizes the suspension, and history teaches, and so the fathers understood it, that such suspension was allowed, so as to authorize and permit imprisonment without the ordinary cause or process, for the safety of the Republic. *Ibid.*

The act of Congress of March 3, 1863, declaring that "any order of the President made at any time during the existence of the present Rebellion shall be a defense, etc.," does not include the proclamation of the President made September 24, 1862, prior to the date of the enactment; and, as the President of the United States has no authority to suspend the privilege of the writ, except as authorized and directed by Congress; and as, at the date of this proclamation, no such authority existed, that proclamation is no defense to an action for false arrest and imprisonment of a citizen 65 L. R. A.

of a state where there is no insurrection or rebellion, and the courts are open for business by the order of a commanding military officer. *Ibid.*

In the above case the plaintiff had been arrested by order of the defendant, for exulting over the assassination of President Lincoln.

In *Griffin v. Wilcox*, 21 Ind. 370, the supreme court of Indiana held that a deputy provost marshal, who arrested and imprisoned a person for selling intoxicating liquors to soldiers by virtue of an order of the provost marshal, issued pursuant to an order of the chief provost marshal of a district composed of the state and another state, was liable for damages on account of such arrest, because such order was illegal; but, as the same court held, as a reason for the result it arrived at, that as the act of Congress of March 3, 1863, which indemnified officers for such arrest, was unconstitutional, and neither the President nor the Congress of the United States could suspend the issue of the writ of habeas corpus by a state court; both of which propositions have been decided the other way by the Supreme Court of the United States,—the value of the decision may be considered somewhat impaired.

The chief officers of a provisional government established in a territory of India, which had been conquered by the military authorities of the British government, were not liable in an action in the municipal court, after the capture of the capital city of the locality, and the surrender of the individual who was the Peishwa or former head of the government of the locality, for seizing a quantity of treasure from one who had been governor of a fortress in the capital city of the locality, who had been refused the benefit of the articles of capitulation of his fortress, but who had been permitted to reside under military surveillance in his own house in the city in which the seizure was made, and which was at a distance from the scene of actual hostilities, if not during actual war, at least before it had actually ceased; but, if anything was done amiss, recourse could only be had to the government for redress; and a judgment for the value of the treasure so seized, in favor of the representatives of such governor, and a judgment of such municipal court in favor of such governor against the sole commissioner appointed by the governor general for the settlement of the locality thus conquered, and also against a collector

before the taking can be justified. In deciding upon this necessity, however, the state of the facts as they appeared to the officer at the time he acted must govern the decision, for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he has a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous, will not make him a trespasser." Taney, Ch. J., *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75.

And, while the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible, for the first and overruling duty is to repress disorder, whatever the cost; and all means which are necessary to that end are lawful. The situation of troops in a riotous and insurrectionary district approximates that of troops in an enemy's country, and in proportion to the extent and violence of the overt acts of hostility shown is the degree of severity justified in the means of repression. The requirements of the situation in either case, therefore, shift with the circumstances, and the same standard of justification must apply to both. The only difference is the one already ad-

verted to, the liability to subsequent investigation in the courts of the land after the restoration of order.

Coming now to the position of the relator in regard to responsibility we find the law well settled. "A subordinate stands, as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, Had the accused reasonable cause for believing in the necessity of the act which is impugned? and, in determining this point, a soldier or member of the *posse comitatus* may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and, if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier consequently runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances." Hare, Am. Const. Law. Lecture xli, p. 920.

The cases in this country have usually arisen in the Army and been determined in the United States courts. But by the articles of war (article 59), under the acts of Congress, officers or soldiers charged

and magistrate of such capital city appointed by such commissioner, was reversed by the privy council. *Elphinstone v. Bedreechund*, 1 Knapp, P. C. 316.

During the recent war in South Africa between the British government and the Dutch South Africa and Transvaal Republics, a person had been arrested by the chief constable of a town about 35 miles from Cape Town, who had no warrant, and did not show the cause of arrest, and removed about 300 miles to another town, and there detained in custody. Martial law had been proclaimed over the district in which he was arrested and the district to which he was removed. He petitioned the supreme court of Cape Town for his release, contending that he had committed no crime, otherwise, that he should have been arrested and tried according to law; that the civil courts were open for his trial; that the judge to whom he made the application was announced to sit for the trial of all offenders in the district in which he was arrested; and that his arrest, deportation, and confinement in custody by the military authorities were wholly illegal, and he was entitled to his immediate discharge. The judge, in refusing the application, held that martial law had been proclaimed in the district in which the party had been arrested and to which he was transported, and that the court ought not to go into the necessity for that proclamation. On the petition for special leave to appeal, the privy council advised against the appeal, and said that the fact that for 65 L. R. A.

some purposes some tribunals had been permitted to pursue their ordinary course was not conclusive that war was not raging. The lord chancellor who delivered the opinion then stated that "in *Elphinstone v. Bedreechund*, 1 Knapp, P. C. 316, the supreme court, at Bombay, had given a large sum as damages against the appellant for the seizure of certain treasure at Poonah. During the time of the seizure no actual hostilities were carried on in the immediate neighborhood of Poonah, but the great battle of Kirkee had been fought, and Poonah had been taken possession of by the British forces. The treasure was seized on July 17, 1818. At Poonah some courts had been open from the previous February, and it was argued and held by the Bombay courts that it must be held to be a time of peace, and that the military authorities were responsible in damages for seizure of the treasure. To this the attorney general . . . replied that a military commander may allow the usual courts of justice that existed in the country before the invasion to continue their jurisdiction upon such subjects as may not be reserved for the consideration of the commander; but this does not deprive the commander of his power, or free the country from military government. Lord Tenterden, in giving judgment, said: 'We think the proper character of the transaction was that of hostile seizure made, if not *flagrant*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and, consequently, that the municipal

with offenses punishable by the laws of the land are required (except in time of war) to be delivered over to the civil (*i. e.*, in distinction from military) authorities, and the courts proceed upon the principles of the common (and statute) law. *United States v. Clark*, 31 Fed. 711. The decisions, therefore, are precedents applicable here.

A leading case is *United States v. Clark*, 31 Fed. 710. A soldier on the military reservation at Ft. Wayne had been convicted by court martial, and when brought out of the guardhouse with other prisoners at "retreat" broke from the ranks, and was in the act of escaping, when Clark, who was the sergeant of the guard fired and killed him. Clark was charged with homicide, and brought before the United States district judge, sitting as a committing magistrate. Judge Brown, now of the Supreme Court of the United States, delivered an elaborate and well-considered opinion, which has ever since been quoted as authoritative. In it he said: "The case reduces itself to the naked legal proposition whether the prisoner is excused in law in killing the deceased." Then, after referring to the common-law principle that an officer having custody of a prisoner charged with felony may take his life if it becomes absolutely necessary to do so to prevent his escape, and pointing out the peculiarities of the Military Code, which practically abolish the distinction between felonies and misde-

meanors, he continued: "I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or . . . were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice."

In *McCall v. McDowell*, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673, where an action was brought by plaintiff against General McDowell and Captain Douglas for false imprisonment under a general order of the former for the arrest of persons publicly exulting over the assassination of President Lincoln, the court said: "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate, when acting in obedience to the order of his commander. Otherwise he is placed in the dangerous dilemma of being liable to damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto. . . . Between an order plainly legal and one palpably otherwise, . . . there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions, of which it cannot be expected that

court had no jurisdiction to adjudge upon the subject;" and the judgment was accordingly reversed." *Marals v. General Officer* [1902] A. C. 109, 71 L. J. P. C. 42, 85 L. T. 734, 50 Week. Rep. 273.

VI. Conclusion.

✕ In *COM. ex rel. WADSWORTH V. SHORTALL* the supreme court of Pennsylvania would seem to have taken a different view as to the rights, powers, and discretion with which a military officer called upon by an executive having power to demand his aid in suppressing a mob, riot, or domestic insurrection is clothed, from that stated by the supreme court of Massachusetts in *Ela v. Smith*, 5 Gray, 121, 66 Am. Dec. 356, and the court of common pleas of Ohio in *State v. Colt*, 8 Ohio S. & C. P. Dec. 62, *supra*, IV. In the cases last mentioned the rule seems to be laid down that the military power, being called in simply and purely to aid the civil authorities in subjecting to their authority the illegal congregation, assemblage, or body, neither have, nor can be clothed with, any power or discretion to direct what shall be done in the accomplishment of the end for which their aid was solicited or demanded; but that their power is only to carry out the directions and discretion of the civil authority which calls them forth, while, on the other hand, *COM. ex rel. WADSWORTH V. SHORTALL* seems to lay down the rule that the moment the military authority is called in to suppress the insurrection or

disorderly assemblage a qualified martial law (whatever that may be) is thereby declared, and the governing head of the military has an unbounded power and discretion as to how he shall act. It is believed that the trend of decision is in favor of the rule laid down by the Massachusetts and Ohio cases.

It must be admitted, however, that the frequent occurrence of lynching parties, mobs, riots, and disorderly assemblages, sufficiently powerful to overcome for the time being the local civil authorities, and particularly where, as stated in *Re Boyle*, 6 Idaho, 609, 45 L. R. A. 832, 96 Am. St. Rep. 286, 57 Pac. 706, *supra*, IV., the local district officers whose duty it is to make an application to the executive are either in league with the members of the disorderly assemblage, or else, through fear of the latter, refrain from doing their duty, has necessitated a change in the strict rule just alluded to, and compelled the courts, in the interest of law and order, to enlarge the powers of the head of the military called out by the civil executive to suppress such rebellion or insurrection, against the due enforcement of the law by the civil authorities. But even then, though the district in which the disorder exists is said to be, by virtue of the proclamation or order of the executive calling to his aid the military forces, under what has been designated qualified or limited martial law, such military forces are yet to be directed and controlled by the civil executive authority which called for their aid.

P. H. V.

the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require, that the order of the superior should protect the inferior, leaving the responsibility to rest where it properly belongs,—upon the officer who gave the command.” The court, sitting without a jury, accordingly gave judgment for Captain Douglas, though finding damages against General McDowell.

In *United States v. Carr*, 1 Woods, 480, Fed. Cas. No. 14,732, which was a case of the shooting of a soldier in Fort Pulaski by the prisoner, who was sergeant of the guard, Woods, J., afterwards of the Supreme Court of the United States, charged the jury: “Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased, with his surroundings at the time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened to ripen into mutiny. If he had reasonable ground so to believe, . . . then the killing was not unlawful. But if, on the other hand, the mutinous conduct of the soldiers, if there was any such, had ceased, and so it appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required.”

In *Riggs v. State*, 3 Coldw. 85, 91 Am. Dec. 272, the supreme court of Tennessee held to be correct an instruction to the jury that “any order given by an officer to his private which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey; and such order would be a protection to him.”

These are the principal American cases, and they are in entire accord with the long line of established authorities in England.

Applying these principles to the act of the relator, it is clear that he was not guilty of any crime. The situation, as already shown, was one of martial law, in which the commanding general was authorized to use as forcible military means for the repression of violence as his judgment dic-

tated to be necessary. The house had been dynamited at night, and threatened again. With an agent so destructive, in hands so lawless, the duty of precaution was correspondingly great. There was no ground, therefore, for doubt as to the legality of the order to shoot. The relator was a private soldier, and his first duty was obedience. His orders were clear and specific, and the evidence does not show that he went beyond them in his action. There was no malice, for it appears affirmatively that he did not know the deceased, and acted only on his orders when the situation appeared to call for action under them. The unfortunate man who was killed was not shown to have been one of the mob gathered in the vicinity, though why he should have turned into the gate is not known. The occurrence, deplorable as it was, was an illustration of the dangers of the lawless condition of the community, or of the minority who were allowed to control it, and must be classed with the numerous instances in riots and mobs where mere spectators, and even distant noncombatants, get hurt without apparent fault of their own.

Whenever a homicide occurs, it is not only proper, but obligatory, that an official inquiry should be made by the legal authorities. Such an inquiry was had here at the coroner's inquest, and if there were any doubt about the facts we should remand the relator to the custody of the constable under his warrant for a further hearing before the justice of the peace. But there was no conflict in the evidence before the coroner, and the commonwealth's officer makes no claim here that anything further can be shown. The facts, therefore, are not in dispute, and the question of relator's liability depends on whether he had reasonable cause to believe in the necessity of action under his orders. As said by Judge Hare, citing Lord Mansfield, in *Mostyn v. Fabrigas*, 1 Cowp. 180: “The question of probable cause is in this as in most other instances one of law for the court. The facts are for the jury; but it is for the judges to say whether, if found, they amount to probable cause.” Hare, Am. Const. Law, Lecture xli, p. 919.

In *United States v. Clark*, 31 Fed. 710, already cited, Mr. Justice Brown said: “It may be said that it is a question for a jury in each case whether the prisoner was justified by the circumstances in making use of his musket, and if this were a jury trial I should submit that question to them. But . . . as I would, acting in . . . [that] capacity, set aside a conviction if a verdict of guilty were rendered, I shall assume the responsibility of directing his discharge.”

This court, either sitting as a committing magistrate or by virtue of its supervisory jurisdiction over the proceedings of all subordinate tribunals (*Goeline v. Place*, 32 Pa. 520), has the authority and the duty, on habeas corpus in favor of a prisoner held on a criminal charge, to see that at least a prima facie case of guilt is supported by the evidence against him. In the relator's case the facts presented by the evidence are undisputed, and on them the law is clear and settled. If the case was before a jury, we should be bound to direct a verdict of not guilty, and to set aside a contrary verdict if rendered. It is therefore our duty now to say that there is no legal ground for subjecting him to trial, and he is accordingly discharged.

The relator, Arthur Wadsworth, is discharged from further custody under the warrant held by respondent. X

Alfred HICKS

v.

AMERICAN NATURAL GAS COMPANY,
Appt.

(207 Pa. 570.)

1. One negotiating for the purchase of a farm is charged with notice of facts with reference to the title, which come to the knowledge of his agent who conducts the negotiations and secures the option.
2. One who takes title to a farm without making any inquiries as to the purpose of a derrick and connecting machinery which are plainly in use for the production of oil or gas on the premises is not entitled to a preliminary injunction to restrain further operations under a lease transferring the right to the oil and gas to another person, although it was not recorded.
3. A preliminary injunction will not be awarded a purchaser of a farm to restrain operations under a prior oil and gas lease of the premises, which he alleges is void as to him, where by the terms of the lease the lessee is bound to pay for all injuries to the surface, and to measure accurately all gas taken from the premises.
4. A preliminary injunction will not be granted to restrain further operations under an oil and gas lease alleged to be of no effect as against a purchaser of the premises, where the lessee has a well in operation from which he is supplying the public, and has machinery in place for the drilling of another one, so that, by stopping his operations, the lessee will lose everything he hoped to gain by his contract, while the owner of the premises will lose nothing by delaying the injunction until final hearing.

NOTE.—As to the nature of interest in an oil or gas lease, see also note to *Williamson v. Jones*, 25 L. R. A. 226.
65 L. R. A.

5. Ejectment, and not a bill in equity for an injunction, is the appropriate remedy to oust from possession one who has entered upon premises under an oil and gas lease which is alleged to be invalid, and has erected necessary machinery, drilled a well, and is proceeding to drill others.

(January 4, 1904.)

APPEAL by defendant from a decree of the Court of Common Pleas for Westmoreland County granting a preliminary injunction to restrain further proceedings under an oil and gas lease. *Reversed.*

The facts are stated in the opinion.

Messrs. Williams, Sloan, & Wegley, and Lyon, McKee, & Mitchell, for appellant:

A preliminary injunction will not be granted in the absence of irreparable injury to the complainant.

New Boston Coal & Min. Co. v. Pottsville Water Co. 54 Pa. 164; *Hesperheide's Appeal*, 4 Pennyp. 71; *Gilfillan v. Grier*, 145 Pa. 317, 22 Atl. 593.

It will not be granted or continued where the complainant's right, either on the law or on the facts, is not clear and free from doubt.

Biddle v. Ash, 2 Ashm. (Pa.) 211.

Especially will the injunction be refused where great damage or inconvenience would be caused to the respondent or the public by the granting thereof, or where the complainant has been guilty of laches.

Butler v. Egge, 170 Pa. 239, 32 Atl. 402; *New Boston Coal & Min. Co. v. Pottsville Water Co.* 54 Pa. 164; *Raub Coal Co. v. Waddell*, 7 Kulp, 282.

The preliminary injunction will not be granted where the answer denies the equities of the bill, and the weight of the evidence is in favor of defendant.

Huston v. Huston, 1 W. N. C. 26; *Crombie v. Order of Solon*, 157 Pa. 588, 27 Atl. 710.

An injunction will not be granted where greater injury would be done thereby than by refusing it, although the matter complained of may be a nuisance.

Richards's Appeal, 57 Pa. 105, 98 Am. Dec. 202.

Equity will not enjoin what is a great advantage to many and a slight inconvenience to a few.

Denehey v. Harrisburg, 2 Pearson (Pa.) 330.

A purchaser with notice of an unrecorded oil and gas lease of which the lessee is in possession takes title subject to the lease. Notice is information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by

law to have been acquired by him, which information is regarded as equivalent in its legal effects to a full knowledge of the fact.

21 Am. & Eng. Enc. Law, 2d ed. p. 581; *Jakes v. Weeks*, 7 Watts, 276; *Daniels v. Davison*, 16 Ves. Jr. 249, 10 Revised Rep. 171; *Hottenstein v. Lerch*, 104 Pa. 454; *Sailor v. Hertzog*, 4 Whart. 259; *Krider v. Lafferty*, 1 Whart. 303; *Maul v. Rider*, 59 Pa. 167; *Hill v. Epley*, 31 Pa. 331; *Tanney v. Tanney*, 159 Pa. 277, 39 Am. St. Rep. 678, 28 Atl. 287; *State Bank v. Carr*, 15 Pa. Super. Ct. 346.

It is the duty of purchasers of real estate to make inquiry respecting the rights of parties in possession.

Jamison v. Dimock, 95 Pa. 52; *Sill v. Swackhammer*, 103 Pa. 14; *Lord's Appeal*, 105 Pa. 457; *Roue v. Ream*, 105 Pa. 546.

A lessee who is in "open, notorious, visible, and exclusive possession" of land under an unrecorded lease for three years may hold his term against the subsequent mortgagee.

Marsh v. Nelson, 101 Pa. 51; *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542; *Delaware & H. Canal Co. v. Hughes*, 183 Pa. 66, 38 L. R. A. 826, 63 Am. St. Rep. 743, 38 Atl. 568.

Defendant's possession was as open, notorious, visible, and conclusive as the subject-matter is capable of.

Funk v. Haldeman, 53 Pa. 229; *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724.

Notice to Taylor as agent was notice to the principal.

Danville Bridge Co. v. Pomroy, 15 Pa. 151; *Sergeant v. Ingersoll*, 15 Pa. 343; *Wetzel v. Sponsler*, 18 Pa. 460; *Hood v. Fahnestock*, 8 Watts, 489, 34 Am. Dec. 489.

Mr. W. A. Griffith also for appellant. **Messrs. Paul H. Gaither and Cyrus E. Woods**, for appellee:

The burden of proving notice in cases of this kind is on the party claiming title by virtue of such notice.

Billington v. Welsh, 5 Binn. 129, 6 Am. Dec. 406; *Hodge v. Amerman*, 40 N. J. Eq. 99, 2 Atl. 257.

The question upon constructive notice is not whether the purchaser had the means of obtaining, and might, by prudent caution, have obtained, the knowledge in question, but whether or not obtaining it was an act of gross or culpable negligence.

Sugden, Vendors & Purchasers, p. 755; *Phillipsburg Sav. Bank's Appeal*, 10 W. N. C. 265; *Meehan v. Williams*, 48 Pa. 238.

The derrick, located as it was, on a remote part of the farm, and partially obscured by trees, was not sufficient notice to the vendee of the alleged title of the vendor.

It is impossible to sustain an action of 65 L. R. A.

ejectment for the possession of the subject-matter of such a grant.

Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Funk v. Haldeman*, 53 Pa. 229; *Union Petroleum Co. v. Bliven Petroleum Co.* 72 Pa. 173; *Carnegie Natural Gas Co. v. Philadelphia Co.* 158 Pa. 317, 27 Atl. 951; *Hancock v. McAvoy*, 151 Pa. 460, 18 L. R. A. 781, 31 Am. St. Rep. 774, 25 Atl. 47.

The purpose of this bill is simply to prevent the defendant from interfering with plaintiff's possession by exercising acts of ownership, waste, and trespass on the property until a final decree is secured as to the cancelation of the said lease of the defendant; which lease is a cloud on the plaintiff's title.

Dull's Appeal, 113 Pa. 515, 6 Atl. 540.

The defendant's agreement is a cloud; and a serious one, upon the plaintiff's title; and, unless that cloud can be removed by the present proceeding, the plaintiff is without remedy.

Dull's Appeal, 113 Pa. 510, 6 Atl. 540; *Walters v. McElroy*, 151 Pa. 549; *Bierbower's Appeal*, 107 Pa. 14; *Gray v. Citizens' Gas Co.* 206 Pa. 303, 55 Atl. 988; *Shillito v. Shillito*, 160 Pa. 167, 28 Atl. 637; *Evans v. Goodwin*, 132 Pa. 136, 19 Atl. 49.

Dean, J., delivered the opinion of the court:

The defendant obtained a grant from Peter A. and Margaret Stewart on the 14th of May, 1902, of all the oil and gas under their farm, consisting of 189 acres in Westmoreland county. The grant was in writing, duly executed and acknowledged by the parties to it. It stipulated that the gas company should have the right at all times of ingress and egress to drill and operate for oil and gas upon the farm, with the right to conduct all operations, lay all pipes, erect such buildings and tanks as were necessary for the production and transportation of oil and gas, no well to be drilled nearer than 200 feet from the house. Provision was made for the prompt payment of the consideration, and for forfeiting the contract if default were made. In August, 1902, defendant went upon the premises and commenced drilling a natural gas well. It erected a derrick 80 feet high, 24 feet square at the base, an engine house 125 feet long, 5 feet wide, and 12 feet high, with belt connecting the engine with the derrick. A well was then drilled 2,700 feet deep, and gas struck on the 18th of November, 1902. Defendant then connected the well by pipes with its mains on the other side of the Kiskiminitas river. The gas company in the following year removed its machinery and derrick a short distance from the first well, and

commenced drilling another. This was about July, 1903. Previous to this, however, on the 12th of May, 1903, the plaintiff sent his agent, John Taylor, to the Stewarts, who solicited an option for the purchase outright of the farm from which the oil and gas had been granted to defendant. Taylor obtained a sixty-day option for the price of \$75,000. Before the expiration of the option Hicks elected to purchase, and took, on the 3d of July, 1903, an absolute deed for the farm, and four days thereafter had it recorded. The oil and gas company did not leave its contract for record until August 3, 1903, thirty days afterwards. There was no reservation of the oil and gas in the deed from the Stewarts to Hicks, and of course, from the record, there was no notice to Hicks of the land being subject to the prior grant. When the oil and gas company commenced its second well, Hicks, averring that he was an innocent purchaser of the land without notice of the encumbrance, and that he had paid the money, prayed the court below for a preliminary injunction restraining defendant from in any way interfering with him in the ownership, possession, or use of the farm, and, further, that the contract be annulled.

Defendant filed no formal answer, but took testimony at the hearing for a preliminary injunction, which was treated by the court below and the parties as its answer. It set up as a defense actual notice of the qualified possession by defendant from plaintiff by the grant of the oil and gas under the farm; that without this the operations of defendant were on the land in full view of the agent when he took the option, and of Hicks when he afterwards took the deed, and therefore knowledge should be implied.

There was quite a full hearing of the evidence by the learned judge of the court below, who awarded a preliminary injunction restraining defendant from in any way entering upon said land, or interfering with plaintiff in the ownership, possession, or use thereof. We now have this appeal by defendant, assigning for error the decree of the court.

It is somewhat embarrassing to an appellate court to discuss the reasons for or against a preliminary decree, because generally in such an issue we are not in full possession of the case either as to the law or testimony; hence our almost invariable rule is to simply affirm the decree, or, if we reverse it, to give only a brief outline of our reasons, reserving further discussion until appeal, should there be one, from final judgment or decree in law or equity. We therefore content ourselves here with a statement of the rules which should govern courts in granting or withholding preliminary injunctions,

and advert very briefly to the testimony.

All the text-books agree that a preliminary injunction should only be granted where injury to the property of complainant is imminent, and, if committed, irreparable. And it will not generally be awarded where the complainant's right is not clear, or to turn the proposition around, where the wrong is not manifest. Courts of equity invariably, on a hearing for preliminary injunction, endeavor as far as possible to make such decree, however it may be framed, as will maintain the *status quo* until final hearing or judgment.

Under the undisputed facts in this case, how could it be said that plaintiff's right appeared clear at the preliminary hearing? But one fact alone makes in his favor,—by his deed from the Stewarts he holds the legal and equitable title to the land. On its face this carries the right to the exclusive possession, for under the recording acts the oil and gas company, as against plaintiff, had constructively no right whatever, while, as against the Stewarts, the common grantors, the company's right was clear; but the company averred that plaintiff had full notice, before he took his option and accepted his deed, that already the Stewarts had made the grant to it, and that it was in possession under that restricted right. To sustain these averments, whatever may be the nature of the evidence at a trial at law, yet at the preliminary hearing it was not vague or uncertain. There was upon the land in full view a large derrick 80 feet in height. A building 125 feet long and 12 feet high connected with it. Taylor, the agent of Hicks, who took the option in his own name, admits that he examined the farm and knew its boundaries before taking the option. He saw the derrick, and Stewart called his attention to it, but he (Taylor) made no further inquiry about it.

Taylor was called by plaintiff, and was his most important witness. Whatever knowledge the agent who conducted the negotiations and took the option on the farm had must be imputed to Hicks. Plaintiff, then, knew, when the option was taken and deed accepted, that there was upon the farm a high derrick and large building for drilling purposes. Somebody was producing oil or gas from the land. Stewart was an old farmer, cultivating the surface. It is not even pretended that anyone supposed he was operating the derrick and drill. It was there by consent of the owner, Stewart, under some kind of license or contract with him. This plaintiff, by the admissions of his agent, Taylor, was presumed to know. The slightest inquiry from Stewart would have disclosed the name of the owner of the

derrick, and inquiry from him or Stewart would have disclosed the formal particulars of the grant antedating the option and deed. If plaintiff desired to put himself in the position of an innocent purchaser who had paid the purchase money without notice of any prior grant, inquiry became a duty on his part at this juncture in the negotiations. Thus far we have not noticed any testimony except that of plaintiff. It seems to us he wholly fails to make out what the books call a "clear right," such as would entitle him to a preliminary injunction.

But a reference to Stewart's testimony still further weakens plaintiff's case. Taylor was there with Stewart to negotiate the option. They walked together over the farm, talking about the proposed purchase. Stewart testifies: "I told him there was a lease on the place as we came down the road past it, and that that derrick was the fruit of the lease. I told him that I was telling him that as a matter of form, as I supposed he knew it already." Without discussing at present the exact nature of the property or possession passing from the Stewarts to defendant by the grant of the oil and gas, the evidence of a qualified or restricted possession for the purpose of drilling and operating gas wells is far from what is called merely doubtful. It is so significant as to approach, at least, the unquestionable. The familiar rule so often cited, announced in *Jaques v. Weeks*, 7 Watts, 261 (indeed, it is much older than that case), is, then, pointedly applicable to these facts: "The general doctrine is that whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, . . . and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. Notice of a deed is notice of its contents, and notice to an agent is notice to his principal."

The Stewarts could not have maintained a bill for a preliminary injunction in the face of their grant. Hicks, because he had notice of it, stands in their shoes. It is therefore a barrier to him.

Not only should the preliminary injunction have been refused because, on the evidence at that stage, plaintiff's right was not at all clear, but it also should have been refused because he showed no irreparable damage. His use of the surface continued as undisturbed as Stewart enjoyed it. By the contract defendant must pay all damages occasioned by ingress or egress; it must keep at least 200 feet distant from the house; it must pay not less than \$50 quarterly whether gas be produced or not; the quantity of gas produced is to be measured by an accurate system, and to be paid for quarterly.

If the contract with the Stewarts, therefore, be void, if it be eventually determined that it conferred no right on defendant, the measurement will accurately show just how much gas defendant got during the interval between the ending of Stewart's title and final judgment. Surely, it would not then be a very difficult matter to make plaintiff whole because of the alleged appropriation of the gas under his land.

But, further, the preliminary injunction does not maintain the *status quo*. The defendant has sunk one costly well, has cased it, and has piped the gas therefrom to its mains; is now supplying its patrons, the public; was about to sink another well under its contract with the Stewarts; has all its costly machinery ready for operation at the proper point. Its entire business is suddenly stopped by the strong arm of the chancellor. By delaying injunction until final hearing, plaintiff practically would have lost nothing. Defendant substantially loses everything it hoped to gain by its contract, and all it has gained by its large expenditure at that location. Its customers cannot wait a year or more for the event of a lawsuit; it must at once seek another field to obtain its product, involving, perhaps, the duplication of its structure and machinery. The plaintiff thus accomplishes at once, and for the time being, all he could have got by final decree. It is extremely doubtful if it that decree were in defendant's favor if it could ever be put in the same situation as before the injunction. Therefore the preliminary injunction was improvident.

It is further argued by appellant that this court is without jurisdiction because this is what is known as an ejectment bill,—an attempt to oust defendant from possession of land by a suit in equity, while the remedy is at law by ejectment. To this appellee replies, in a supplemental paper book, citing a number of our own decisions, to the effect that an oil or gas contract or lease is an incorporeal hereditament; that is, "a right issuing out of a thing corporate, or concerning or annexed to or exercisable within the same. It is no part of the corporate thing that remains as perfect after the right has issued, or has been exercised as before."

Undoubtedly several of our cases hold that an oil or gas contract in the usual form is an incorporeal hereditament, and ejectment cannot be maintained thereon. But whether it is the subject of ejectment by him who has the title of the corporate thing, after the right has issued out of the thing corporate, depends on the special situation of the incorporeal hereditament in the particular case at the date of the suit. If, to enjoy the right or exercise it, an actual,

though qualified or restricted, possession has been taken, then the owner of the thing corporate, who denies the existence of the right, or alleges it to have been lost or forfeited, can maintain ejectment against him who has the restricted possession under the incorporeal hereditament. We will not say that ejectment would in all cases be the only remedy of the owner, for there might be rare cases where equity would take jurisdiction; but we do say, unhesitatingly, that in the case before us ejectment was his only appropriate remedy.

And the cases cited by counsel for appellee in their supplemental paper book in no wise antagonize, but support, this view. *Funk v. Haldeman*, 53 Pa. 229, is the first and leading case cited. In that case Funk filed his bill to restrain defendants from trespassing on land leased exclusively to him for oil purposes by McElheny, the owner. The defendants alleged that Funk, the first lessee, had forfeited his right, and that at all events his right was not exclusive. The court below held that Funk had forfeited his right, and granted an injunction. He appealed to this court, which in an elaborate opinion by Woodward, Ch. J., reversed the decree and awarded an injunction, holding that Funk had not violated his covenants whereby a forfeiture had been incurred, and that, if he had, "a chancellor would be likely to send the grantors into a court of law to enforce the forfeiture by ejectment, for equity does not ordinarily enforce forfeiture." It will be noticed that this case was not between the oil lessee and the owner, but between two rival claimants of the oil; yet it is more than intimated that, if Funk had forfeited his lease, and the defendants under their contract had succeeded to his right, then they would have stood in the shoes of the owner, and, Funk being in possession, ejectment would have been their remedy. This is the first case in this state in which the nature of the estate acquired by a lease of the exclusive right to search and drill for oil was passed upon by this court. And, although it is somewhat reluctantly held to be an incorporeal hereditament, yet it is, in substance, decided that, if the suit had been between the owner of the land and Funk, the owner of the incorporeal hereditament or license, the owner's remedy to oust Funk would have been by ejectment. This case was decided in 1866, a very few years after the great utility of natural oil and its immense value as an article of commerce had been demonstrated. Its extent under the earth, the means of discovery, and methods of production were still but imperfectly known. It may be doubted whether now, after forty years more of knowledge, if the question were first be-

fore us, we would hold that a grant of exclusive right to the oil under a defined tract of land, coupled with the exclusive right to portions of the surface for production and transportation, is an incorporeal hereditament. But in *Funk v. Haldeman* we did so classify it, and have followed that decision in many cases since. Having due regard, therefore, to the rule of *stare decisis*, we must continue to so classify such contracts.

The next case cited is *Union Petroleum Co. v. Bliven Petroleum Co.* 72 Pa. 173,—an action on the case for damages between two rival companies for the oil rights under the same land. It was held that the action would lie for the interference with and obstruction of the right of one by the other, although the right was an incorporeal hereditament. The case was tried in the court below by Judge Trunkey, afterwards a justice of this court. In his charge he says: "If he [McClintock, the owner of the land] were asserting or attempting to enforce his rights to the possession of the soil, his remedy would be ejectment or trespass." The charge as a whole, although also relating to other facts, was approved by this court in an opinion by Sharswood, J.

The case of *Carnegie Natural Gas Co. v. Philadelphia Co.* 158 Pa. 317, 27 Atl. 951, also cited by appellee, is a case of two warring lessees each claiming the right to the gas under the same tract of land, and the main question was as to whether the one company by the failure to keep its covenants had forfeited its rights, and thereby the other company had acquired the exclusive right. It was held in that case that the right of each company was an incorporeal hereditament, and that equity had jurisdiction on the facts of that case. It by no means holds that equity had exclusive jurisdiction.

We have found no case, and none has been cited, which holds that the remedy of the owner of the thing corporate against the unlawful possession by the owner of the incorporeal hereditament must oust the trespasser by injunction. The other cases cited involved trespasses or acts in their nature tortious, in which cases it has been decided that for them actions at law are often inadequate remedies. In the case before us the possession was initiated by virtue of a positive contract with the owners of the fee. It was actual and peaceable. It is not alleged, nor could it be, that defendant's entry was in the beginning wrongful. All that is alleged is that during that possession plaintiff obtained a superior right by deed without notice of defendant's right,—the very case for ejectment, for it is strictly a possessory action. Although in practice it

has somewhat changed, its foundation and sole purpose were originally to determine the right of possession. It is still fully adequate to that purpose on these facts.

So that, supposing defendant, after taking its restricted possession, had erected its buildings and structures, had commenced, as it did, to pipe, transport, and sell large quantities of gas, and had then refused to pay, and then the grantors, as provided by the contract, had declared it forfeited, then their right of re-entry on the land where defendant had erected its derricks and buildings would have been clear, and, if possession had been refused, their right could have been enforced by ejectment. It would have been the only appropriate remedy. The plaintiff by his deed, if he had notice of the lease, has no higher or other right than his grantors.

Assume that this contract was a mere license, then, as long as defendant remained outside,—did not have full control or possession of the hereditament,—it could not, under the authorities cited, bring ejectment. But when it has actually entered upon the land under its contract its position is entirely different; it then has actual peaceable possession. It could not bring an ejectment to be put in possession, but the owner could and must bring one to put it out. The reason given for barring the licensee in several of the cases is that, if he recovered, the sheriff could not, under a writ of habere facias, put him in possession without interfering with the rightful possession of the owner; but the reason wholly disappears when the grantee is in possession, and the owner denies his right to be upon his land under any contract. The nature of this possession is aptly stated by Mitchell, Ch. J., in *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724. "And equally so as between lessor and lessee in the present case, the one who controls the gas—has it in his grasp, so to speak—is the one who has possession in the legal, as well as in the ordinary, sense of the word. Tested by these principles, there is not the slightest doubt that the possession of the gas, as well as the right to it under this lease, was in the complainant's when the bill was filed. They had put down a well, which had tapped the gas-bearing strata, and it was the only one on the land. They had it in their control, for they had only to turn a valve to have it flow into their pipe ready for use. The fact that they did not keep it flowing, but held it generally in reserve, did not affect their possession any more than a mill owner affects the continuance of his water right when he shuts his sluice gates."

We think plaintiff in this case, on this 65 L. R. A.

contract and under the evidence, had a full and complete remedy at law by ejectment. Therefore, for all the reasons given, *the decree of the court below is reversed*, and for the last one the bill is dismissed, at the costs of appellee.

Edward J. FOX *et al.*, *Appts.*,

v.

City of PHILADELPHIA

(208 Pa. 127.)

1. The creation by the legislature of a commission to erect public buildings for a municipal corporation does not relieve the city from liability for injuries caused by negligent operation of elevators in a building after it has been turned over to the city, where the commission is given no power to maintain, rebuild, repair, or re-furnish the building after it has once parted with possession of it.
2. A municipal corporation cannot relieve itself from liability for injuries caused by the negligence of one employed to operate an elevator in a public building which is under its control by the fact that he was employed by a commission which had been created by the legislature for the erection of the building, where he was paid by the city, and the elevator had been turned over to the city for use, at which time the authority of the commission over it impliedly ceased according to the terms of the act creating it.
3. The creation, by the legislature, of a commission to supervise the construction of public buildings for a municipal corporation does not relieve the latter from the obligation of seeing that elevators in the building are safe before it places them in use, where that duty is not imposed, by the terms of the act, upon the commission.
4. The burden of rebutting the presumption of negligence is upon a municipal corporation, when one attempting to use an elevator in one of its buildings is shown to have been crushed to death through no fault or negligence of his own.
5. The owner of an elevator for carrying passengers from one floor of a building to another is governed by the rule applicable in case of common carriers, which makes him liable for injuries caused by the slightest negligence against which human prudence and foresight might have guarded.

(February 15, 1904.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in defendant's favor

NOTE.—As to liability of city for negligence in respect to public buildings, see also, in this series, *Snider v. St. Paul*, 18 L. R. A. 151; *Baron v. Detroit*, 19 L. R. A. 452; *Shields v. Durham*, 36 L. R. A. 293; *Long v. Elberton*, 46 L. R. A. 428; *Gray v. Griffin*, 51 L. R. A. 131; and *Little v. Holyoke*, 52 L. R. A. 417.

in an action brought to recover damages for the alleged negligent killing of their father. *Reversed.*

The facts are stated in the opinion.

Mr. Wendell F. Bowman, for appellants:

The evidence raises a legal presumption of negligence that entitled plaintiffs to go to the jury.

Spear v. Philadelphia, W. & B. R. Co. 119 Pa. 61, 12 Atl. 824; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 359, 39 Am. Rep. 787.

There is no difference in law as to the rights and obligations of a passenger on and the owner and operator of an elevator, and a passenger on and the owner and operator of a railroad.

2 Shearm. & Redf. Neg. 5th ed. 1240, § 719; *Riland v. Hirshler*, 7 Pa. Super. Ct. 384; *Goodsell v. Taylor*, 41 Minn. 207, 4 L. R. A. 673, 16 Am. St. Rep. 700, 42 N. W. 873; *Treadwell v. Whittier*, 80 Cal. 574, 5 L. R. A. 498, 13 Am. St. Rep. 175, 22 Pac. 266; *Mitchell v. Marker*, 25 L. R. A. 33, 10 C. C. A. 306, 22 U. S. App. 325, 62 Fed. 139; *Hartford Deposit Co. v. Solkitt*, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178.

The plaintiffs' father being killed while a passenger on the elevator, they are only required to prove the accident, nature and extent of the injury, and the circumstances thereof, in the first instance.

Philadelphia & R. R. Co. v. Anderson, 94 Pa. 357, 39 Am. Rep. 787.

Even if this were not a case where the duty of the defendant is absolute, the plaintiffs have brought themselves within the maxim, *Res ipsa loquitur*, as it applies to cases, other than those of absolute duty, or obligation, equivalent to that of an insurer.

Zakmsen v. Pennsylvania Torpedo Co. 190 Pa. 350, 42 Atl. 707.

The commissioners for the erection and furnishing of the city hall, with their limited powers, with the city authorities bound to act in conjunction with them in the exercise of that limited power, and under all the circumstances, were simply the agents of the defendant.

Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; *Barnes v. District of Columbia*, 91 U. S. 540; 23 L. ed. 440; *Esberg Cigar Co. v. Portland*, 34 Or. 282, 43 L. R. A. 435, 75 Am. St. Rep. 651, 55 Pac. 961; *Williams*, Mun. Liability for Tort, 27.

As regards its private functions, powers, and capacities, the city is substantially on the same footing as private corporations or individuals.

Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; *Com. v. Philadelphia*, 132 Pa. 290, 19 Atl. 136; 65 L. R. A.

Wheeler v. Philadelphia, 77 Pa. 353; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 394; *Brumm's Appeal* (Pa.) 12 Atl. 855; *Philadelphia v. Gilmartin*, 71 Pa. 140; *Kibele v. Philadelphia*, 105 Pa. 41; *Bodge v. Philadelphia*, 167 Pa. 494, 31 Atl. 728; *The Giovanni v. Philadelphia*, 59 Fed. 303; *Guthrie v. Philadelphia*, 73 Fed. 688; *The F. C. Latrobe*, 28 Fed. 377; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65.

The uses and purposes of the public buildings are very largely for the private benefit of the city; and when the officers or servants of a municipal corporation are in the exercise of a power conferred upon the corporation for its private benefit, and an injury ensues from the negligence or misfeasance of any such officer or servant, the corporation is liable as in the case of a private corporation or party.

Williams, Mun. Liability for Tort, pp. 34, 1901; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Briegel v. Philadelphia*, 135 Pa. 451, 20 Am. St. Rep. 885, 19 Atl. 1038; *Ford v. Kendall School Dist.* 121 Pa. 543, 1 L. R. A. 607, 15 Atl. 812; *Winne-more v. Philadelphia*, 18 Pa. Super. Ct. 631.

Messrs. Harry T. Kingston, Joseph S. MacLaughlin, and John L. Kinsey for appellee.

Brown, J., delivered the opinion of the court:

On May 12, 1899, James W. Fox, the father of appellants, was attending one of the courts in the city hall, Philadelphia, having in his charge a helpless old lady, who was moved on a rolling chair. After he left the courtroom with her he rolled the chair to an elevator in the northwest corner of the corridor on the second floor of the building, to be taken down to the first. When the elevator descended to the second floor and the door was opened, he pushed the chair into it at the invitation of the man operating it, and when he was about to get on it, having one foot on it, it suddenly started downward. He had his hand on the rear of the chair at the edge of the elevator, and, in its descent, was caught by the top and crushed to death. A nonsuit was entered, the trial judge saying: "We take it, then, that in 1899, when this accident happened, the elevator was under the management and control of the commission, operated by its employee, who was in no sense under the control or direction of the city. The question then is, Was the city liable for his negligence, if he was negligent? The decisions of the supreme court in *Aloorn v. Philadelphia*, 44 Pa. 348, and in *Ashby v. Erie*, 85 Pa. 286, would seem to rule this question against the plaintiffs. But I prefer not to rest the decision of

this case upon this point, but upon the broader ground that the plaintiffs have shown no negligence. . . . The principles so clearly stated by Justice Fell in *McClain v. Henderson*, 187 Pa. 283, 40 Atl. 985, apply to this case, and, for the reason that the evidence discloses an accident, but no negligence, the nonsuit is granted."

The act of August 5, 1870 (P. L. 1871, p. 1548), under which the public building commission of the city of Philadelphia was constituted, is entitled: "An Act to Provide for the Erection of All the Public Buildings Required to Accommodate the Courts and for All Municipal Purposes in the City of Philadelphia, and to Require the Appropriation by Said City of Penn Square, at Broad and Market Streets, to the Academy of Fine Arts, the Academy of Natural Sciences, the Franklin Institute, and the Philadelphia Library, in the Event of the Said Squares Not Being Selected by a Vote of the People as the Site for the Public Buildings for Said City." Though the commission was a most important one, the act creating it is brief; but the powers and duties of the commissioners are clearly defined. From the title to the act it is first learned that it was passed to provide simply for the erection of the public buildings. Reading it through, the powers and duties of the commission in connection with the public buildings are confined strictly to their erection and furnishing. There is a provision that "it shall be the duty of the mayor, the city comptroller, city commissioners and city treasurer, and of all other officers of the city, and also the duty of the councils of the city of Philadelphia, to do and perform all such acts in aid and promotion of the intent and purpose of this act of assembly as said commission may from time to time require;" but there is a clear limitation put upon the power of the commission to expend the moneys of the city. It is "that the amount to be expended by said commissioners shall be strictly limited to the sum required to satisfy their contracts for the erection of said buildings and for the proper and complete furnishing thereof." And there is a further provision that, "as soon as any part of said buildings may be completed and furnished ready for occupancy, they shall be occupied by the courts or such branch of the municipal government as they are intended for."

To erect and furnish, and nothing more, were all the commissioners were to do. Neither the building, nor any part of it, when finished, was to be under their control, management, or operation. They had no voice in maintaining it, and they could neither rebuild, repair, nor refurnish. What-

ever powers were not given to them were withheld from them and remained in the city, with the duties incident thereto. Elevators which were necessary in the erection of the building would necessarily be under the control and management of the commissioners, but not an elevator used, as this was, in carrying persons to and from finished and furnished portions of the city hall. It was a part of a finished part of the building, which, when finished and furnished, passed, if not by the express words of the act, by implication that cannot be questioned, from the hands of the commission to the control and management of the municipality itself, from responsibility for which it cannot relieve itself by allowing others to perform its duties for it; and it is to be assumed that all the machinery connected with the operation of the elevator was also finished, else it would not have been operated as a means of transportation for those having business in the courts and municipal offices. The man who ran it may have been employed by the building commission, but he was paid out of the treasury of the city, and it was the duty of the city, not of the building commission, to have employed him or some other competent person to operate its elevator. It was further the duty of the city to see that it and the machinery connected with its operation were not defective, for no such duty had been imposed upon the building commissioners; and if, when this accident occurred, they were acting beyond the limitation upon their powers, and exercising duties that they were not called upon to perform, the city, which ought to have performed them, is answerable for failure to do so.

It is manifest that the learned trial judge was misled by the cases upon which he relied in directing the judgment of nonsuit. In *Alcorn v. Philadelphia*, 44 Pa. 348, the action was brought for damages sustained by the alleged negligence of a district surveyor in giving the plaintiff the lines of his lot, on which he proposed and actually proceeded to build. The judgment for the defendant, *non obstante veredicto*, was sustained because the surveyor had been elected directly by the people, under the authority of a statute, and the city, having no control over him, was therefore not bound by any of his acts. We further held that it is not a duty incumbent upon cities, in their corporate capacity, to provide for the survey of lots and location of lines, but a private one, falling upon the lot owners themselves; and, if injury results from negligence or unskilfulness in the surveyor employed, the employer must look to him for redress. A judgment of nonsuit

was sustained in *Ashby v. Erie*, 85 Pa. 286, in a suit by the plaintiffs for the flooding of the basement of their store by the bursting of a street water main, because by the act of April 4, 1867 (P. L. 768), the waterworks of the city had been built and were managed by commissioners appointed by judges of the court of common pleas of the county, and, among other duties imposed upon them by the statute, they were required to take the full charge and control of the erection and completion of the waterworks of the city, make all contracts for the erection and completion thereof, provide for the repair and maintenance of the same, collect the water rents, and appoint their own officers and agents. These commissioners were an independent board, wholly independent of the city authorities, and it was not liable for the nonperformance of a duty which had not been imposed upon it, but, by the very words of the statute, upon the board of commissioners. *McClain v. Henderson*, 187 Pa. 283, 40 Atl. 985, was a suit against an employer by the widow of one of his employees, who had been killed by the breaking of a chain in the machinery, and the plaintiff was, of course, bound to show the negligence of the employer, for, as between employer and employee, there is no presumption of it; but no such relation existed between the father of the appellants and the city of Philadelphia, and this last case does not apply to them. Their right to recover depends upon a different rule.

Under the assumption that the burden was upon them to affirmatively establish the negligence of the city, the appellants undertook to do so. They proved that the elevator had been equipped with what was known as the "Connor safety device," which, if in order, automatically locked the elevator when the door was open; that, if it had been in working order on the day of the accident, it would have been impossible for the elevator to descend when the door was open; that it was discovered after the accident that this device had become unhooked or uncoupled; and that, before the man operating the elevator told the deceased to get on it, he knew it was not working properly. In view of this discovery by the operator, it is contended that he ought to have stopped using the elevator and reported its condition, that it might be repaired, and that it was negligence to continue its use, imperiling the lives of those who got on it. On plaintiffs' evidence the learned trial judge said that it undoubtedly showed the locking device to have been either disconnected or out of order. Whether this evidence was sufficient for the purpose for which it was of-

fered we need not decide, for the plaintiffs were not called upon for specific proof that the city had been negligent. Their case was for the jury when they showed that their father had been crushed to death by the elevator through no fault or negligence on his part, and it was for the defendant to rebut the presumption that it had been negligent.

The rule for the protection of passengers in the hands of common carriers, laid down in *Laing v. Colder*, 8 Pa. 479, 49 Am. Dec. 533, recognized elsewhere, and unvaryingly followed by us, is that "the slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable to answer in damages. Nay, the mere happening of an injurious accident raises, prima facie, a presumption of neglect, and throws upon the carrier the onus of showing it did not exist." This presumption may, of course, be rebutted by the carrier by showing that the injury arose from an accident which the utmost skill, foresight, and diligence could not have prevented. *Meier v. Pennsylvania R. Co.* 64 Pa. 225, 3 Am. Rep. 581.

The foundation of the rule for the protection of a passenger is in the undertaking of the common carrier, which is to carry safely; but another reason for it is that, when the passenger commits himself to the carrier, he does so in ignorance of the machinery and the appliances, as well as their defects, used in connection with the means of transportation, and becomes a passive and helpless creature in the hands of the transportation company and its agents. For the same reasons, this rule should be extended to those who operate elevators for carrying passengers from one story of a building to another. When they undertake to carry, they undertake to do so safely. If it is not their express agreement to do so, it is surely an implied one, and the condition of a passenger caged in a suspended car is one not only of utter ignorance of what has been done, or ought to be done, for his safety, but of absolute passiveness and pitiable helplessness when confronted with danger against which human knowledge, skill, and foresight ought to have guarded. And the rule has been so extended. "For the same reason—a regard for human life—that common carriers are required to exercise the highest degree of care for the safety of their passengers, irrespective of any contract of carriage, a like degree of care is exacted of a landlord in transporting persons by elevator between the several floors of his building. He is therefore bound to use the greatest care, not only in providing safe and suitable

cars, appliances, and machinery for motion and control, but also in managing these means of transportation." 2 Shearm. & Redf. Neg. 5th ed. 1240. In *Treadwell v. Whittier*, 80 Cal. 574, 5 L. R. A. 498, 13 Am. St. Rep. 175, 22 Pac. 266, the rule is laid down that the plaintiff is only called on to show that he was hurt by the breaking of the machinery of the elevator, and that, when he has done so, he has made out his case, as he is not required to make any particular proof of negligence. Referring to the responsibility of common carriers, it is there well said: "The same degree of responsibility must attach to one controlling and running an elevator. Persons who are lifted by elevators are subjected to great risks to life and limb. They are hoisted vertically, and are unable, in case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control, by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments to avoid injury to those they carry. The care and diligence required are proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised; where the danger is great, the utmost care and diligence must be employed. In such cases the law requires extraordinary care and diligence. We know of no employment where the law should demand a higher degree of care and diligence than in the case of the persons using and running elevators for lifting human beings from one level to another. The danger of those being raised is great. When persons are injured by the giving way of the machinery, the hurt is always serious, frequently fatal; and the law should, and does, bind persons so engaged to the highest degree of care practicable under the circumstances. It would be injustice and cruelty to the public in courts to abate in any degree from this high degree of care. The aged, the helpless, and the infirm are daily using these elevators. The owners make profit by these elevators, or use them for the profit they bring to them. The cruelty from a careless use of such contrivances is likely to fall on the weakest of the community. All, including the strongest, are without the means of

self-protection upon the breaking down of the machinery. The law, therefore, throws around such persons its protection, by requiring the highest care and diligence." Another case to which reference may be made is *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 64 Am. St. Rep. 38, 50 N. E. 178, where it is held that "persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings. It is a duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators, so as to prevent injury to persons therein. The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed."

The foregoing rule is peculiarly applicable to those operating elevators like the one in the present case. The courts of Philadelphia are not on the first floor of the city hall. They are reached on the upper stories by stairways and elevators. When summoned to attend them, suitors and witnesses must go, and, on reaching the public buildings, they find two means of ascending to them,—stairways and elevators, finished, and, as already shown, subject to the control and management of the city. Either means of reaching the courts may be adopted, though, to one who climbs the staircase, the elevators carry hundreds; and it sometimes happens, as here, that the halt and the lame are summoned to these upper stories, and they cannot mount the stairways, but must be carried by the elevators. To them, to those who attend them in their helplessness, and to all others who, from choice or necessity, use these elevators, there must be given the utmost protection which human knowledge, human skill, and human foresight and care can provide. In case of injury, without fault or negligence by the one injured, the presumption is that such protection had not been afforded, and that there had been negligence on the part of those operating the elevators.

Judgment reversed, and a procedendo awarded.

C. W. STONE *et al.*, Appts.,
v.

MARSHALL OIL COMPANY *et al.*

(.....Pa.....)

An assignee of a gas lease, which, to

NOTE.—On the subject of accession and confusion, see, in this series, cases in note to Har-

avoid accounting to its assignor for his share of the profits of a well to which he is entitled under the contract of assignment, fraudulently commingles the product of the well with the product of other wells, without keeping any account or preserving any record of the amount of gas produced by it, will be compelled to account for the proportionate part called for by the contract of the whole amount of gas produced and sold by it, under the principle which is applied in case of the fraudulent confusion of goods.

(January 4, 1904.)

APPEAL by plaintiffs from a decree of the Court of Common Pleas, No. 2, for Allegheny County awarding them a less amount than demanded in an action brought to recover their alleged contract share of the profits of a gas well. *Reversed.*

The portion of the report of the master dealing with the principle upon which the account should be directed was as follows:

The master being unable to separate the gas discovered and conducted from the Grimes well, and thereby ascertain the profits derived from the sale of gas from the said well, because of the failure of the defendant companies to keep an accurate account, they must bear all the inconvenience and losses which may arise from their mingling the production of the several wells with the production from the Grimes well, without any effort on their part to measure or ascertain and determine the amount of gas discovered on and conducted from the Grimes lease.

Confusion of goods, as understood in English and American law, is the wilful and fraudulent intermixture of the chattels of one person with the chattels of the other, without the consent of the latter, in such a way that they cannot be separated and distinguished. *Dwight, Persons & Pers. Prop.* 486.

Confusion of goods arises wherever the goods of two or more persons are so blended as to have become undistinguishable. 2 *Schouler, Pers. Prop.* 41; 2 *Kent, Com.* 364; 2 *Bl. Com.* 405.

Blackstone states the principles governing this subject in the following language, in 2 *Bl. Com.* 405: But in the case of the confusion of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares. But

if one wilfully intermixes his money, corn, or hay with that of another man, without his approbation or knowledge, or cast gold into another's melting pot in like manner, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion was invaded, and endeavored to be rendered uncertain without his own consent.

Chancellor Kent states the rule in 2 *Kent, Com.* 364, as follows: With respect to the state of a confusion of goods, where those of two persons are so intermixed that this can no longer be distinguished, each of them has an equal interest in the subject as tenants in common, if the intermixture was by consent. But if it was wilfully made without mutual consent, then the civil law gave the whole to him who made the intermixture, and compelled him to make satisfaction in damages to the other party for what he had lost. The common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed. If A wilfully intermix his corn or hay with that of B, or cast his gold into another's crucible, so that it become impossible to distinguish what belonged to A, from what belonged to B, the whole belongs to B. But this rule is carried no further than necessity requires; and if the goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place. But if the articles were of different value or quality, and the original value not to be distinguished, the party injured takes the whole. It is for the party guilty of the fraud to distinguish his own property satisfactorily, or lose it. No court of justice is bound to make the discrimination for him.

If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it. If it be a case of damages, damages are given to the utmost value that the article will bear. *Hart v. Ten Eyck*, 2 *Johns. Ch.* 108.

The leading case in England on the doctrine of confusion of goods is that of *Lupton v. White*, 15 *Ves. Jr.* 436, 10 *Revised Rep.* 94. The plaintiff in that case was the owner

old v. Jones, 3 *L. R. A.* 408 (confusion of logs in jam); and *note* to *Carpenter v. Lingenfelter*, 65 *L. R. A.*

32 *L. R. A.* 422 (title by accession to crops, fruit, and timber wrongfully severed).

of a lead mine, and the defendant was the owner of an adjacent lead mine, and was also the lessee of the plaintiff. The defendant, in operating the two mines, mixed the ores from his own with those obtained from plaintiff's land, and caused them to be smelted together at the same hearth and marked them with the same mark and letter. He kept no separate account of the production of each mine, and, in order to prevent a proper examination of plaintiff's mine, in order to ascertain the amount of ore taken therefrom, he permitted parts to fall in, filled up other parts with rubbish and *débris*, and in other parts permitted water to accumulate, so that no proper estimate could be formed of the quantity of ore taken from plaintiff's land. The court directed that the defendant be charged with the whole production, except what he should be able to prove to have taken from his own mine.

The doctrine laid down by Blackstone and the English decisions has been followed very generally by the courts of the several states,—in some with slight modifications. In our own state, in the case of *Winlack v. Geist*, 107 Pa. 297, 52 Am. Rep. 473, it was said by the trial court: If I wrongfully take away from my neighbor what belongs to him of such a nature that I can create confusion of goods, and I go and mix it with goods that are mine in such a way that my neighbor cannot distinguish his goods, or ascertain which are his or which are mine, he can seize the whole. And the supreme court, Mr. Justice Green voicing its opinion, said: It is only the impossibility of distinguishing goods intermixed with others that transfers the title to the whole, to the one who is innocent of the intermixture.

The same doctrine is held in Kentucky, in *Weil v. Silverstone*, 6 Bush, 702. Judge Hardin, voicing the opinion of the court, said: The doctrine of the confusion of goods in its effects on the rights of immediate owners may be considered as clearly and distinctly settled. If a party wilfully so confounds the property of another with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown on the party who produces it, and generally it is for him to distinguish his own property or lose it.

Illinois also reiterates the doctrine in *First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681.

The rule is that, if a party unlawfully mixes or confuses his goods with those of another, so that they cannot be distinguished, the innocent party will be entitled to take the whole. The burden is upon the party thus confusing his goods with another, to identify his own property or lose it. 65 L. R. A.

See also *Diversey v. Johnson*, 93 Ill. 547; *Fuller v. Paige*, 26 Ill. 358, 79 Am. Dec. 379; *Beach v. Schmultz*, 20 Ill. 185.

And in the recent case of *Kleppner v. Lemon*, 197 Pa. 430, 47 Atl. 353, the supreme court reiterated and reaffirmed the doctrine of the confusion of goods, by affirming the decree of the trial court. In that case it is held that, when a lessee, in order to evade paying royalties under an oil or gas lease, instead of drilling a well and operating the land, in accordance with his covenants, drills a well on adjoining property, which he controls in such a way as to drain the oil and gas from under the leased land, and to render it impossible to determine how much oil was drawn from the lessor's land, the lessee will be liable to pay royalties to the lessor on all of the oil produced by the well operated on the adjoining land. The master, whose opinion was affirmed by the lower court and by the supreme court, said: There has been such a course of conduct on the part of the defendant, and such an intermixture of the production of the plaintiff's tract of land with the production of the adjacent tracts of land, as to prevent the possibility of ascertaining the production of each, and separating them.

Applying the principles laid down in *Kleppner v. Lemon* to the present case, we must say that there has been such an intermixture of the production of the gas discovered on and conducted from the Grimes well in which the plaintiffs have property rights, with the gas from the several wells belonging to the defendant companies as to prevent the possibility of ascertaining the production of the gas from the Grimes well, or the production from the several wells, and making a separation, and thereby determining the amount of the profits derived from a sale of gas discovered on and conducted from the Grimes lease.

The cases are uniform in holding that the burden is upon the party tortiously intermixing his property with that of another, to distinguish between his own property and that of the other with which he fraudulently intermixes his own; and, if he fails to so distinguish, then the whole must go to the party with whose property he has thus mingled his own.

The defendants contend, however, that the doctrine of the confusion of goods can only apply where the parties seeking to enforce it have the title to specific chattels which have been wrongfully mingled with others, and that inasmuch as the plaintiffs herein have no title to any of the goods discovered and conveyed from the Grimes lease, but only to one fourth of the profits derived from its sale, there can be

no application of the doctrine of confusion of goods. The plaintiffs had certain property in the Grimes lease, and in the gas discovered and conducted from said lease; but the value could not be determined until the gas was discovered and marketed, and a balance struck; but, Can this property be destroyed by the defendants who have the control of the Grimes lease and the marketing of the gas, negligently or fraudulently mixing the gas from the Grimes well (the testimony before the trial court was that it was a phenomenal well), with the gas from other wells, and then calmly say, we cannot tell you how much your property is worth, but, as nearly as we can approximate, it is worth such and such a sum of money?

If this be true, then the defendants might have gone one step further, and acknowledging that they were unable to account, because of their malfeasance or misfeasance, claim that they need not pay the plaintiffs anything because of their inability to say how much they should pay. That this is the law seems incredible to the master.

The further facts appear in the opinion.

Messrs. R. B. Stone, Lee & Chapman, Charles M. Thorp, and A. Leo Weil, for appellants:

To reverse a master's findings without assigning any reason is simply an act of arbitrary power, and practically leaves his findings in full force.

Morgan's Appeal, 125 Pa. 561, 17 Atl. 641; *Williams v. Concord Cong. Church*, 193 Pa. 120, 44 Atl. 272.

There are cases where the rule of confusion of goods, or analogous principles, have been applied to circumstances similar to those of the case at bar,—namely, to questions of account.

Diversey v. Johnson, 93 Ill. 547; *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639; *Ollaghan v. Myers*, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177.

The Pennsylvania cases on the subject of confusion of goods are as follows:

Allison's Appeal, 77 Pa. 221; *Henderson v. Lauck*, 21 Pa. 359; *McDowell v. Rissell*, 37 Pa. 164; *Kleppner v. Lemon*, 197 Pa. 430, 47 Atl. 353, 198 Pa. 581, 48 Atl. 483.

Messrs. Johns McCleave and R. W. Cummins, for appellees:

The decree under which the court below and the master are required to act, required the defendants to render an account "of the profits realized from the sale of the gas from the well on the Grimes farm." It did not require an accounting of profits made by the defendant companies from the gas realized from the eighteen other wells. This decree is in strict conformity to the prayer of the bill, and grants to the appellants full

relief in accordance with their prayers, it gives them all they have asked, and, having been affirmed by this court, is not now open to question, either by the master or the court below.

Re Emig, 186 Pa. 409, 40 Atl. 522; *Beach*, *Modern Eq. Pr.* § 685; *Gordon v. Hobart*, 2 Story, 243, Fed. Cas. No. 5,608; *Janes's Appeal*, 87 Pa. 428.

Even if the appellees had no title whatever to the Grimes well,—if the gas were mingled with the gas from the other wells under the belief that they owned the well,—a forfeiture of the mass would not take place; but the appellees would be allowed to prove their proportion as nearly as this could be done.

Hesseltine v. Stockwell, 30 Me. 242, 50 Am. Dec. 627; *Gates v. Rifle Boom Co.* 70 Mich. 310, 38 N. W. 245; *Ryder v. Hathaway*, 21 Pick. 298; *Pratt v. Bryant*, 20 Vt. 333.

Where the mass is homogeneous, as in this case, a forfeiture of property never takes place, but the wrongdoer is permitted to prove his *pro rata* share as nearly as he can do so, all presumptions being taken in favor of the innocent party.

D. M. Osborne & Co. v. Cargill Elevator Co. 62 Minn. 400, 64 N. W. 1135; *Pickering v. Moore*, 67 N. H. 533, 31 L. R. A. 698, 68 Am. St. Rep. 695, 32 Atl. 828; *The Idaho*, 93 U. S. 575, 585, 23 L. ed. 978, 981; *Olafin v. Continental Jersey Works*, 85 Ga. 46, 11 S. E. 721; *Henderson v. Lauck*, 21 Pa. 359; *Lawson, Rights, Rem. & Pr.* § 1318, p. 2396; *Mowry v. White*, 21 Wis. 417; *Bent v. Hozie*, 90 Wis. 625, 64 N. W. 426; *Young v. Miles*, 20 Wis. 615; *Reid v. King*, 89 Ky. 388, 12 S. W. 772; *Kaufmann v. Schilling*, 58 Mo. 218.

There must be a concurrence of two things in the intermingling of goods before a forfeiture takes place: (1) A fraudulent intermingling; (2) impossibility of otherwise protecting the innocent party's rights.

Sutherland, Damages, p. 536; *Winlack v. Geist*, 107 Pa. 297, 52 Am. Rep. 473.

Dean, J., delivered the opinion of the court:

Akin, one of the plaintiffs, on November 13, 1885, leased from Grimes the oil and gas under the latter's 150-acre farm in Washington county for the term of three years, or as long as oil and gas should be found in paying quantities. Akin, as a consideration, was to give one eighth the oil, if oil were found, and, in case gas was struck in paying quantities, was to pay Grimes \$700 annually for each well. One well was to be completed within a year, and Akin was to pay \$150 annually in quarterly payments until a well was completed.

The lease was acknowledged and recorded July 22, 1886. On December 2, 1886, Akin assigned one half his lease to C. W. Stone, R. B. Stone, and A. J. Hazeltine, the other three plaintiffs to this suit. This assignment was recorded the same day. They drilled no well, but made the quarterly payments to Grimes, who accepted them. On August 19, 1887, they executed a lease of 50 acres of the farm to the Marshall Oil Company, subject to all the stipulations of the original lease from Grimes to Akin, all of which stipulations were to be kept and performed by the oil company. The oil company was to have the right to drill and operate for oil and gas for one year, and as much longer as oil and gas should be found in paying quantities. The company was to drill four wells, to be completed within four, eight, twelve, and sixteen months, respectively. Part of the consideration is embodied in this provision: "The said party of the second part [the oil company] for itself, its successors and assigns, agrees to give to said parties of the first part [Akin, Stones, & Hazeltine], one fourth of all petroleum, one eighth to credit of John Grimes and one eighth to the lessors of this lease. It is also agreed that in case gas shall be discovered and conducted off the premises for use or sale, the said parties of the first part in the proportionate interests aforesaid shall receive one fourth of the profits thereof above cost bonus of \$700 to the original lessor." This lease is dated August 19, 1887, and was recorded the next day. On December 25, 1887, this lease was supplemented by another of 30 acres more of the farm on the same terms, but providing that of the four wells, none of which had yet been drilled, two should be completed within four months,—one on the 50-acre tract and one on the 30-acre tract,—and that as to all oil or gas produced on either tract the royalty should be the same as that fixed for the 50 acres. The Marshall Oil Company then drilled one well,—a very strong gas well. The Marshall Oil Company did not utilize it itself, but sold it to the Washington Oil Company, another of defendants. Then, on June 19, 1888, the Marshall Oil Company induced Grimes to lease to it directly the whole farm for oil and gas purposes. The terms of the lease were substantially the same as those in the lease from Grimes to Akin except that instead of \$700 per annum the price for each gas well was to be \$600 but the price for the well completed was to remain \$700. Then by a separate agreement Grimes reduced the price per well to \$500. Then by agreement dated July 5, 1888, the Marshall Oil Company leased an additional 15 acres to the Washington Oil Company, subject to the

same terms as its first lease to the same company, dated the previous June. The Washington Oil Company tubed the first well, piped the gas, and sold it from August, 1888, to September, 1889; then by bill of sale transferred the gas to the Taylorstown Natural Gas Company, which has been disposing of it ever since. This last company was practically a selling company for the Washington Oil Company. This first well was a remarkably strong and productive well. Even after nine years there is no perceptible diminution in the pressure or in the volume of gas. After its contract with Grimes of June 19, 1888, the Marshall Oil Company and Washington Oil Company drilled other wells on the Grimes farm, and the gas from them, as well as from the first well drilled, was conducted into a main pipe, and from that pipe conducted and distributed to consumers who desired to purchase it. The defendants refused to account to plaintiffs for their share of the profits of the Grimes well, and this bill was filed in July, 1893, for discovery, and for an account and decree of their share of the profits of that well.

Defendants set up defense that the lease from Grimes to Akin and from the latter to the Stones and Hazeltine were not the subject of assignment; that the covenant for share of the profits was a mere personal covenant of the Marshall Oil Company; and not binding on its assignees; that there had been default in payment to Grimes, which avoided the lease; and that plaintiffs had an adequate remedy at law. The late Judge White, then sitting as chancellor, after a full hearing on the evidence, in an elaborate opinion filed, decreed in February, 1898, that defendant should account, and sent the case to a master to state an account of the profits of the Grimes well. From this decree defendants appealed, and it was affirmed by this court on the opinion of the court below November 14, 1898 (188 Pa. 602, 614, 41 Atl. 748), and now, after five years more, with many and prolonged hearings before the master and the court below, we have this appeal by plaintiffs. Judge White, in his opinion decreeing the accounting, held that "it was very evident that the Marshall Oil Company, in procuring the lease from Grimes [of the whole farm] of June 19, [1888], acted in bad faith, and was guilty of a legal fraud upon the plaintiffs," and that this was for two purposes,—one to get clear of drilling another well, and, second, to get clear of paying to plaintiffs the share of one fourth of the profits on sale of gas. He further held: "A share of the gas stands on the same footing as a share of the oil. A share of the oil may be delivered at the well or

in pipe lines. As a share of the gas could not be delivered *in specie* at the well or elsewhere the only way of sharing it would be to share in the proceeds of sale." The master then very properly brushed aside much of the rubbish brought into the case by defendants to shield them from fully accounting, and, as he was bound to do, treated two questions as *res judicata*: First, defendants were bound to account for one fourth of the profits from the Grimes gas well; second, to get at their share of the profits they were bound to show with approximate accuracy plaintiffs' money share of the profits by showing the quantity of gas produced from that well. But defendants alleged the gas from the Grimes well was indiscriminately blended and mixed by defendants with that from a number of other wells of theirs, and it is impossible now to tell the quantity received from that particular well. As to this plea the master answers: "It is true they admit they were unable to determine with accuracy how much gas came from the Grimes well, but they say, Having failed to keep such account, what more can we do than we have done? This might answer very well if they had innocently erred, but if the failure to keep an account is not the result of innocent error, but of a fixed purpose to secure for themselves the profits of the Grimes lease, the case is a very different one. The testimony discloses the fact that the defendant companies have acted with their eyes open, and with full knowledge of the claim of plaintiffs to one fourth the profits from the sale of gas from the Grimes well." The master might very well find that they had acted with their eyes open. Not only were the lease to Akin and the assignment of half interest by him to the other three plaintiffs before them, but they had actual notice from R. B. Stone of plaintiffs' contract and claim of right under it. In 1893 this bill was filed, yet no attempt for nearly ten years was made to keep any account of this particular well. The master finds that there was a well-known system of measurement which might with but little trouble have been adopted and approximate accuracy of quantity obtained. Having made no effort to keep an account, with a full knowledge of their moral and legal obligation, they mingled the production of this well with their other wells, so that it is now impossible to ascertain with even approximate certainty the quantity. That it was very large, that it was in volume persistent and under high pressure, is not questioned.

The master, having stated the fact of the confusion of plaintiffs' property with that of defendants, and the fraudulent purpose in defendants' conduct, and after finding

as a fact from the evidence that it was impossible to separate with even approximate accuracy as to quantity the product of the Grimes well from the product of defendants' other wells, finds that in law there was by defendants a confusion of goods, and to the end that he might award to plaintiffs their one-fourth share of the profits under this contract he adopts the definition of "confusion of goods" given in Dwight on Persons & Personal Property, 486, as his rule of action. That definition is as follows: "Confusion [of goods], as understood in English and American law, is the wilful and fraudulent intermixture of the chattels of one person with the chattels of another, without the consent of the latter, in such a way that they cannot be separated and distinguished." The master fortifies the accuracy and scope of this definition by a citation of unimpeachable authorities. In fact, there is no substantial distinction between his definition and that cited by appellees' counsel from Sutherland on Damages, § 101: "A reasonable rule, which has much authority to support it, is that one who has confused his own property with that of other persons shall lose it when there is a concurrence of these two things. First, that he has fraudulently caused the confusion; and secondly, that the rights of the other party after the confusion are not capable otherwise of complete protection." Taking the facts as found by the master, there is no distinction in the applicability of either definition. So the master, governed by this rule, stated an account, charging the defendants with the gross receipts of gas from October, 1888, to February, 1898, \$549,544.03 and allowing them credit for expenses and other items which reduced the amount to \$451,861.22. One fourth of this, or \$112,965.30, he awarded to plaintiffs as their share of profits, and submitted his report accordingly to the court.

In the meantime Judge White, who had heard the evidence at the first hearings, and who had adjudged the liability of defendants to account, and had appointed the master, died; so exceptions to the report were heard and passed upon by Judge Shafer, who decreed in opinion filed that the exceptions denying the application of the doctrine of the confusion of goods be sustained, and that the case be referred back to the master that he might state an account in accordance with that opinion. Accordingly the master with great reluctance restated the account as directed by the court, making the receipts from the Grimes well \$111,203.05, and one fourth of that sum, \$27,800.76, he awarded to plaintiffs. That statement of account the court confirmed absolutely, and we have this appeal by plaintiffs

assigning for error the change in the computation as directed by the court.

The reasons given by the learned judge for setting aside the account stated by the master do not convince us that his decree is correct. He says: "Upon a careful examination of the authorities cited by counsel, we are convinced that the doctrine of confusion of goods is not applicable to the facts of this case." Then, after stating the substance of the contracts on which the claim of plaintiffs is based, he further says: "The default of the defendants consists, not in mingling the goods of the plaintiffs with their own, but in failing to keep a proper account of the proceeds of the Grimes well so as to be able to show definitely the amount of profit derived therefrom by them. The well and the gas produced from it being entirely in their own hands and control, and plaintiffs having no means whatever of keeping any account, the duty devolved upon the defendants to keep an account, and their agreement to pay to the plaintiffs the one fourth of the profits implied an agreement to keep a reasonably definite and accurate account. While we are of opinion that the doctrine of confusion of goods is not to be applied so as to deprive them of the profits of one fourth of all the gas produced from the other eighteen wells owned by them, yet the fact that negligence or fraud of the defendants has made a determination of the exact product of the Grimes well difficult, and perhaps impossible, must certainly be deemed to cast on them the inconvenience and loss which may arise from the difficulties of the account, and not on the plaintiffs, who are not to blame for them." We are at a loss to see any practical distinction between the reasons for the rule adopted from the books by the master and the reasons for the one announced by the court; nor can we see any other rational method that could be adopted by the master which would certainly reach none other than a righteous result.

There is but little difference between the master and the court in the moral stamp put upon the conduct of the defendants, but a very wide difference in the result of the two computations. By discarding his own computation in his first report and adopting the court's in the second, he relieves defendants of three fourths of the award he first imposed upon them. But in the second he treats defendants exactly as equity would have treated them, if from the beginning there had been a mutual agreement that the product of the Grimes well should not be measured before it passed into the main, that then, for years it might be commingled with the gas from the other wells, and then, with no means of approximating certainty, 65 L. R. A.

the plaintiffs' share of the profits should be computed. This is what equity would have done if both parties had been equally innocent, or, rather, if both had been equally negligent. But the adoption of the court's method flatly ignores the facts found by the master, and from which the court does not dissent. The gas was commingled by the fraud of defendants; in defiance of plaintiffs' right, which they well knew, they wholly neglected to keep any account of it. The master finds now that it is utterly impossible to approximate the quantity. Therefore, obeying the peremptory instruction of the court, as was his duty, he could not do other than make a somewhat arbitrary estimate or guess at the quantity, and so report. In doing so he disregards the facts, which the law declares would impel him to adopt the principle on which his first report is founded, and therefore the second report is not founded on fact or reason. By the guessing method, the chances of loss or gain between the innocent plaintiffs and the culpable defendants are even. By adopting the court's method, it is just as probable that defendants will gain thousands of dollars worth of plaintiff's gas to which they have no right as that plaintiffs will get any part of the gas to which they have no right. This is the very situation that arouses the indignation of equity, for plaintiffs did nothing to bring it about and defendants did; hence comes into operation the principle that the wrongdoer shall not profit by his wrong, and the innocent party shall not suffer by it.

The principal reason given by the learned judge for not adopting the first report of the master is that he misapplies to the facts before him the doctrine of confusion of goods, because the plaintiffs had no property in the gas as a product or chattel, but only a right to one fourth the profits on the sale of it. It is clear to us that this is too narrow a view of the power and functions of either law or equity. It taints them with an imbecility which would render them powerless in many cases to remedy wrongs or vindicate rights. Although such a term as "confusion of goods" is generally used, there is in fact properly no such doctrine as a "confusion of goods." There is a fact of confusion of goods, which, if committed with a fraudulent motive, subjects the transaction to an inflexible rule, rigorously enforced both at law and in equity, that the wrongdoer shall not profit by, nor the innocent party suffer from, the wrong. It would be impossible, in reaching a righteous result, that any one particular method should be adaptable to the innumerable and complex transactions of the business world, or exactly to all the devices and devious ways of fraud. Substantially, a like method is

adopted with the same result in settling the accounts of negligent and faithless trustees who have kept no accounts, or have mixed indiscriminately the trust funds with their own. Equity does not fear wrong to the culpable trustee, but so shapes its decrees that no possible wrong shall come to the innocent *cestui que trust*. The same principle is applied to the wilful trespasser, who has mixed his own ore or his own logs with those of his innocent neighbor, and as in *Kleppner v. Lemon*, 197 Pa. 430, 47 Atl. 353, the case of a wrongdoer who commingled the oil from his own land with that of an owner from whom he leased, and wilfully neglected to keep account of the respective products. Indeed, we can see no room for distinction in the application of the principle between the *Kleppner Case* and the one before us. Kleppner, by his contract, was entitled to a royalty of one eighth the oil from one well on his own land. The lessee had other wells on adjoining lands, then fraudulently commingled the oil from all of them, and kept no account of that from Kleppner's. It was held that Kleppner was entitled to one eighth of the whole.

The definitions heretofore quoted happen to have had in view a fraudulent commingling of chattels having a separate individuality, which might have been preserved if proper care had been taken and accounts kept by him on whom was imposed such duty, so that afterwards, on settlement or adjustment, the value of each one's share of the chattels could readily be ascertained according to the number of cattle, tons of ore, or gallons of oil. If the chattels be wilfully and fraudulently commingled, no accounts kept or other means of determining each one's share, there comes into operation the principle, applicable to all transactions affected by fraud, that the wrongdoer shall not profit, nor the innocent party suffer, by the fraud. And the more difficult it is, from the nature or species of the chattel, to preserve the property right of the owner, the more imperative is the duty upon him who is answerable to preserve to the extent that he is able the evidence of the

right. It makes no difference in the application of the principle that plaintiffs were entitled to one fourth the profits of the Grimes well, instead of to one fourth the gas. Defendants' motive in first attempting the fraud was to get rid of paying one fourth the profits of the product. Then, with distinct knowledge of, and actual notice of, plaintiffs' claim, even by suit, they effectually smothered any certain evidence of the extent of their answerability by neglecting to keep accounts. Their only defense now is, "We have no accounts," and, as the master practically finds, they resort to guessing to determine the quantity of gas from the Grimes well. The argument of appellees' counsel, to some extent approved by the court below, is, that by their contract they acquired title to the gas, and therefore had a right to commingle it with their own. This argument evades the point at issue. The whole of the gas was in their control and custody. By their relation to the contract and to plaintiffs it was their moral and legal duty to account to and pay to the plaintiffs one fourth the profits. They wilfully neglected to keep accounts showing, even approximately, the extent of their liability, and now ask, after putting it out of their power to account, leave to guess at the amount payable to plaintiffs.

We think the facts that the entire product was by the contract the property of defendants, and that their responsibility consisted only in their duty to account for and pay over one fourth the profits, does not relieve their conduct from the application of the same principle as is applied to a fraudulent confusion of goods.

Therefore the decree of the court setting aside the first report of the master is reversed; the second report is set aside, and the decree affirming it reversed; the appeal of J. B. Akin, C. W. Stone, R. B. Stone, and A. J. Hazeltine is sustained; and the first report of the master is confirmed absolutely.

Rehearing denied.

RHODE ISLAND SUPREME COURT.

Louis A. GLADDING *et al.*, Trustees, etc.,
of Sarah Emeline Acly, Deceased,

v.

SAINT MATTHEW'S CHURCH *et al.*

(.....R. I.....)

1. A legacy to a religious corporation

NOTE.—As to *cy près* doctrine generally, see, in this series, note to *Stratton v. Physio-Medical Institute*, 5 L. R. A. 33; also *Weeks v. Hobson*, 6 L. R. A. 147, and note; *Adams Female Academy v. Adams*, 6 L. R. A. 785; *Nor-*
65 L. R. A.

lapses when the corporation consolidates with another, under a statute which contemplates the termination of the existence of the old corporations and the formation of the new one to acquire their property.

2. The addition to a will giving a legacy to a religious corporation of a

mal School Dist. No. 3 v. Painter, 10 L. R. A. 493; *Crerar v. Williams*, 21 L. R. A. 454; *Teale v. Bishop of Derry*, 38 L. R. A. 629; *McHugh v. McCole*, 40 L. R. A. 724; and *Harrington v. Pier*, 50 L. R. A. 307.

codicil after the legatee has ceased to exist, which makes no provision for the change effected by the termination of such existence, cannot be held to have continued the legacy in favor of another corporation into which the interests of the legatee were consolidated, because the new corporation has a department identical with the work which the legacy was intended to advance.

3. A legacy to a particular church of which testator is a member will lapse with the termination of the church's existence, and it will not be administered *cy près* although the church was for the benefit of deaf mutes, and the work in their behalf is carried on by the corporation into which the legatee was consolidated, where there is nothing to indicate that the continuation of the work, rather than the church itself, was the object of the testator's bounty.

(February 3, 1904.)

BILL for the construction of the will of Sarah Emeline Acly, deceased. *Construction favorable to heirs at law and next of kin.*

The facts are stated in the opinion.

Messrs. Van Slyk & Mumford for complainants.

Messrs. Comstock & Gardner and **Joseph C. Sweeney**, for respondents:

The legal effect of a consolidation upon the consolidating corporations is now established beyond question to be a dissolution of the consolidating companies and the formation of an entirely new and distinct corporation.

2 Cook, Stock & Stockholders & Corp. Law, 3d ed. p. 1544; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *Clearwater v. Meredith*, 1 Wall. 25, 17 L. ed. 604; *State v. Maine C. R. Co.* 66 Me. 488, 96 U. S. 499, 24 L. ed. 836; *McMahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *People ex rel. New York Phonograph Co. v. Rice*, 57 Hun, 486, 11 N. Y. Supp. 249, Affirmed in 128 N. Y. 591, 28 N. E. 251; *People v. New York C. & St. L. R. Co.* 129 N. Y. 474, 15 L. R. A. 82, 29 N. E. 959.

The liability of a testamentary gift to lapse by reason of the decease of its object in the testator's lifetime is a necessary consequence of the ambulatory nature of wills; which, not taking effect until the death of the testator, can communicate no benefit to persons who previously die.

1 Jarman, Wills, 6th ed. 333.

A codicil does not, by its republishing operation, revive a devise or bequest the object of which has previously died in the testator's lifetime.

I Jarman, Wills, Randolph & T.'s ed. p. 374; *Rymer v. Stanfield* [1895] 1 Ch. 19, 64 L. J. Ch. N. S. 86, 12 Reports, 22, 71 L. T. N. S. 590, 43 Week. Rep. 87. 65 L. R. A.

The fact that this is a gift charitable in its nature does not at all modify the doctrine of lapse.

Jarman, Wills, 6th ed. p. 241.

The doctrine of lapse applies as well in cases of gifts to charitable uses as in the case of an ordinary gift, unless it appears from the will that the testator intended to give to charity generally, and not alone to the particular institution he names in his will.

Clark v. Taylor, 1 Drew, 642; *Rymer v. Stanfield* [1895] 1 Ch. 19, 64 L. J. Ch. N. S. 86, 12 Reports, 22, 71 L. T. N. S. 590, 43 Week. Rep. 87; *Fisk v. Atty. Gen.* L. R. 4 Eq. 521; *Langford v. Gowland*, 3 Giff. 617, 9 Jur. N. S. 12, 10 Week. Rep. 482; *Re Ovey*, L. R. 29 Ch. Div. 560, 54 L. J. Ch. N. S. 752, 52 L. T. N. S. 849, 33 Week. Rep. 821.

If it appears that the testator had but one particular object in mind, and his purpose cannot be carried out, the gift must go to the next of kin. And if the gift cannot vest, in the first instance, in the donees for the reason that no such donees can be found, or because a corporation is dissolved, the court cannot appoint other donees *cy près*.

Perry, Tr. 5th ed. p. 726; 3 Pom. Eq. Jur. 2d ed. p. 1524; 5 Am. & Eng. Enc. Law, 2d ed. p. 939; *Brooks v. Belfast*, 90 Me. 318, 38 Atl. 222; *Merrill v. Hayden*, 86 Me. 134, 29 Atl. 949.

The intent in this case was particular, and not general.

Kelly v. Nichols, 18 R. I. 62, 19 L. R. A. 413, 25 Atl. 840; *Stratton v. Physio-Medical College*, 149 Mass. 505, 5 L. R. A. 33, 21 N. E. 874.

Douglas, J., delivered the opinion of the court:

This bill is brought by the trustees under the will of Sarah Emeline Acly to obtain a construction of the will. The adverse parties in interest are the Rector, Church Wardens, and Vestrymen of St. Matthew's church in the City of New York, a corporation created under the laws of the state of New York, on the one hand, and Joseph C. Sweeney, administrator upon the estate of Albert J. Acly and Horace Hurlbutt, Jr. (the said Acly and Hurlbutt having been the sole heirs at law and next of kin of the testatrix at the time of her death), on the other. The case was heard upon bill and answers, from which, and by stipulation filed, the following material facts appear: The will was executed November 30, 1888. After a direction to pay debts, and a provision for the burial of the testatrix, it gives a legacy to her grandson, and then devises and bequeaths the residue

of her estate to trustees for the following purposes, namely: "I direct my said trustees to convert all my diamonds, silverware, and personal effects into money, and to invest the same and reinvest when necessary, in first class real-estate mortgages, and to hold the same for and during the natural life of my son, Albert Journeay Acly of said Providence. And I direct my said trustees to pay the income from said investment unto my said son Albert during his natural life, and at his decease to pay the principal thereof unto Saint Ann's Church for Deaf Mutes in the city of New York, Rev. Thomas Gallaudet being now rector of said church. I direct my said trustee, to convert the remainder of all my estate into money, and to invest thereof a sum not exceeding six thousand dollars in a house and lot, either in city or country, as my said son Albert may desire, to be used by my said son for his home during his natural life free of rent. And I direct my said trustees to hold said house and lot during the natural life of my son, and to permit him to use the same as aforesaid. At the decease of my said son I direct my said trustees to convey said house and lot in fee simple unto said Saint Ann's Church for Deaf Mutes in the City of New York. All the rest and residue of my said converted estate I direct my said trustees to invest in United States government bonds, and to pay the yearly income thereof unto my said son Albert Journeay Acly for and during the term of his natural life, and also to pay unto him such portion or portions of the principal thereof as may at any time seem to them necessary on account of sickness of my said son. At the decease of said Albert Journeay Acly, I direct my said trustees to transfer said United States government bonds unto the aforesaid Saint Ann's Church for Deaf Mutes in the City of New York." January 3, 1898, the testatrix executed a codicil to her will, in which she made no provisions pertinent to this case, except to enlarge the powers of the trustees to appropriate the principal of the trust fund for the support of her son. Mrs. Acly died February 8, 1902, and her son, Albert J. Acly, died March 22, 1903. At the time that the will of Mrs. Acly was executed there was in existence a corporation organized under the laws of the state of New York by the name of "The Rector, Church Wardens, and Vestrymen of Saint Ann's Church for Deaf Mutes in the City of New York." This church carried on a special and peculiar religious work for the benefit of deaf mutes. It was organized as a Protestant Episcopal church. Of this church Mrs. Acly was at one time a member and communicant, and in it she was

greatly interested. Rev. Thomas Gallaudet was, at the time of the will, its rector, and it is admitted that this was probably the corporation intended to be designated by the testatrix by the phrase, "Saint Ann's Church for Deaf Mutes in the City of New York." At the time of the execution of the will this corporation owned a church building on Eighteenth street, near Fifth avenue, in the city of New York. In the year 1895 this corporation sold its church and other property on Eighteenth street, and the church building was torn down. The corporation purchased lots in West 148th and 149th streets, in said city, and had plans prepared for the construction of a new church building thereon. Thereafter, until the year 1897, the work of the church was to a great extent diminished, but it still maintained services, and the Rev. Thomas Gallaudet continued as its rector. In the year 1897 this corporation became consolidated with another corporation, known as "The Rector, Church Wardens, and Vestrymen of Saint Matthew's Church in the City of New York" also a Protestant Episcopal church. This consolidation was effected in accordance with the Laws of New York of 1895, p. 484, chap. 723, § 12, as amended by the Laws of 1896, p. 23, chap. 56. As the first step in this consolidation, the two corporations, on the 14th day of June, 1897, made an agreement in writing in which it was recited that they were desirous of uniting and consolidating into a single corporation. By the terms of this agreement the name of the consolidated corporation was to be "The Rector, Church Wardens, and Vestrymen of Saint Matthew's Church in the City of New York." It was to belong to the Protestant Episcopal Church in the United States of America. The new corporation was to assume and carry on the special work among deaf mutes theretofore carried on by St. Ann's church, by providing for them sign services and pastoral ministrations until a building for this special purpose should be ready for occupancy. The present status and rights of the rector emeritus of St. Ann's church were to be maintained and continued. The sum of \$25,000 was to be utilized in the erection of a church building upon two of the lots owned by St. Ann's church, unless it should be determined to sell said two lots, in which event the proceeds were to be devoted to the purchase of another site upon which to erect said church building. The church building so erected was to be known as "Saint Ann's Church for Deaf Mutes in the City of New York," and was to be devoted to the sole and exclusive use of deaf mutes, and to be maintained, so far as not self-supporting,

by the consolidated corporation. This agreement received the approval of the bishop and of the standing committee of the Protestant Episcopal diocese of New York. Proceeding in accordance with the statute referred to, both corporations petitioned the supreme court of the state of New York for their "union and consolidation" into a single corporation, and upon these petitions it was ordered and adjudged that the agreement be approved and confirmed, and that the two corporations be "united and consolidated into a single corporation;" which new corporation should be vested with all the estate, rights, and property belonging to either of the petitioning corporations. Upon the entry of the order of consolidation the same was recorded in the office of the clerk of the supreme court in the manner provided by law, and also in the office of the register of the county of New York. This record was made in October, 1897. By this order certain persons, some of whom were vestrymen of the original St. Matthew's church, and some of whom were vestrymen of the original St. Ann's church, were made vestrymen of the new corporation. Immediately after the consolidation the consolidated corporation, one of these respondents, proceeded to carry out the terms of the agreement between the two previous corporations, and in the same year made a contract for the erection of a church building on certain of the lots belonging to St. Ann's church on West 148th street, in the city of New York. The church building was duly erected, and was consecrated by the name of "Saint Ann's Church for Deaf Mutes in the City of New York." The Rev. Thomas Gallaudet was made the rector emeritus of the respondent corporation and the vicar of St. Ann's church, which offices he continued to hold up to the time of his death, in the year 1902. The respondent corporation has ever since carried on, and still carries on, the precise special work for deaf mutes which was formerly carried on by St. Ann's church, and the respondent corporation defrays all the expenses of the work.

There now remains in the hands of the trustees of the trust estate bequeathed by Mrs. Acly the sum of about \$7,500. This fund is claimed by the respondents Joseph C. Sweeney, administrator, and Horace Hurlbutt, Jr., as intestate estate of Sarah Emeline Acly, and by the respondent corporation St. Matthew's church as the representative of St. Ann's church named in the will. It is not disputed, and we have no doubt, upon the facts stated, that the original body whose corporate name was "The Rector, Church Wardens, and Vestrymen of St. Ann's Church for Deaf Mutes

in the City of New York" was intended by the testatrix as the legatee mentioned in the will by the name "Saint Ann's Church for Deaf Mutes in the City of New York."

The contest is upon two questions: First. Is the respondent St. Matthew's church entitled to claim the legacy upon the ground that to all intents and purposes it is or comprises in itself the same identical organization to which the will directs the trust fund to be paid? Secondly. If not, has the legacy to Saint Ann's church lapsed, or can the trust be administered *cy pres*?

We think the first question can only be answered affirmatively if the original legatee still existed as a legal person after the consolidation of it with the original St. Matthew's church. This consolidation was made before the death of the testatrix, and unless the legatee was in being at the time of the death the legacy never vested, and it never acquired any rights to transmit to a successor. What, then, was the legal effect of the consolidation of St. Ann's church and St. Matthew's church upon the corporate existence of the original bodies? These corporations were creatures of the laws of the state of New York. They originated and continued by virtue of those laws, and the question must be determined by reference to the law under which they existed. The statute under which the consolidation was made (Laws 1896, chap. 56, p. 23), which went into effect February 29, 1896, provides that upon petitions by two incorporated churches, and after a hearing, the court may make an order for the consolidation of the corporations, "specifying the name of such new corporation," etc. "When such an order is made and duly entered, the persons constituting such corporations shall become an incorporated church by, and said petitioning churches shall become consolidated under, the name designated in the order. . . . And all the estate, rights, powers, and property of whatsoever nature belonging to either corporation shall, without further act or deed, be vested in and transferred to the new corporation as they were vested in or belonged to the former corporations, and the said new corporation shall be liable for all the debts and liabilities of the former corporations in the same manner and as effectually as if said debts or liabilities had been contracted or incurred by the new corporation. A certified copy of such order shall be recorded in the book for recording certificates of incorporation in each county clerk's office in which the certificate of incorporation of each consolidating church was recorded," etc. This statute provides for the creation of a new corporation, and the transfer to it of the membership, prop-

erty, rights, and obligations of the former corporations. We do not see how a corporation can be held to exist in law after the power which has created it has taken from it all its membership, property, and powers,—everything which constituted its legal personality. The question arose in *People ex rel. New York Phonograph Co. v. Rice*, 57 Hun, 486, 11 N. Y. Supp. 249, upon exactly similar provisions in a statute permitting the consolidation of business corporations. The court says: "It is true that the two consolidating bodies were corporations in full life until they formed . . . the new corporation. Then they ceased . . . to exist. It was for this very purpose that they executed the agreement,—the purpose to end their own existence and to form a new person. Whenever they form the new corporation, their own corporate existence ceases. The new company is not a partnership of the two old companies,"—citing *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; and then referring to the words of the consolidation act, which are the same as those in this act. This decision was affirmed by the court of appeals. 128 N. Y. 591, 28 N. E. 251. In *People v. New York, C. & St. L. R. Co.* 129 N. Y. 474, 15 L. R. A. 82, 29 N. E. 961, the latter court had before them a similar question, and incidentally reaffirmed the decision in *People ex rel. New York Phonograph Co. v. Rice*. On page 482, 129 N. Y., page 88, 15 L. R. A., and page 961, 29 N. E., Judge Andrews says: "This decision accords with the general current of authority to the effect that statutes for the consolidation of domestic corporations are to be treated as acts of incorporation, and that, on consolidation being effected under their provisions, the constituent companies, unless such an intention is excluded by the language of the statute, are deemed to be dissolved, and their powers and faculties, to the extent authorized, become vested in the consolidated company as a new corporation created by the act of consolidation;" citing in addition to the cases cited in *People ex rel. New York Phonograph Co. v. Rice*, *Bishop v. Brainard*, 28 Conn. 289; *McMahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *Clearwater v. Meredith*, 1 Wall. 25, 17 L. ed. 604; *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757. These authorities are sufficient to support the contention of the heirs at law that the original legatee named in the will ceased to exist when the new corporation was formed.

The respondent corporation cites two cases in this connection, but neither of 65 L. R. A.

them is in point, upon the construction of the New York statute. In *Coldwell v. Holme*, 2 Smale & G. 31, 23 L. J. Ch. N. S. 594, 18 Jur. 396, a society which answered the description in the will had ceased to exist before the will was made, and a society subsequently established for the same purposes, but differently named, was given the legacy. The ground of the decision was that, though imperfectly answering the description, the latter society must have been intended by the testatrix. The vice chancellor says: "It would be proceeding on a very unsound principle in a case in which there is and was at the date of the will but one society at all answering the description, if, in the absence of any evidence to justify such a conclusion, I were to assume that the testatrix was ignorant that the society of which she had been a member had been dissolved, and ignorant also that there was a society in existence similar in name and identical in purpose." In *Hosea v. Jacobs*, 98 Mass. 65, the question was whether the legatee mentioned in the will had become extinct, and the court held that it still existed. Says Judge Gray (p. 73): "It was strongly argued that, although the formal organization of the trustees had been kept up, yet they had been dissolved, and had lost their corporate existence by the dissolution of the religious society, to hold and manage the property of which was the sole object of their incorporation. But the facts of the case do not seem to us to support this position."

Nor can it be held that, because a certain department of the work of the respondent corporation is identical with that which was carried on by the legatee, the codicil, of a later date than the date of the consolidation, substituted this branch of the respondent corporation for the corporation named in the will. The codicil does not mention the residuary legatee of the trust fund, and contains nothing to indicate the intention of the testatrix in that regard. A codicil does not, by its republishing operation, revive a devise or bequest, the object of which has died in the testator's lifetime. 1 Jarman, Wills, Randolph & T.'s ed. 374; *Stilwell v. Mellersh*, 20 L. J. Ch. N. S. 356; *Rymer v. Stanfield* [1895] 1 Ch. 19, 64 L. J. Ch. N. S. 86, 12 Reports, 22, 71 L. T. N. S. 590, 43 Week. Rep. 87.

We come, then, to the second question,—whether or not the case presented demands the exercise of the power of the court to make a *cy pres* application of a charitable gift. That the gift is a charitable one cannot be contested. It is well settled that a Christian church, lawfully existing, is a charity in the sense of the statute of 43

Eliz. chap. 6; 2 Redf. Wills, 501; *Potter v. Thornton*, 7 R. I. 252. But the question is not concluded by that circumstance. Gifts to charitable institutions may lapse, as well as gifts to natural persons. The law is well stated in *Teele v. Bishop of Derry*, 168 Mass. 341, 38 L. R. A. 629, 60 Am. St. Rep. 401, 47 N. E. 422, as follows: "The difficulty in this case, and generally in cases like it, is one of construction,—to find out the intention of the testatrix. When that is arrived at, the rules of law which apply seem to be pretty well settled. If it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then if, by a change of circumstances or in law, it becomes impracticable to administer the trust in the precise manner provided by the testatrix, the doctrine of *cy près* will be applied in order that the general charitable intent which the court regards as the dominant one may not be altogether defeated. . . . But if the charitable purpose is limited to a particular object, or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of *cy près* does not apply; and, in the absence of any limitation over, or other provision, the legacy lapses." Some earlier cases in Massachusetts seem to have given the doctrine of *cy près* a more general application, *e. g.*, *Winslow v. Cummings*, 3 Cush. 358, where the court found, in a bequest to an unincorporated society which had gone out of existence at the date of the will, a gift for the charitable purposes which such organization had promoted. It could not have been construed as a gift to the society as a combination of individuals, for they were not capable in law to take as such. The argument, therefore, was sound that the gift was to the objects of the society, not to itself, and the court might well carry out the intention of the testator by giving the legacy to a trustee. See also *Loscombe v. Wintringham*, 13 Beav. 87; *Re Clergy Society*, 2 Kay & J. 615; *Marsh v. Atty. Gen.* 2 Johns. & H. 61, 30 L. J. Ch. N. S. 233, 7 Jur. N. S. 184, 3 L. T. N. S. 615, 9 Week. Rep. 179; and comments by Sir J. W. Chitty, J., in *Rymer v. Stanfield* [1895] 1 Ch. 19, 64 L. J. Ch. N. S. 86, 12 Reports, 22, 71 L. T. N. S. 590, 43 Week. Rep. 87. In *Bliss v. American Bible Society*, 2 Allen, 334, the supreme court of Massachusetts went further, and held, though citing no authority but *Winslow v. Cum-*

minge: "The bequest being to a charity, the object of which can be distinctly ascertained, it is valid, and will be sustained by the court, although the legatee is incapable, by reason of original want of corporate capacity, or from its corporate existence having terminated, of undertaking to execute the trust." The rule laid down in *Teele v. Bishop of Derry* restricts these general expressions, and is approved in *Bulard v. Shirley*, 163 Mass. 559, 560, 12 L. R. A. 110, 27 N. E. 766; and, furthermore, it is in accord with the courts and text writers, generally, in England and in this country. So 2 Perry on Trusts, § 726, states the rule as follows: "If it appears from the construction of the whole instrument that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot by construction apply the gift *cy près* the original purpose. If, therefore, it appears that the testator had but one particular object in mind, as to build a church at W., and his purpose cannot be carried out, the gift must go to the next of kin. And if the gift cannot vest in the first instance in the donees, for the reason that no such donees can be found, or because a corporation is dissolved, the court cannot appoint other donees *cy près*,"—quoting *Carter v. Balfour*, 19 Ala. 814; *Marsh v. Means*, 3 Jur. N. S. 790; *Atty. Gen. v. Power*, 1 Ball & B. 145; *Fisk v. Atty. Gen.* L. R. 4 Eq. 521. To the same effect, see 1 Jarman, Wills, 8th ed. 241; 2 Pom. Eq. 2d ed. 1524; 5 Am. & Eng. Enc. Law, 2d ed. p. 939. The leading case in England is *Clark v. Taylor*, 1 Drew. 642, decided in 1853, which held that "there is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect. If that mode fails, the court says the general purpose of charity shall be carried out. There is another class in which the testator shows an intention, not of general charity, but to give to some particular institution, and then, if it fails because there is no such institution, the gift does not go to charity generally. That distinction is clearly recognized, and it cannot be said that wherever a gift for any charitable purpose fails it is nevertheless to go to charity." "This case," says the Lord Chancellor, in *Rymer v. Stanfield* [1895] 1 Ch. 19, 64 L. J. Ch. N. S. 86, 12 Reports, 22, 71 L. T. N. S. 590, 43 Week. Rep. 87, decided in 1895, "has been followed ever since." Chief Justice Durfee, in *Pell v. Mercer*, 14 R. I. 412, affirms the rule. He says (p. 438): "If, however, the trust is for some particular purpose, which has been accomplished before the trust becomes

available, or which is impracticable, there a *cy près* application is more questionable; but even then, if it be clear that a general charitable intent has simply taken form in a particular purpose, the court will best carry out the will of the donor by applying his donation to some other purpose which is as nearly as possible akin to the purpose which is named."

Counsel for the respondent corporation refers to several Rhode Island cases. *Wood v. Hammond*, 16 R. I. 108, 113, 17 Atl. 324, 18 Atl. 198, presented the question as to which of four corporations the testator had designated by the term "The Nursery," no corporation having existed bearing that name at the time when the will was executed. Following the principle of *Winslow v. Cummings*, 3 Cush. 358, the court held that "evidently the bequest was intended for the benefit of the nursery as a favorite charity, and should go to the corporation as the medium through which the benefit would reach its destination." *Cady v. Rhode Island Children's Hospital & Nursery*, 17 R. I. 207, 21 Atl. 365, was simply a case of imperfect designation. In *Almy v. Jones*, 17 R. I. 265, 12 L. R. A. 414, 21 Atl. 616, it could not be doubted that the legacy sprang from a general charitable intent, if the purpose was a legal charity at all. In *St. Peter's Church v. Brown*, 21 R. I. 367, 43 Atl. 642, the court appointed a trustee to hold a legacy given to an unincorporated religious society. These cases evidently afford us no assistance in interpreting this will.

To apply the rule to the present case, we do not find in the will of Mrs. Acly any general charitable intention. The legatee named was a church to which she had belonged, and in whose prosperity she took great interest; and it is impossible for us to gather from any of her expressions that she made her gift to the church because it cared for the religious training of deaf mutes, rather than because of her affection for her former associates who composed it. Doubtless the work and the institution were both present in her mind, but who shall say which held the more prominent place? Where the will is silent, we are not justified in substituting our arbitrary conjecture. The case of *Rymer v. Stanfield* [1895] 1 Ch. 19, 64 L. J. Ch. N. S. 86, 12 Reports, 22, 71 L. T. N. S. 590, 43 Week. Rep. 87, is quite similar to this. The bequest there was "to the rector, for the time being, of Saint Thomas Seminary, for the education of priests in the diocese of Westminster, for the purposes of such seminary, £5,000." The seminary was discontinued before the testator's death, and the students were removed to another seminary, 65 L. R. A.

which, as part of its work, educated priests for the diocese of Westminster. It was held by Chitty, J., that the gift was confined to the particular institution, and lapsed; and this decision was affirmed on appeal. The case of *Merrill v. Hayden*, 86 Me. 133, 29 Atl. 949, presents many points of similarity to the case at bar. The bequest to be construed was: "I give, bequeath, and devise to my daughter Maria K., all the property of which I shall die possessed, to hold during her life the income thereof and so much of the principal as she shall need to be spent by her; and the residue, both of the principal and income, that shall be left at the decease of said Maria, I give and devise to the Maine Free Baptist Home Missionary Society." The society named existed at the date of the will, but before the testator's death, by authority of an act of the legislature, it had transferred all its property to the Maine Free Baptist Association, and thereupon, by force of said act, became extinct. The new corporation, as the successor of the old, though having somewhat more extended objects, claimed the legacy; but the court held that "by the extinction of the Maine Free Baptist Home Missionary Society (the legatee named in the will) in the lifetime of the testator the legacy to that society lapsed to the estate of the testator, and, not having been otherwise disposed of by the will, it descended to his heirs as undeviseed estate." This decision is approved in *Brooks v. Belfast*, 90 Me. 318, 38 Atl. 222, where the whole subject is exhaustively considered.

We are of opinion, therefore, that the legacy lapsed when the corporation known as "Saint Ann's Church for Deaf Mutes" ceased to exist, and that the fund in question, on Mrs. Acly's death, descended to her heirs at law and next of kin as intestate estate.

Walter J. HOWARD

v.

UNION RAILROAD COMPANY.

(.....R. I.....)

A street car company which removes from its tracks an obstruction wrongfully placed there by trespassers is not bound to place it where it will not be dangerous to travelers upon the highway; nor is it liable for such injuries to a traveler in case it leaves the obstruction in the traveler's path after dark, unmarked by

NOTE.—As to liability of a street railway company removing snow from track to adjacent roadways for injury caused thereby, see, in this series, *Gerrard v. La Crosse City R. Co.* 57 L. R. A. 465.

light, so that the traveler comes into contact with it to his injury.

(February 18, 1904.)

PETITION by plaintiff for a new trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which had resulted in a verdict in defendant's favor. *Denied.*

The facts are stated in the opinion.

Messrs. Comstock & Gardner and William W. Moss, for plaintiff:

It was the duty of the motorman and conductor, in removing the mortar bed from the right of way of the defendant company, to use all reasonable care and effort to put it where it would not be a dangerous obstruction to persons traveling upon the street, and failure to exercise any care in the matter constituted negligence.

The cases most closely analogous to the case at bar are cases of injuries caused to travelers by the negligent manner in which street railway companies have removed accumulations of snow from their tracks and piled them upon other parts of the streets. In these cases it has been held that a street railway company, in removing snow from its tracks, must do it in such a way as not to form obstructions dangerous to travelers in other parts of the highway.

Bowen v. Detroit City R. Co. 54 Mich. 496, 52 Am. Rep. 822, 20 N. W. 559; *Smith v. Nashua Street R. Co.* 69 N. H. 504, 44 Atl. 133; *Lee v. Union R. Co.* 12 R. I. 383, 34 Am. Rep. 668; *Wallace v. Detroit City R. Co.* 58 Mich. 231, 24 N. W. 870.

Messrs. Hayes, Easton, & Hoffman for defendant.

Tillinghast, J., delivered the opinion of the court:

This is trespass on the case for negligence. The plaintiff alleges that the defendant, by its agents and servants, who were operating one of its electric cars on Academy avenue, a public highway in the city of Providence, removed a mortar bed, which obstructed its track upon which said car was passing, from the track to the easterly half of the roadway of said avenue at a point near Hendrick street, and that it was the duty of the defendant, upon removing said obstruction, to place the same where it would not interfere with and cause damage to travelers lawfully upon said Academy avenue. The plaintiff then alleges that, while lawfully riding on said avenue upon a bicycle, subsequently to said removal, and while in the exercise of due care, he ran into said mortar bed, which had been negligently placed on the roadway

by the defendant in manner aforesaid, and was thrown violently to the ground and injured. In his second count the plaintiff alleges that it became and was the duty of the defendant, after removing said obstruction from its track to the easterly side of the street, to place a light or some other signal on or near to said mortar bed, so that persons traveling on said highway in the nighttime might be warned of the presence of said obstruction. At the trial of the case in the common pleas division a verdict was rendered for the defendant by direction of the court, and the case is now before us on the plaintiff's petition for a new trial on the ground that the court erred in directing said verdict.

The material facts of the case, as they appeared in evidence, were these: Shortly before the happening of the accident in question, which occurred at about 10 o'clock in the evening of the 16th day of June, 1902, some vicious boys or young men had carried the mortar bed above referred to from a new building near by, and had placed it upon the track of the defendant company, which, at that point, runs along the west side of the street. They then put out the electric light which was near by, so that the place was left in darkness. Soon afterwards a car of the defendant company came along, and, being unable to get by without removing the obstruction, the conductor and motorman of the car pulled the mortar bed off the track, and left it in the highway, about 20 inches away from the nearest rail, the car then proceeding on its way. Shortly afterwards the plaintiff, who was riding to his home on his bicycle, not being able to see the obstruction on account of the darkness, ran into the same, and was thrown from his wheel and injured. A little later a policeman came along, and finding the mortar bed near the middle of the street, moved it over to the edge of the sidewalk and leaned it over the curbing. He then telephoned for assistance, and two men came and took the mortar bed away from the street and put it upon a vacant lot near by.

In view of these facts, the only question which arises is whether the defendant corporation can be held for the injury which the plaintiff sustained. The answer to this question depends upon whether the defendant owed any duty to the plaintiff in the premises; that is, whether it owed the plaintiff the duty of either removing said obstruction out of the highway, so that it would have been impossible for the accident in question to have happened, or of giving him some warning of its presence in the highway by means of a light or otherwise. The plaintiff contends that such duty was

owing to him from the defendant, and that the case, for all practical purposes, stands the same as it would if the defendant had originally placed said obstruction in the highway. We think this contention is untenable. In removing the obstruction from the car track the defendant was doing what it clearly had the right to do in the management of its business and in the discharge of its duties to the public under its charter and the laws of the state. It was conveying passengers from one point to another for hire, and it could not legally be called upon to even temporarily suspend its business for the purpose of clearing a highway of obstructions so that travelers thereon might not be inconvenienced or injured. Having found an obstruction upon its track, it had the right to remove it therefrom, and the mere fact that it did no more than remove it from its tracks did not have the effect to render the defendant liable because someone else was subsequently injured by reason of the presence of the obstruction in the street. All that the defendant did was to remove said obstruction from one part of the highway to another part thereof. It was in no way responsible for the presence of the obstruction in the highway; and its removal from the track, so far as appears, did not add to the danger incident to its presence in the street. But, even if it did, we fail to see that any liability attached to the defendant in the premises. Meeting with an obstruction in the highway, the defendant had the same right that any ordinary traveler would have in similar circumstances. And who can doubt that such a person has the right, upon meeting with an obstruction in the highway which prevents his lawful progress thereon, to move it aside so as to enable him to proceed? Such a state of things very frequently happens. A stone rolls down from an embankment and obstructs the traveled part of the road, and a traveler who is passing along at that point finds it necessary, in order to proceed with his team, to roll the stone a little to one side of the way. He does so, and then goes on about his business. Can it be said, with reason, that he owes any legal duty, regarding said obstruction, to another traveler who may follow him on that road at some later period? Take this illustration: A box or package of merchandise accidentally falls from an express wagon upon one of the rails of the street railway company in the nighttime, and, being unnoticed by the driver of the team, he passes on and leaves it there. Soon afterwards a car comes along, and the motorman, seeing the object on the track, and seeing that it is of such a size and in such a position that

it can be readily pushed from the rail by pressing the fender of the car gently against it, does so, and the obstruction is so far removed as not to interfere with his progress, and he goes on. Shortly afterwards a carriage comes along, and, it being dark, the driver fails to see the obstruction, and his horse takes fright therefrom and runs away, whereby the driver is thrown from his carriage and injured. Would the street railway company be liable for his injuries? We think not, for the company would owe the driver no legal duty in the premises. Take another illustration: Some person leaves his carriage in the highway in such a manner as to prevent a person in another carriage from passing without the removal of said first-mentioned carriage. Is it not clearly the right of the traveler whose progress is thus interfered with to remove the carriage sufficiently to enable him to pass by? And if another traveler is subsequently injured by coming in contact with the carriage thus removed, is the person removing it to be held liable on account of such injury, simply because he changed the location of the obstruction from one part of the street to another? If so, it is evidently a new discovery in the already over-worked law of negligence, for neither the diligence of counsel nor the efforts of the court have succeeded in finding any case in support of such a proposition.

Counsel for plaintiff contends, however, that while no case has been found which is directly in point, yet those cases which hold that street railway companies are liable for injuries to travelers caused by removing snow from their tracks and piling it up on other parts of the streets so as to render the same unsafe for travelers are closely analogous to the case at bar, and that the principle of those cases should be held to be controlling in this. In support of this contention counsel cites the following named cases: *Bowen v. Detroit City R. Co.* 54 Mich. 496, 52 Am. Rep. 822, 20 N. W. 559; *Smith v. Nashua Street R. Co.* 69 N. H. 504, 44 Atl. 133; *Lee v. Union R. Co.* 12 R. I. 383, 34 Am. Rep. 668; *Wallace v. Detroit City R. Co.* 58 Mich. 231, 24 N. W. 870. While recognizing the correctness of the decisions in these cases, we fail to see their applicability to the case at bar. The difference between those cases and the present one is a vital one. The obstruction to the track caused by the presence of snow thereon is not a nuisance. It is not placed there by human hands, but is the act of God. Being an obstruction to travel, however, the railway company has the right to remove it, and, indeed, is under obligation to remove it as soon as may be, so that the rights of the traveling public may not be

interfered with. And just here arises its duty to the public who have occasion to use the highway, *viz.*, that in removing the snow the company shall not create a nuisance on the highway. As said by the court in *Bowen v. Detroit City R. Co. supra*, 54 Mich. 500, 52 Am. Rep. 826, 20 N. W. 561: "It is the duty of the company, in removing the snow from its tracks, to adopt such a mode as will not create obstructions in the streets, to the detriment or danger of the public in the ordinary use thereof. If it can deposit the snow in the street upon the sides of its tracks in such manner as not to interfere with the use of the street as a public highway, there appears to be no good reason why it may not adopt that mode of disposition; but in doing so it cannot be permitted to leave it in ridges or piles which would obstruct the streets, and make them unsafe or dangerous for vehicles to pass along or cross them. Its rights in this respect are subject, and not paramount, to the rights of the public to use the streets for the ordinary purpose of passage, and all acts which create obstructions to the use of the street by the public are unlawful." The cases above cited are simply to the effect that a street railway company is liable for a nuisance which it creates. In the case at bar it did not create the nuisance in question, but simply removed the nuisance, which it had the right to do. Thus, in *State v. White*, 18 R. I. 477, 28 Atl. 970, this court said: "If one places an obstruction in a public street, an individual who is incommoded by it may remove it." See also *Bowden v. Lewis*, 13 R. I. 191, 43 Am. Rep. 21; *Earp v. Lee*, 71 Ill. 195; *Elliott, Roads & Streets*, 2d ed. § 660.

For the reasons above given, we are of the opinion that the plaintiff did not show a case which entitled him to recover in any event, and hence that the presiding justice rightly directed a verdict for the defendant.

The plaintiff's petition for a new trial is denied, and the case remanded to the Common Pleas Division for judgment on the verdict.

John J. FOX

v.

Walter L. CLARKE, Treasurer of Providence.

(.....R. I.....)

1. A statute making a municipal corporation liable for injuries caused by

NOTE.—As to right of bicyclist to recover for injuries caused by defective highway, see also note to *Taylor v. Union Traction Co.* 47 L. R. A. 289, and the later cases in this series of *Richardson v. Danvers*, 50 L. R. A. 127, and *Hendry v. North Hampton*, 64 L. R. A. 70, 65 L. R. A.

failure to keep its streets safe for travelers "with their teams, carts, and carriages" will not apply in favor of one using a bicycle, when such means of conveyance subsequently comes into use.

2. That one is riding a bicycle at the time he is injured by a defect in a highway will not preclude his holding the municipal corporation liable for the injuries if the highway is unsafe for ordinary purposes of travel.

(December 21, 1903.)

MOTION by defendant for new trial after verdict in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Granted.*

The facts are stated in the opinion.

Messrs. Francis Colwell and Albert A. Baker for defendant.

Messrs. J. W. Hogan and P. S. Knauer, for plaintiff:

The city is bound to keep its highways and streets safe and convenient for travelers properly using them in the ordinary and usual manner.

General Laws, chap. 72, p. 244; *McCloskey v. Moies*, 19 R. I. 297, 33 Atl. 225; *Seamons v. Fitts*, 20 R. I. 443, 40 Atl. 3.

The statute has been construed so as reasonably to protect the traveler lawfully using the highway.

Gregory v. Adams, 14 Gray, 242; *Hardy v. Keene*, 52 N. H. 370.

The wording is, "safe for travelers with their teams, carts, and carriages." We find no statute anywhere requiring, directly, that streets or sidewalks be kept safe for pedestrians. Yet it is particularly noticeable that where such recovery has been allowed by the court, it has been based on this particular § 1 of chapter 72.

Hampson v. Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; *McCloskey v. Moies*, 19 R. I. 297, 33 Atl. 225.

A strict construction of the section would allow recovery only on failure to "repair or amend" the street itself; yet the court has found no difficulty in holding that an obstruction in the street, and not a part of the highway itself, or even an object therein not in any way injurious to vehicles, but simply calculated to frighten horses, will render the city liable.

Yeaw v. Williams, 15 R. I. 20, 23 Atl. 33; *Sauthof v. Granger*, 19 R. I. 606, 35 Atl. 300; *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17; *Williams v. Tripp*, 11 R. I. 447; *Gregory v. Adams*, 14 Gray, 242.

While a town is liable only by statute, a greater duty devolves upon a city by implication because of the greater amount of travel, and more varied modes of use made of the streets and highways.

2 Dill. Mun. Corp. 998; 4 Am. & Eng. Enc. Law, 2d ed. p. 16; Elliott, Roads & Streets, pp. 634, 635.

The use of a bicycle in the streets as a means of locomotion, is proper and legitimate.

Williams v. Tripp, 11 R. I. 454; *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; *McCloskey v. Moies*, 19 R. I. 297, 33 Atl. 225; *Seamons v. Fitts*, 20 R. I. 443, 40 Atl. 3.

A bicycle is "a carriage or vehicle which carries a person mounted upon it, and which is propelled and driven by him."

State v. Collins, 16 R. I. 371, 3 L. R. A. 394, 17 Atl. 131; *Holland v. Bartch*, 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83.

The defect found in this case would be dangerous to a team, horse, or foot traveler.

McCloskey v. Moies, 19 R. I. 297, 33 Atl. 225; *Seamons v. Fitts*, 20 R. I. 443, 40 Atl. 3, Reaffirmed in 21 R. I. 236, 42 Atl. 863; *Carroll v. Allen*, 20 R. I. 541, 40 Atl. 419.

Stiness, Ch. J., delivered the opinion of the court:

The plaintiff brings this suit against the city of Providence for breach of its duty in suffering and permitting Francis street to become unsafe and dangerous for travelers. The plaintiff was riding a bicycle, and he alleges that he rode into a hole or depression which had been worn in the traveled part of the street, so that he was thrown from his bicycle and injured. The defendant made two requests for instruction to the jury:

"(1) The plaintiff cannot recover, because a bicycle is not a team, cart, or carriage within the meaning of § 1 of chapter 72 of the General Laws of 1896, or of § 15 of chapter 36 of the General Laws of 1896. (2) If the street was safe for travel of ordinary kinds of vehicles, the city is not liable for an accident suffered by a person riding a bicycle on the street."

The first statute referred to imposes upon towns the duty to keep highways in repair, "so that the same may be safe and convenient for travelers with their teams, carts, and carriages;" and the second statute gives an action for breach of such duty. These provisions have been in force for many years, and the real question is whether they are so elastic as to adapt themselves to all newly invented methods of conveyance. As the duty imposed is purely statutory, it is not to be extended unless such extension is made necessary by a reasonable construction of the statute. As it stands, it requires highways to be safe and convenient for "travelers with their teams, carts, and carriages." Bicycles were not in common use—if not unknown—when the statute

was adopted, and evidently they were not intended to be included within its scope. Since bicycles came into common use, there have been revisions of the statute, but they have not been included. In *State v. Collins*, 16 R. I. 371, 3 L. R. A. 394, 17 Atl. 131, it was held that a bicycle was a vehicle within the meaning of a statute requiring one traveling on a highway with "any carriage or other vehicle" to turn to the right. Two things are to be noted in regard to that decision: First, that the words "any carriage or other vehicle" are somewhat broader than the words in the statute relating to highways; and, second, that they were reasonably within the intent of the statute requiring all vehicles to turn to the right to avoid collision, which might happen as well from a bicycle as from any other vehicle. In such case a bicycle may well be held to be a vehicle; but to hold that it is a carriage, with reference to the duty of keeping a highway safe and convenient for its passage, is quite another question. It appears from the statutes that, although bicycles have been the subject of legislative action, no change has been made to broaden the scope of the statutes in question. In May, 1896 (Pub. Laws 1896, chap. 345), bicycles were declared to be personal baggage, within the meaning of the law requiring railroad corporations to carry personal baggage. Clearly, this gives no force to the claim that it is a carriage within the meaning of the highway statutes. A more significant act, however, is found in Pub. Laws, chap. 757 (January, 1900), which provides specially for a commission of cyclists for the construction of side paths, to be "separated and distinguished from the main traveled part" of the highway, and to be for the exclusive use of licensed cyclists. The adoption of such an act shows plainly that a highway was not intended to be maintained in such a manner as to include a bicycle within the requirement that it should be safe for carts and carriages. The reason for this is strongly stated in *Richardson v. Danvers*, 176 Mass. 413, 50 L. R. A. 127, 79 Am. St. Rep. 320, 57 N. E. 688. The court there admits that a bicycle may be considered a vehicle or carriage, so far as lawful use on a highway, conforming to the law of the road, furious driving, riding on sidewalk, etc., are concerned, although it holds it to be a mere machine. The opinion then goes on to say that, in view of its use in wet weather, on frozen ground, and easy puncturing of its tire by a sharp stone, a bit of glass or coal, a hard rut, or a tack, it would impose an intolerable burden on towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could

go over them with assured safety. We concur with the reasoning in this last case, and it is fully sustained by the following cases: *Leslie v. Grand Rapids*, 120 Mich. 28, 78 N. W. 885; *Sutphen v. North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128; *Wheeler v. Boone*, 103 Iowa, 238, 44 L. R. A. 821, 78 N. W. 909; *Gagnier v. Fargo*, 11 N. D. 73, 88 N. W. 1030. We are therefore of opinion that the statutes do not impose a duty upon towns or cities to keep their highways safe and convenient for bicycles, but only for ordinary carts and carriages as these terms have long been understood.

The only case cited by the plaintiff, to which we need refer, is that of *Holland v. Bartch*, 120 Ind. 46, 16 Am. St. Rep. 307, 22 N. E. 83, which was an action for damages because the defendant rode a bicycle, in the middle of the street, up towards and about 25 feet from the plaintiff's horses, by which they were frightened and ran away. The case simply holds that the rider of the wheel had a right to be upon the highway, and that he did nothing to infringe upon the plaintiff's rights.

Applying our construction of the statutes to the requests excepted to, we think that the first was properly refused. It implies that the plaintiff could not recover because he was on a bicycle. One has a right to ride on a highway, and such a statement would exclude a bicycle rider from recovery at all, although the fact that he was on a bicycle may not have been the proximate cause of the accident. Many conditions can be supposed where injury would follow to a traveler from passing over a highway, whether he was in a carriage, on a wheel, or on foot. For example, suppose there was a large unguarded hole, into which any traveler in the dark would be plunged; the fact that one was on a wheel would not bar his right to recover. A bicycle rider may recover, as any other traveler can, for a breach of statutory duty whereby he is injured; but he cannot recover for a defect which would not have caused injury to an ordinary traveler. The test is whether the highway is safe and convenient for "travelers with their teams, carts, and carriages," under the construction here given, which means ordinary travel other than on a bicycle.

In this view the second request should have been granted. A town is bound to keep its highways safe for ordinary kinds of vehicles, as intended by the statute, but not in the extraordinary condition which is required for safe riding on a wheel. The refusal of the instruction was likely to mislead the jury.

We express no opinion on the question of the verdict being against the evidence, as a new trial must be granted.

65 L. R. A.

Louise DYSON

v.

RHODE ISLAND COMPANY.

(.....R. I.....)

1. The power of the court to assess the damages, in case of default, without the aid of a jury is not destroyed by a constitutional provision preserving the right of trial by jury inviolate, where, at the time of the adoption of the Constitution, the court followed the common-law practice of assessing damages in such cases without calling a jury.
2. If the court calls a jury to aid in the assessment of damages in case defendant suffers a default, it must approve the finding of the jury before such finding can become operative under a statute providing that in such cases "damages shall be assessed by the court, with or without the intervention of a jury, in the discretion of the court."

(February 4, 1904.)

PETITION by defendant for a new trial upon the question of damages, of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, in which the court refused to assess damages without the aid of a jury. *Case remitted for rehearing of the question of damages.*

The facts are stated in the opinion.

Messrs. Henry W. Hayes, Frank T. Easton, and Lefferts S. Hoffman for defendant.

Mr. Irving Champlin for plaintiff.

Blodgett, J., delivered the opinion on the court:

In the common pleas division the defendant, by its counsel in open court, submitted to a default, and then moved that damages be assessed by the court. The defendant's motion was denied, and a jury was impaneled therefor, and found damages for the plaintiff in the sum of \$2,250. To the refusal of the court to assess the damages without the intervention of a jury the defendant seasonably excepted, and the case is now before us on its petition for a new trial grounded on the alleged error of this ruling, and also upon the ground that the damages awarded by the jury were excessive and unjust.

The statute under which these proceedings were had is Gen. Laws 1896, chap. 243, § 5, p. 830, as follows: "In all cases except where otherwise provided, if judgment be rendered on default, discontinuance, submission, or demurrer, damages shall be assessed by the court, with or without the

NOTE.—As to constitutional right to jury for assessment of damages on default, see also, in this series, *Dean v. Willamette Bridge R. Co.* 15 L. R. A. 614, and *note*.

intervention of a jury, in the discretion of the court."

It will be observed that the language of the statute directs that damages "shall be assessed by the court, with or without the intervention of a jury, in the discretion of the court." Upon its face, then, the statute does not require the court to call a jury to its aid for that purpose. Neither is the court prohibited from doing so; but the court may call in a jury or may refrain from doing so, in its discretion. And this provision is of considerable antiquity in this state, being first adopted in substantially its present form more than one hundred and twenty-five years ago.

In the Digest of 1767, p. 59, is to be found "An Act Regulating Sunday Proceedings in the Several Courts in This Colony," in which it is provided as follows: "That in all cases, both at the Inferior and Superior Courts, where Judgment shall pass by Default, Discontinuance, *Nihil Dicit*, *Non sum informatus*, or Demurrer where Damages are to be enquired into and assessed by the Court or otherwise by a Writ of Enquiry at the Discretion of the Courts."

In the Revision of 1798, p. 166, "An Act Prescribing the Manner of Proceeding in Courts," it is provided, by § 13: "That in all cases in the Supreme Judicial Court and Courts of Common Pleas when judgment shall be rendered on default, discontinuance, or demurrer, damages shall be assessed by the Court with or without the intervention of a Jury at the discretion of such court."

In the Revision of 1822, p. 126, "An Act Prescribing the Manner of Proceeding in Courts," § 13 re-enacts the last provision verbatim with addition of the word "submission" to the cases above enumerated. This was again re-enacted in the Revision of 1844, p. 129, in § 14 of "An Act Prescribing the Manner of Proceeding in Courts;" in the Revisions of 1857, Rev. Stat. chap. 186, § 7; 1872, Gen. Stat. chap. 202, § 7; 1882, Pub. Stat. chap. 213, § 8; 1893, Judiciary Act, chap. 23, § 5; 1896, Gen. Laws, chap. 243, § 5, p. 830.

From the foregoing citations it will be seen that there was no statutory right to have damages in a defaulted case assessed by a jury at the time of the adoption of the Constitution in 1843.

Two questions are presented for our consideration by the exceptions,—one being whether damages must be assessed by a jury as matter of right when the question of damages is the only question to be determined; and the other being this: If an assessment of damages by a jury is not a matter of right, what is the effect of the 65 L. R. A.

finding of a jury in cases in which the court has intrusted the consideration of that question only to a jury?

Properly to decide these questions involves an examination of the respective provinces of court and jury, and requires us to trace the growth of the method of assessing damages in defaulted cases at the common law; and it therefore becomes necessary to consider the adjudications of the courts upon the law of England as it anciently stood, in deference, not only to the injunction of Lord Coke in that behalf (*Pilfold's Case*, 10 Coke, 115),—*Satius est petere fontes quam sectari rivulos*,—but in view, also, of the statute of the general assembly of the colony, contained in the Digest of 1767, p. 56, providing "that in all Actions, Causes, Matters, and Things whatsoever where there is no particular Law of this Colony, or Act of Parliament introduced for the Decision and Determination of the same, then and in such Cases the Laws of England shall be in Force for the Decision and Determination of the same," as well as of the decision of this court in *Martin v. Clarke*, 8 R. I. 403, 5 Am. Rep. 586, that "the colonists here upon their emigration brought with them to this country the law of England as it then existed as modified by statutes so far as it was applicable to their condition and circumstances here." See also *Bishop v. Tripp*, 16 R. I. 198, 14 Atl. 79; Act 1647 (1 R. I. Col. Rec. 158); Act 1700 (Dig. 1719, p. 45).

In the *Registrum Brevium*, of which it is said by Lord Coke (Pref. part 10, Coke, Th. & F. ed. xxiv.) that it is "the ancientest book of the law," and that it "containeth the original writs of the common law," and that it is (Pref. part 8, Coke, Th. & F. ed. xxiii.) "so ancient as the beginning whereof cannot be shewed," adding also, *Concludere licet hunc esse librum tum antiquitatis, tum autoritatis maximam*, "And of these ancient writs I will say . . . that all the secretaries in Christendom may learn of them to express much matter in few and significant words,"—is to be found the form of a writ for the summoning of a jury for the trial of an issue, and the form for a writ of inquiry for the assessment of damages.

The form of a writ of *venire facias* to summon a jury of twelve men to determine an issue between the parties is as follows (Reg. Brev. Editio Quarta, 1687):

"Rex, Vicecomiti salutem. Præcipimus tibi qd' venire facias coram justitiariis nris apud Westm' a die, &c. 12 tam milites quam alios liberos & legales homines de visinetu de E. quorum quilibet habeat centum solidatas terræ, tenemen, vel redditus per annum ad minus, per quos rei veritas

melius sciri poterit, & qui nec A. nec I. aliqua affinitate attingunt, ad recognoscend' super sacramentum suum si W. consanguineus praed' A. cujus haeres ipse est, fuit seisisus de manerio de R. cum pertinentiis in dominico suo ut de feodo die quo obiit, quod idem A. in curia nostra coram justitiariis nris apud Westm' clamat ut jus suum versus eum, sicut idem A. dicit, vel non sicut praed' I dicit, quia tam praed' I quam praed' A. inter quos inde contentio est, posuerunt se in juratam illam. Et habeas ibi nomina juratorum & hoc breve. T. &c."

And the form of a writ ad inquirendum de damnis was in these words:

"Rex vic' salutem. Ostensum est nobis ex parte P. de L. quoddam cum B. de S. in curia nostra, &c. sum' esset ad respondend' eidem P. de placito quare cepit unum equum ipsius Petri in separali ipsius Petri, & eum injuste detinuit contra vadium & pleg', & idem B. venisset in eadem curia & dixisset quod ipse cepit averia illa in damno suo pascentia separalem pasturam ipsius Bernardi, & partes hinc inde posuissent se in juratam patriae, per quam postea in eadem curia nostra convictum fuit quoddam praed' Bernardus averia cepit in damno suo in separali pastura ipsius Bernardi, ita quod idem Bernardus per considerationem curiae nostrae haberet retorem averiorum praedictorum: Praefatus Bernardus Licet praedictus Petrus rationabiles & sufficientes emend' pro damnis & transgressionibus praedictis saepius ei obtulerit, praedicta averia detinet imparcata, contra legem & consuetudinem regni nostri, ad damnum ipsius Petri non modicum & gravamen. Et quia nolumus quoddam praedictus Petrus injuriatur in hac parte, tibi praecipimus quoddam praesentia eorundem Petri & Bernardi ad hoc praemonitorium si interesse voluerint, per sacramentum probor' & legalium hominum de visinatu illo neutri parti suspector', diligenter inquiras quae damna praedictus Bernardus habuit occasione transgressionis praedictae. Et quam citius dictus Petrus eidem P. satisfecerit de damno illius juxta taxationem, eorundem juratorum praedicto averia eidem Petro sine dilatione liberari facias, juxta eundem valorem & precium cujus fuerunt tempore quo fuerunt eidem Bernardo retornata. Et qualiter, &c. Et habeas, &c."

It is evident, in the first place, that the purpose and the effect of the latter writ are different from the purpose and the effect of the former, since otherwise there would be no need of more than one writ. And a comparison of the two discloses differences in several particulars. The number of a trial jury is fixed at twelve, while the number of jurors is not determined in the case of a

jury called merely to assess damages which is to be done merely *per sacramentum probor (um) et legalium hominum* (by the oaths of good and lawful men), the number of whom was determined by the sheriff at his pleasure, as will later appear. The precept of the writ in the former case summons a jury *per quos rei veritas melius sciri poterit* (by whom the truth of the matter may be more clearly known), and who are summoned *ad recognoscendum super sacramentum suum* (to determine upon their oath) as between the parties *inter quos inde contentio est* (between whom there is an issue), and of whom it is said *Posuerunt se in juratam illam* (they have placed themselves upon that jury).

In the latter the precept of the writ is not to the jurors to determine, but to the *vice comes* (sheriff), that he (the sheriff) should diligently inquire (*praecipimus tibi . . . quod diligenter inquiras*) (we command you . . . that you diligently inquire); and there is no statement of any issue remaining between the parties, but rather a recital, in effect, that the issue has been hitherto determined (*et partes hinc inde posuissent se in juratam patriae, per quam postea in eadem curia nostra convictum fuit quoddam, etc.*) ("and thereafter the parties placed themselves upon a jury of the country, by whom it was later found that"), etc.

Again, the sole purpose of the inquiry is to inform the court of the injury done the plaintiff by the act which it has already been found that the defendant committed. *Quia nolumus quoddam praedictus Petrus injuriatur in hac parte* (because we are unwilling that the aforesaid [plaintiff] should sustain injury in this behalf). Neither should it escape observation that in the former case the jurors are to appear before the judges on a certain day—*coram justitiariis nris apud Westm' a die*—while in the latter the sheriff is himself required to execute the inquiry in the presence of the parties only, who, being notified, may attend if they choose so to do, in *praesentia eorundem P. et B. ad hoc praemonitorium si interesse voluerint*. See *Matthew v. Hassel* (1590) Mich. 31 & 32 Eliz. Q. B. Cro. Eliz. pt. 1, p. 144; *Northcott v. Underhill* (1699) Mich. 10 Wm. III. 1 Ld. Raym. '388.

Thus, by the writ of *venire facias*, the fact about which there is a *contentio* between the parties is to be determined by the jurors to whom the parties themselves have referred the determination of the fact; while, by the writ of inquiry *de damnis*, an inquiry and report are to be made by the *vice comes* (sheriff), upon the order of the

court, with leave to the parties to attend the hearing if they see fit to do so.

Before considering the effect of the finding of a jury on a writ of inquiry of damages, such as is mentioned in the act passed by the general assembly of this colony in 1787, *supra*, it is instructive to ascertain the number of jurors composing a jury to consider such questions, and how their number was determined.

In Spellman's Glossarium (*editio tertia*, 1687) *sub voce Jurata*, it is said: "Personarum numerus non idem est in unaquaque jurata. . . . In Brevi enim ad inquirendum de damnis . . . 8 solummodo habeantur."

And in Fitz-Herbert's *Natura Brevium*, of which Lord Coke says that it is "an exact book, exquisitely penned," and which was compiled in 1534, while the author was one of the judges of the common pleas in the reign of Henry VIII., it is stated (8th ed. 107; 1755) that in waste the "Writ of Inquiry is awarded by the court *ex officio per sacramentum proborum*," etc. And "the Sheriff may make the inquiry by the Oaths of Six or Eight persons of the Waste, and he is not bound to take Twelve Persons;" upon which Chief Justice Hale observes, in referring to Brooke's *Abr. Collusions*, 18: "Upon a Writ of Inquiry of Waste for an abbot Quale jus shall issue, which proves it is no Verdict, but an Inquiry."

In *King v. Fitch* (1636) Cro. Car. 414, in the reign of Charles I., a writ of inquiry of waste by thirteen jurors was held good, wherein it was conceded that writs of inquiry were usually executed by more than twelve jurors "at the sheriff's pleasure, for that is but a mere inquest of office." And see 2 Rolle's *Abr.* 673, 674.

In the reign of Charles II. the number of jurors on writs of inquiry of damages seems to have been frequently but two. In 1671, eight years after the granting of the charter of 1663 to this colony, and nearly forty years after the creation of the "General Court of Tryalls" in 1647 by the general assembly acting under the Warwick charter of 1644, there is reported a case (1 Vent. 113) in which the court of King's bench refused to sustain an assessment of damages made on a writ of inquiry by a jury of two, although "custom alleged to warrant it," the report continuing: "And it was resolved by the Court, That there cannot be less than twelve though the Writ of Enquiry saith only *per sacramentum proborum et legalium hominum*, and not *duodecim*, as in a Venire." And later, in the celebrated case of *Duke of York v. Sir Titus Oates*, in the court of King's bench, in an action of slander upon the "Statute De 65 L. R. A.

Scandalis Magnatum," for accusing the plaintiff of being a traitor, and which was tried in 1684 (3 St. Tr. 987), the defendant suffered default, a writ of inquiry of damages was issued, and in the course of the proceedings thereon the undersheriff inquired of the court, "Will you please to have any more than twelve sworn?" to which the lord chief justice replied: "How many do you use to have? Pray swear an odd number as you used to do." And the undersheriff answered, "Then I will swear Three more and that will be just Fifteen." And this jury of fifteen assessed the plaintiff's damages at £100,000. And an examination of the report shows that the writ to the sheriff commanded him "that by the Oaths of Good and Lawful Men of your Bailiwick you diligently inquire what damages," etc., and that the number of jurors was not prescribed, but was determined by the sheriff at his pleasure.

And in the reign of George II. it was held in the court of King's bench, in *Chester v. Crawley*, decided in 1741 (2 Strange, 1159): "The execution of a writ of inquiry before fourteen jurors was held good, for it is but an inquest of office whereon no attaint lies."

While the proceeding by writ of attaint is now abolished, yet it was expressly authorized in Rhode Island by an act of the general assembly passed in 1647, as will later be seen.

And in Duncombe, *Trials per Pais* (6th ed.; 1725), it is stated (chapter 6, *Of the Number of Jurors*) as follows: "And the Law is so precise in this Number of Twelve that if the Trial be by more or less it is a Mis-trial: but in Inquests of Office as a Writ of Waste, there less than twelve may serve." Fitz-Herbert, *Natura Brevium*, 107 C. "And in Writs to enquire of Damages the just Number of Twelve is not requisite, for they may be over or under; and so it was resolved, Trin. 1651, B. R. Abbott versus Holt, that the Sheriff ought (in Writs of Inquiry) to summon Twelve by their names. Yet damages assessed by a less Number is sufficient, and in the Writ to the Sheriff *quod ipse inquirat per sacramentum proborum hominum*, omitting *duodecim*, it's good and usual."

Such being the law of England as to the number of jurors on the execution of a writ of inquiry of damages for more than a hundred years after the founding of this colony, and for nearly a century after the creation of the "General Court of Tryalls" in 1647, we proceed to consider the nature and effect of such an inquiry when made.

Says Mr. Justice Holmes (*The Common Law*, p. 264) of the reign of Edward III. (1327-1377): "This reign may be taken

as representing the time when the divisions and rules of procedure were established which have lasted until the present day."

Accordingly, in the Year Book 21 Edw. III. fol. LVII (1348), upon the question of assessing damages in replevin of certain animals, William de Thorpe, then Chief Justice, said: "Sp cel poynt q̄ fondez v̄re reasō pur ē que la pris fuit conu et la quātity des bestes ieo die q̄ la court duist aver taxe les dām et nemy l'enquest en ceo cas;" later adding that an attaint would not lie for a false verdict in an inquest of office, but only where issue was joined by the parties "et ceo ne puit il mye aū si l'enq̄st ne fuit pris al mis des parties, et al mys des parties nous ne poio' my enquer car les parties fue' a issue spr un certain point, q̄l point est trouve issint q̄ nul aut issue ē e pris euf eux."

Here is the plain declaration, first, that when the taking and the number of animals taken were both admitted, then the question of damages was a question for the court, and not for the jury; and the further distinction is clearly made that, where parties are at an issue and that issue is determined by the jury, no other matter is to be otherwise determined. And see *Id.* fol. 2.

In the Year Book 22 Edw. III. fol. XI (1349), in *un enq̄st en b̄re de trns port p un A de batry*, the plaintiff, being dissatisfied with the amount awarded by the inquest prayed the court to increase the amount *p lours tax*, and the court, upon observing that *touts ses doies fuerunt coupes oustre II*, and after examining the record at nisi prius, decided (per Hill) *eucess s̄ les dām a X maro oustre les xx marcis*, thus affirming the power of the court to disregard the finding of the jury thereon.

In the Year Book 39 Edw. III. fol. 20 (1366), is recorded a case in which plaintiff sued in trespass for an assault and the defendant plead *ryeu coupable*, and was found guilty at nisi prius. The plaintiff claimed a mayhem by the assault, *et les justices demandont del enquest sil avoyt le Mayheme a mesme le temps*, and he was awarded by the jury "£XVIII." damages. The nisi prius record being returned *en banke*, "le playntyfe monstra le maheyme a les iustices del banke, et pria que les damages fue' taxes a pluis haute, pur ē que il fuit troue per vdit que le def. fuit coul̄p, et que il prist l' maheyme a cel temps et ont taxes les damag. forsq̄ a xviii li, q̄ux damages ne fue' pas sufficient pur les damages q̄ il avoit. Si agard l' court que il recouā les damages taxes p l en- 65 L. R. A.

quest, et ouste' XXII li—taxes p̄ le court, q̄ amount en tout a xl li."

It will be noted that the court more than doubled the damages awarded by the jury of "enquest" as to the mayhem *super visum vulneris*.

In Year Book 2 Hen. IV. fol. 2 (1401), it was said by Rickhyl: "Quant home ad recouer terre ciens p̄ defaulte come en briefe de cosinage ou en auter briefe ou & c. et briefe issint al vicount denquerer des damages ceo nest que un enq̄st d'office." And see also 3 H. IV., fol. 4 (1402).

But in year Book 7 Hen. IV. fol. 31 (1406), W. Gervais brought a writ of conspiracy against Hammond de Claxton and others for conspiracy to indict Gervais, and later the defendants made default and the plaintiff had a writ of inquiry *al vicount pur enquerer des dām. Et ore le vicount return les dam a xl li.* And thereupon Gascoigne, Chief Justice, said to Gervais: "Il semble a no' que les dām sount trop haut taxes. et pur ceo ōse bien voilles releasser quar auxib̄ come uo poiom'encresē dām nous avomus poair d'abbeiger solonque n̄re conscience—*quod nota bene.* Et auterment le court voilet avec abbeigge solonque lour conscience," etc.

The power is here exercised by the court of King's bench, and on its own motion to reduce damages awarded by a jury, in a defaulted case, and the right to increase or to diminish damages in such cases is here unqualifiedly affirmed.

In the Year Book 8 Hen. IV. fol. XXXIII (1407), the plaintiff received damages after trial by a jury at nisi prius, in trespass for assault and battery, and claimed a mayhem from the battery, and prayed increased damages; and the chief justice in King's bench questioned the power of the common pleas at nisi prius to increase damages, stating that the plaintiff "issint q̄ le pl', poit v̄n eins en propre person ou devant aucun de nous. copaignons en pais pur m̄rer son mayhā et p cest voye il poit este eide, et ita factum fuit," etc.; thus granting the prayer, upon the plaintiff showing his mayhem to some justice of the King's bench.

And in the Year Book 9 Hen. IV. fol. I (1408), damages were assessed by the court *p. inspeccion* in trespass for assault and mayhem, the report stating that the plaintiff "fuit fait venir en le place de ē view de court daiudger ses damages p inspeccion et la court agard q̄ il recouerist CC marc pur ses dām a double solonque l'ordinance del parlement," etc.

In Year Book 11 Hen. IV. fol. 10 (1410), the plaintiff in replevin in the King's bench received damages on issue tried by a jury of property in defendant. "Et le pl'

pria s iudgement et le court ne voille done son iudgement sinon que il voudre rel' par cel des damages, quar les Justices di s que per mesme le ley que ils poent encesser per mesme le ley ils poent abbreger per q le pleintife pria son iudgement solonc le descreccion des Justices, per que il fuit agard que il re s li, et le rem le partye rel';" thus again affirming the right to reduce damages even after trial on issue joined.

But in the same year, in Year Book 11, fol. 65, in an action of trespass for an assault, while the court of common pleas in that case thought it expedient to have the damages inquired of by a jury, yet the report of the case concludes: "Et nota que le Court tenoit que ils puisent taxes les damages s'ils voillēt," etc.

And in Year Book 14 Hen. IV. fol. 2 (1413), in the common pleas, Finch recovered damages, taxed by the court, for a wrongful taking of his property, against Cornewall and others, upon defendant's default, after the case had been held for advisement. "Et les Justices disoient que il voillent estre avises et puis a autr jour agard' fuit que le pl' rec' ces dammages taxes per la court a IIII li, quod nota. Et nota q il ne re s my da m solonc c q il ad accompte."

And in the same year (fol. 9), in replevin: "Et puis ex assesu e m Justic il agard q le pl' re s ses da m a 6 mar s, qd nota;" and Skrene (of counsel) objected, and said: "P la Inqisi cion les da m ne s o t taxes q a 30s. p q vo', ne pures enlanger les da m." But Hill, B., speaking for the court replied: "No' puisom' agard da m sans asc n e n r, p q l enq s n s forsqu de no' faie dest r apri s des da m, qd nota." And her e the court again affirmed its power to change the award of damages made by the jury, and to make an award without an inquiry by the jury, since the inquiry is only to apprise the court concerning the damages.

In the Year Book 3 Hen. VI. fol. 29 (1425), it was said by Martin, B., of the finding of a jury on the question of waste: "Car cel inqisi cion est grand', et p(l)uis haut q un enq s d'offi c car ceo que serra trouve per cel inqisi cion le iug serra do n s o l e m t et le pty lie per cel iudg en inqisi cion de tous iours, et il puit est r que nul serra trouve per cel inqisi cion issint donq le iudg serra don enco n t le pl' et issint en maner cel enquest en substan c s auxi fort si co m lou un enquest s ioine entre partie et partie."

But of a writ of inquiry as to damages in an action of trespass, after demurrer overruled by the court, he continues: "Nous puisomus eslier le quel nous m voillomus

taxer les damages per nostre discretion, et sur ceo do n iudgement ou ensement de nous pur maund' un brie fe al vi c. pur enq r des damages, etc. et nient obstant le vi c re turne des damages al certaine iour no' puiss o eslier le quel nous voillomus do n iudgement sur cel ou enlanger les damages ou abbreger et issint varier de cel inqisi cion, en quel cas cel inqisi cion nest mere ment d'office, car il non ligat, neque solvit." And concludes: "Et issint may sem ble il ad grande diversitie per enter les cases."

Here it is laid down in the most explicit manner, and in the clearest way, that in trespass the court may either tax the damages itself, or, if it sees fit to call in a jury to pass upon the question, may increase or diminish the amount so found; the finding of the jury being merely an inquest of office which the court could depart from at its discretion. And see Year Book 7 Hen. VI. fol. 31 (1429).

In the Year Book 8 Hen. VI. fol. v (1430), is recorded the case of the default of a garnishee in detinue after issue joined. The jury on the writ of inquiry returned greater damages than the plaintiff claimed in his complaint against him, and then the plaintiff prayed judgment. And Martin, B., said: "Mesque que nous ne doneromus iudgem t sur le verdict nous le doneromus per default. Et veritie est que l enquest ne devoit riens auer enquis del principal issue, mes que le iudgem t doit auer estre done sur le default en ceo case, et issint serra; issint le prender des quest a. ceo point ne fuit que surplusage; mes quant il fuit condempnable per default, les Justices poient auer done iudgement del principal et auera m taxe les dammages, et auxynt poyent auer agard' b f denquer des dammages, per lour justification, en discharge de lour conscience. . . . Et Martin et tota enria, que le iudgement serra done sur le default. Et Martin dyst que quant home serra condemp n per iudgement sur le default les Justices poient taxer les dammages, mes pur le plein notic del tort est use denquer des dammages per enquest." And in continuing the decision (Id. fol. xi), Paston, B., said: "Car l enquest nest que nostre information,"—again affirming the right of the court to assess the damages without a jury, and stating that the basis of the judgment of the court was the default of the defendant; and not the finding of the jury. Here it will be seen that the court directly declares that it does not base its judgment upon the verdict of the jury as to the amount of damages, but upon the default of the defendant on the principal issue. And the importance of this distinction should not be

overlooked. Again, it is further determined that on the assessment of damages the jury has no concern with the principal issue, and that its finding on that question is "surplusage." And, moreover, it is clearly decided that the justices may themselves award the damages, or suffer the jury to inquire concerning damages for their justification and to enlighten their consciences, but that it is only matter of practice, and not matter of right, which permits the jury to inquire concerning damages when the defendant has suffered a default.

In the Year Book 19 Hen. VI. fol. viii (1441), one of three defendants in trespass made default, and the others justified the alleged trespass as his servant, to whom they averred the plaintiff had sold the goods in question. In the argument as to the county in which the writ of inquiry as to damages against the defaulting defendant should be executed, it was said by the court: "Si bñ isseñ denqueñ des dām cel enquest nest q̄ un enquest d'office . . . et no poies aū attaint vax eux, . . . issint sñ icy en nñ discrec' coment voillomus faire;" and (fol. x) thereafter the writ of inquiry was executed and returned into court, and the plaintiff prayed judgment, and Hody, Chief Justice of the King's bench, said: "Ceux damages sont trop grand" pur le tierce par q̄ entaunt q̄ ceo ne fuit forsq̄ un enquest d'offir de quel le def. ne puit auer atteint pur outrageous damages solonqu le statut come il purra sil passera del principal, et auxi quant vous ag brief al viñ denquerer des damages vous puiesses auer agarder damages adonques solonqu vostrē discrec et issint poies faire a ore pur f̄ q̄ il nest q̄ enquest d'office." And after reducing the damages "ex assēsū socioru(m) suorū(m)," the report continues: "Quod nota, ou les iustices ont amesnus les damages taxes par l'enquest;" adding: "Mes auter serra si mesme l'enquest ust passe sur le principal car donques ils nussent ewe tiel poiar de abriger les damages come devant ne d'enlarger nul damages forsq̄ seulement des costages." Mes nient d'enlarger damages quant al principal et si l'enquest dōn outrageous damages les iustic' ne amesuf eux purra surcesser de lour iugeñt cōe fuyt fait par Martin, Justice, anno xliiii, mesme le roy." "Et nota div(er)-sitatem."

Upon this case it is to be noted that the action was trespass *de bonis asportatis*, in which the damages are uncertain; that after default of one of the three defendants, and a writ of inquiry executed as to the damages, the court, of its own motion, pronounced the finding of the jury to be too great, and then of its own motion proceeded

itself to determine and reduce the damages, observing that in such a case the finding of the jury was but an inquest of office, and that the court could award damages at its discretion; at the same time distinguishing the case at bar from a case where the principal issue was determined by the jury, in which latter case power to increase or diminish damages was disclaimed.

In Year Book 32 Hen. VI. fol. 1 (1454), it is said: "Briefe de Dette fuit porte et les parties fuerunt al issue et les iourours chauntēr pur le playntif as damages de (xx) vi s viii d et les costages de xx s. Wangforde pria que ses damages poiet estf encrease et issi tfeñ pur q̄ Fulthorpe dit; Recoues vostf dette et vostf damage de xxvi s, viii d taxes par l'enquest et xliii s, iii d de ouster taxes par le court;" thus increasing the finding of the jury by one half of debt and costs.

In Year Book 34 Hen. VI. fol. 24 (1456), in the exchequer chamber, Fortescue said that the awarding judgment on default in debt, and the inquiry of damages by a jury on default in trespass, rested merely on the usage of the court, and had no other reason, and that, indeed, none could give a reason for the difference in practice, as follows: "Et l'usage fait en ley et sans aut reason q̄r l'usage en bñ de det est que si le def. pled un acquitance ou reles en barf et le pl' dedit le fait issint q̄ ila sont a issue etc. et apres le def. face default il serra cōdempne, &c. Mes si le def. en bñ de Tñs pled un reles et le pl' dedit, etc. et apres issue, &c. le def. face default; en cest cas ne serra mes un enqst p def. et nul condempnacion come serra en le bñ de det &c. *mes nul saver dire le diversite de reason p e trē l un et l autec mes l'usage tm.*"

From which it appears that the action of the court in these cases was solely a matter of practice, and not a matter of right.

In Year Book 39 Hen. VI. fol. 1 (1461), trespass was brought against several defendants, who pleaded in bar, and one of them made default, and the question was whether a writ of inquiry of damages should issue against the defaulting defendant before the trial of the issue joined between the plaintiff and other defendants. And Moyle said, "Si le bñ isseñ ore pur enqueñ les dām nest forsq̄ enquest d'office et nemy al myse des parties," and that where damages are taxed by a jury on issue joined between the parties an attaint would lie. "Mes del enquest d'office nil home auera atteynt et issint pur charger eux qui ont pled' al issue des damages asesses p enquest d'office serra grend' mischiefe."

In Year Book 16 Edw. IV. fol. 1 (1476), is the following case: "Dette sur un obligac̃ le def. dit q̃ il fuit un lay home et nient letf et cē obligac̃ fuit lye a luy sur certeine cond', et issint son obligi. sans condicion nient ē fait, et sur ceo issue fuit prise et al iure fuit doñ en evidece que le def. fuit home letr. Et donqs le def. dit que le verite fuit et est que il est letter home, mes en fait le pl' promist le def. que il ne voile suer le oblig. si le defend. aunt ne voile enchase en le park le pl' puis cel temps issint est graunde conscience en cest matf pur les dām et auxi pur le duety, et sur ē l enquest fuef charge per les costages et damag. et puis il revient al barre a dire lour verdit Sandes, le clerke, dit al Crier dd' le pl'. Catesby ē ne besoign my, car ceo n'est a orē forsqu un enquest d'office quant le point del issue est conu et les Justis ails voient purf aū taxe les dām, per que le iurē taxe les dām et costages et le pl' ne fuit my dd', qd nota." Here the court again affirms its power to assess damages when the point at issue is admitted, and restates the law as to the effect of the finding of a jury on the question of damages where liability is admitted, as it obviously is admitted, by a default.

Leaving the Year Books, and observing more recent decisions, we find that the distinction is more clearly made between the execution of a writ of inquiry of damages and a verdict in its proper signification.

In Pasch. 29 Eliz. (1587), Gouldsb. 49, it was determined, in an action of trespass for an assault, that the finding of a jury on a writ of inquiry in a defaulted case was not a verdict, "for this shall not be said a verdict; whereto the court agreed, for a verdict is that which is put in issue by the joyning of the parties." And in Mich. 37 and 38 Eliz. it was again said, in *Courtier v. Barret* (1595) Cro. Eliz. pt. 1, p. 412, by the whole court of King's bench, in a case of replevin, where the parties were at issue and the plaintiff was nonsuited after evidence and damages were assessed by jury for the avowant, that "here the plaintiff being nonsuited there is not any verdict given; but, in that whereof the jury are to enquire of damages their verdict is but an office of inquest and no verdict," etc. And see *Ireland's Case* (1594) Cro. Eliz. pt. 1, p. 339, and *Grey v. Willoughby* (1595) F. Moore, 465, pl. 657.

And in Year Book 47 Edw. III. fol. 19 (1374), it was said by Finchden, Chief Justice: "Ne l enquest ne fuit my charge de ceo que la party mesme avoit conus et sic est troue encrountr luy."

An even more positive recognition of the essential difference between a verdict of a jury in a trial on issue joined and the find-

ing as to damages in a writ of inquiry is contained in the act of Parliament passed in the fourth year of Queen Anne's reign (1705), 4 Anne, chap. xvi., and entitled "An Act for the Amendment of the Law and the Better Advancement of Justice," the 2d section of which is as follows: "And be it further Enacted by the Authority aforesaid, That from and after the said first Day of Trinity Term (1706) all the Statutes of Jeofails shall be extended to Judgments which shall at any Time afterwards be entered upon Confession, *Nihil dicit*, or *Non sum informatus* in any Court of Record; and no such Judgment shall be reversed, nor any Judgment upon any Writ of Enquiry of damages executed thereon be staid or reversed for or by reason of any Imperfection, Omission, Defect, Matter or Thing whatsoever, which would have been aided and cured by any of the said Statutes of Jeofails in case a Verdict of twelve Men had been given in the said Action or Suit, so as there be an original Writ or Bill and Warrants of Attorney duly filed according to the Law as it is now used."

It will be noticed here that a "Verdict of twelve Men" is contrasted in this act with a "Writ of Enquiry of damages executed," and that the provisions of the statutes concerning the former are "extended" to the latter, thus clearly recognizing as well as preserving the two methods of procedure, and being a parliamentary recognition that the finding in the latter case was a different matter from a "Verdict of twelve Men." And see *Mallory v. Jennings* (1731) in the King's bench, Mich. 4 Geo. II. Fitzg. 162.

So in *Foster v. Jackson* (1816) Trin. 13 Jac. Hobart, 52a, it is said of a verdict: "First lay this for a Ground, that if the Jury find any Thing, that is merely out of the Issue, that such a Verdict, for so much is utterly void and of no Force, though it conclude in general, for or against the Plaintiff or the Defendant, whereof the Reason is plain, which is, that the Jurors are Tryers of Matter of Fact put in Issue between the Parties, and their Oath, which contains their commission is, that they shall truly try the Issue between Party and Party. . . . So that whatsoever they do try besides the Issue is *per non juratos*, as a Cause judged by the Court, that hath no Jurisdiction of the Cause *coram non iudice*, and utterly void, for a Verdict must not be to the Action, that might have been pleaded, but to the Issue, which is pleaded, and in their Charge. . . . And so upon the Matter, if that extravagant Part of the Verdict be false, it is no Perjury, neither doth any Attaint lie upon it, for there is no Party grieved nor any Thing to be restored, neither can it be used as in evi-

denie in any other Tryal, because there is no Redress if it be False. . . . For Jurors are bound to their Issues, but Judges have Power over the whole Matter, and that hath also his Bounds, as to the Matter within the Record, not at large."

In *Goodwin v. Welsh* (1610) Pasch. 7 Jac. Yelv. 152, the plaintiff recovered damages in trespass *de bonis asportatis* against two defendants by default, and it was held: "And by all the justices, they themselves as judges, if they would, might in these cases assess damages without issuing any writ, for it issues only *quia nescitur quæ damna*; but if they will trouble themselves with the assessment of damages, they may. But it is otherwise in the case of *non oul.* pleaded, for there the trespass is denied which must be tried by the jury and there the property and the value also ought to be proved." And in a note to this case by the late Theron Metcalf, in the 1st American edition of Yelverton's Reports, published in 1820, it is stated: "In Rhode Island the court on default and demurrer assess damages in all actions, whether of tort or of contract." See also, to the same effect, 1 Brownlow & G. 214, and Cro. Jac. 220.

Under the protectorate of Cromwell, in 1651, was decided the case of *Davis v. Foliot* (Banc. Sup.) Style, 310. Davis sued Lord Foliot for an assault, and on a writ of inquiry £200 damages were awarded by the jury. "The Plaintiff moved the Court for a new writ because by reason of the willfulness of the Jury the damages were found too small. . . . Roll, Chief Justice, answered, though we grant not a new writ, yet we can increase the damages upon view of the wound, and here appears to have been a foul Battery by the dagger produced in the Court and by the party himself that is wounded, and it is not fit that a wilful Jury should prejudice the party, therefore either consent to a new writ, or else bring your witnesses on both sides, and we will hear the motion again." And later, "Roll, Chief Justice, said—3 things are considerable. 1. Whether the court can increase the damages; 2ly, Whether the wound be apparent; and 3ly, Whether the damages given be too small. The Court, upon view of the party and examination of Chirurgions and Witnesses on both sides upon Oath, did conclude that they might increase the damages, and that the wound was apparent, and that the damages were too small; and therefore they increased them to £400 and said they would not increase them more because they could not inquire into all the circumstances of the fact as the jury might, but they thought fitting to increase them in some proportion because the of-

fense was great and such outrageous Acts are not to be slightly punished." And see *Dames v. Rock* (1625) Mich. 1 Car. Bendloes, 158; and *Wolf v. Meggs* (1597) Cro. Eliz. pt. 2, p. 544; *Hooper v. Pope* (1626) Latch, 223; and *Mallet & Ferrer's Case* (1588) Hil. 30 Eliz. 1 Leon. 139; and *Tripcony's Case* (1554) Mich. 1 & 2 Philip & Mary, 2 Dyer, 105a; *More's Case* (1674) Freeman, 173; *Burton v. Baynes* (1733) Mich. 7 Geo. II. Barnes's Notes, 153; *Austin v. Hilliers* (1666) Pasch. 17 Car II. Hardr. 408.

In the reign of William III. (1695) was decided, in the King's bench, *Harbert's Case*, Skinner, 595. Here the plaintiff in replevin became nonsuit after joinder in trial and evidence to a jury, and the jury were discharged without assessing the defendant's damages. And at a later day, on a motion for a writ of inquiry for that purpose, it was said by Holt, Chief Justice: "The Jury here are discharged from giving their Verdict by the Nonsuit; and therefore, if they had given a Verdict for the Damages this had been but as an Inquest of Office upon which no Attaint would lie if the Damages had been excessive. . . . But where the Jury gives a Verdict and does not give Damages there such a Defect should not be supplied; for if the Jury had given Damages this was as Part of their Verdict upon which an Attaint lay if they are excessive, and therefore if this shall be supplied by a Writ of Inquiry which is but an Inquest of Office, if the Damages are excessive the Party shall be oppressed without the Benefit of an Attaint." And see *Herbert v. Waters*, 1 Salk. 205, 1 Ld. Raym. 59, 12 Mod. 85. In *Herbert v. Waters*, Carth. 362, decided in the court of King's bench in 1695, the rule is thus stated as to a writ of inquiry of damages to an avowant upon a nonsuit in replevin: "Where the Matter omitted to be inquired by the principal Jury is such as goes to the very Point of the Issue, and upon which if 'tis found by the Jury, an Attaint will lie against them by the Party, if they have given a false Verdict; there such Matter cannot be supplied by a Writ of Inquiry, because thereby the Plaintiff may lose his Action of Attaint, which will not lie upon an Inquest of Office. But where the Matter omitted to be inquired by the principal Jury doth not go to the Point in Issue or necessary Consequence thereof, but are Things merely collateral, as Damages are in this Case, and the Four usual Inquiries on a *Quare Impedit*, such may be supplied by a subsequent Writ of Inquiry, without any Damage to the Party; because if the same had been inquired into by the principal Jury, it would have been

(as to those Particulars) no more than an Inquest of Office, upon which an Attaint will not lie." *Brampton's Case* (1616) Mich. 13 Jac. 1 Rolle Rep. 272; *Cheyney's Case*, 10 Coke, 118; *Heydon's Case* (1613) Trin. Jac. 11 Coke, 5.

During the same reign (Hil. Term, 8, 9, Wm. III.; 1696) was also decided *Cook v. Beal*, 1 Ld. Raym. 176. This was trespass for an assault, and not guilty pleaded, and verdict for plaintiff, who later moved for an increase of the damages upon affidavit that he had partially lost the sight of his eye by the assault; and therefore it was "resolved that the court may increase the damages if the wound be apparent though it be not a maim. . . . And Powell, Justice, said that Holt, Chief Justice, was of that opinion. . . . And he [Powell, J.] said that the court might increase the damages upon a writ of enquiry because that was but a bare inquest of office." And see 3 Salk. 115. And in the following cases the assessment of damages by a jury on a writ of inquiry was set aside by the court of King's bench: *Woodford v. Eades* (1721) 1 Strange, 425, because damages were too small; and for the same cause in *Hall v. Stone* (1722) 1 Strange, 515; and in *Markham v. Middleton* (1746) 2 Strange, 1259; *Parr v. Purbeck* (1724) 8 Mod. 196.

In *Beardmore v. Carrington* (1764) 2 Wils. 244, it was said by the court, in considering the question of damages awarded in an action of trespass and false imprisonment after joinder on the general issue and trial to a jury: "There is also a difference between a principal verdict of a jury and a writ of inquiry of damages, the latter being only an inquest of office to inform the conscience of the court, and which they might have assessed themselves without any inquest at all."

And in *Hewit v. Mantell* (1768) 2 Wils. 372, it was said, by Wilmut, Chief Justice: "The taking of the inquisition and entering final judgment were only the conclusion and necessary consequence of the interlocutory judgment, for the court themselves, if they had so pleased, might upon the interlocutory judgment have assessed the damages, and thereupon given final judgment before Bibbines became bankrupts, and the inquisition is only a matter of course taken to inform the conscience of the court."

Again, in *Bruce v. Rawlins* (1770) 3 Wils. 61, the plaintiff recovered damages in trespass by default for breaking and entering plaintiff's house and searching his effects. The court said, in considering the damages assessed by the jury on the writ of inquiry: "Wilmut, Chief Justice. This is an inquest of office to inform the conscience of the court, who, if they please, may them-

selves assess the damages." And see *Coleman v. Mauby* (1730) 2 Strange, 854; and also *Oreswick v. Saunders* (1682) 34 Car. II., 2 Show. 200.

In Rhode Island the act of the general assembly, passed in 1647, creating the "General Court of Tryalls," made provision for the use of writs of inquiry of damages in defaulted cases, and also provided for the proceeding by writ of attainr for a false verdict, as follows (1 R. I. Col. Rec. p. 196): "But in case after a declaration is filed in expectation of an answer, or to make his defense, and he doth not, then the plaintiff taketh him by default, which is called confessing the action, and then the Recorder's office shall be, to enter and record a *Nihil dicit* (*id est*), he saith nothing thereon, and so shall he send out a writ of enquiry of dammages unto the Towne where the defendant lives. And the head officer of the Towne at the next Towne Court, shall enquire of damages, and by a writ of destringes to the Sargant, shall cause the defendant for that purpose to come to the Court, and in case he appeare not, he shall forfeit the distraint, and the head officer of the Towne may distraine again and again." This provision was changed in 1650 (1 R. I. Col. Rec. 224) by a provision "that in case a *Nihil dicit* be taken in any Courte, the Jury of that Courte shall make inquirie," apparently extending to all courts the provisions of the act of 1648, relative to the "General Court of Tryalls" only, and which specified (p. 211) that in case of a *nihil dicit* in that court "that then the Jury Empanelled for the said Court shall enquire of Damages," etc. And also (p. 200): "And be it further enacted by the authority of this present Assemblée, that if any false verdict be given in any action, suit, or demand, either in this or in any other Court of the Colonie, in anything personall, as Trespass, Debt, Difference, &c., the party grieved shall have a writ of attainr out of this Court of the Colonie, putting in sufficient security, against each partie giving in such an untrue verdict, whereby ye parties shall be summoned by great distresses, and in case the thing in demand and the verdict, surmounts forty pounds, to the three able men of each Towne (Providence, Newport, Portsmouth, and Warwick) shall be added twelve of the same Towne where the Colonie Court of Tryall shall be, being worth three score pounds apiece, if such and so many are to be had, and in case these find they gave an untrue verdict, every one of the former inquest shall forfeit twenty pounds, ten whereof is the King's custome, and ten pounds shall go to the partie grieved, that sues for it; he shall be also not of credence, neither shall his

solemn testimony be taken in any Court, untill the Colonie release him. But if, eyther the demand or verdict be under forty pounds, then shall the inquest be worth fifty pounds a man, and every one of the petty inquest being found guilty, shall forfeit five pounds, with the like punishment as is before specified. See 23 Hen. VIII. 3; 37 Hen. VIII. 5. And in case he that sues forth the writ of attaint makes it not good, every party attainted may have his action against him, and recover sufficient damages."

But this statute applies only to "false verdicts," and its terms do not include the execution of a writ of inquiry of damages. So, too, it provides a jury of twenty-four for the trial of cases thereunder, as does the "Act against Perjury and Untrue Verdicts," of 23 Hen. VIII. 3, enacted in 1531, and referred to therein, and which it closely follows in many particulars. And as to "false verdicts" it was doubtless true here, as in England, as was said in 1736, by the court of King's bench in *Barker v. Dixie*, 2 Strange, 1051: "And new trials came in the room only of attaints as a more expeditious and easy remedy."

Prior to 1671 the records of the "General Court of Tryalls" are to be found with the proceedings of the general assembly, and in 1730 it was succeeded by the superior court of judicature. The records between these dates are in our possession, and an examination of them shows that for some years it was the practice of the court to submit the question of damages in defaulted cases to a jury. The practice appears to have changed about the year 1710, for at the September term, 1709, in *Burlington v. Whipple* (Newport county), which was debt on a bond, upon defendant's default the damages were assessed by the court; and thereafter the latter practice gained, until, at the last term of the court before it was succeeded by the superior court of judicature and inferior courts of common pleas, created in 1729 (i. e., March term, 1730), of 254 defaulted cases at that term, the damages in each case were assessed by the court; nor does there appear at that term a single defaulted case in which the damages were assessed by a jury. So that this may safely be said to have been the constant and established practice during the latter years of the first court created in the colony. But the act of the general assembly specifically authorizing this method of procedure was not passed until 1767 (*supra*), and seems to have been rather a recognition of and authority for what may be termed the common law of the colony, as seems, also, to have been the fact in Connecticut. See *Lennon v. Rawitzer*, 105 L. R. A.

57 Conn. 583, 19 Atl. 334. Indeed, it would seem that in this colony the claim was made of record as late as 1722 of a right to a trial otherwise than by a jury,—that is to say, a trial by wager of law; for at the September term, 1722, of the court of trials at Newport, the defendant appealed from a judgment of a justice court in an action of detinue, whereby the plaintiff recovered judgment below for return of the property detained, or in lieu thereof the defendant to pay plaintiff 40 shillings. On the appeal in the court of trials the plaintiff below did not appear, but made default, and the court reversed the judgment below and awarded judgment in favor of the appealing defendant for costs. It is of interest to note that in this case one of this defendant's reasons of appeal is thus stated: "For that the defendant ought to have been allowed the benefit of his wager in Law, that he detaineth no Gun of the plaintiff's and thereby discharge himself, but was not;" and cites authorities. And, indeed, in the *Case of the Abbot of Strata Mercella*, 9 Coke, at page 32a, it is said by Lord Coke that "wager of law countervails a jury. . . . Also trial may be in debt upon a simple contract, detinue, etc., either by wager of law of the defendant himself, or by jury at the defendant's election." And in 1724, in an action of detinue, the defendant's counsel, who was then the attorney general of the colony, filed the following plea: "And the Defendant prays the Benefit of the Law," and that the "Plaintiff's action may be barred." The defendant also pleaded nondelivery and nondetainer, with prayer to the country, and the case was finally submitted to a jury, who found for the defendant, the record not showing whether the defendant so elected or not. The counselor who advanced this claim in the former case was six years later, in 1728, appointed by the general assembly, together with the then attorney general, a former attorney general, and the "general recorder" or secretary of state, the fourth member of the commission to revise the laws of the colony and to print the laws of the colony "now in force" (4 R. I. Col. Rec. p. 408), and which prepared the Digest of 1730, *supra*.

Even in criminal cases the court for many years acted under a statute, which adjudged a respondent who did not appear, but made default, to be guilty, and then proceeded to impose sentence. The act creating the office of attorney general, in 1650 (1 R. I. Col. Rec. 225), is as follows: "That the Attorney Generall shall have full power to impleade any transgression of the lawe of this State in any Courte of this State; but especially to bringe all such

matters of penall lawes to tryall of the Generall Courte of Tryalls, as also for the tryall of the officers in the State at the Generall Assemblies, and to impleade in the full power and authoritie of the free people of this State, their prerogatives and liberties;" and he was authorized "that upon information of transgressions or transgressors of the lawes, prerogatives, and liberties of the people, and their penall lawes, he shall under hand and seale take forth summons from the President or Generall Assistants, to command any delinquent, or vehemently suspected of delinquencie in what kind so ever accordinge to the premises, to appeare at the Generall Courte, if it be thereto belonginge, or to the Generall Assemblie in those matters proper thereunto; and if any refuse to appeare at that mandamus in the State of England's name and the free people of this State, he shal be judged guiltie, and so proceeded with accordinge to fine or penaltie."

In 1717, in the "Court of Tryalls" for Newport county, upon an indictment for illegal cohabitation, the respondent "being called in court appeared not, but made default, whereupon the sentence of this court is,"—and then follows a fine.

And in 1724, upon an indictment for larceny, the respondent "made default, Whereupon the sentence and judgment of this court is that the said respondent Restore and pay unto said [owners] three pounds ten shillings, being two-fold, and to be whipped on your naked back on the 10th of this Inst. September, at the Publick Whipping Post in Newport with fifteen stripes or pay a fine of fifty shillings to the King to and for the support of the Government, and pay the charges of the prosecution, Conviction, &c. And to Remain in the Custody of the Sheriff till this Sentence be performed;" and similar proceedings were had on other indictments.

In 1745, upon an indictment for uttering counterfeit money, the respondent "being solemnly called in court did not appear. . . . And afterwards the said respondent was brought into Court and by virtue of an Act of Ye General Assembly of said Colony was to have a Trial notwithstanding the former Default."

Here is to be found a recognition of the doctrine, which had been advocated long before, that default even in a civil action was not only the defendant's admission of the truth of the contention, but that it was in itself a contemptuous and disobedient act, and therefore blameworthy. Thus, Bracton, writing about the end of the reign of Henry III. (1272), prescribes that, upon default in a civil action *ex delicto*, damages should be assessed by the court; and 65 L. R. A.

if the defendant have no lands or goods, and be not found, he should be considered as an outlaw, not, indeed, to suffer death or dismemberment if captured, but nevertheless to be perpetually imprisoned and kept from all who live in the King's peace, since there is no greater offense than contempt and disobedience of the King's summons. De Legibus Et Consuetudinibus Angliae, Lib. V., fol. 440 ed. of 1640: "Si autem placitum esset civile descendens ex delicto sicut actio injuriarum quod tunc per officium Justic. aestimaretur injuria et adhibita taxatione de redditib et catallis fugientis caperetur in manu dñi Regis ad valentiam p(ro) contumacia ipsius et fieret eodem modo sicut supra. Si autem cum corpus non inveniatur nec terras habuerit nec catalla ille de quo queritur, iniquum esset si justitia remaneret vel malitia esset impunita. . . . Quia nullum majus crimen quàm contemptus et inobedientia, omnes enim qui in regno snt obedientes esse debent dño Regi, & ad pacem suam, & cum vocati vel sumoniti per Regem venire contempserint, faciūt seipsos exleges & ideo utlagari deberent, non tamen ad mortem vel membrorū truncationem si postea redierint, vel intercepti fuerint, cum causa utlagationis criminalis non existat, sed ad perpetuam prisonam, vel regni abjurationem, et a communione aliorum qui sunt ad pacem dñi Regis." But this is rather a statement of that which Bracton considered was the proper course to be pursued than a statement of the law as it is to be found in the early reported cases of the Year Books.

Even after our independence of Great Britain had been declared, a similar course was pursued. In 1779 (8 R. I. Col. Rec. p. 609) there was enacted an act confiscating the estates of those who had adhered to the King and had aided his forces, and providing as follows: "And whereas it is necessary that some mode of trial should be instituted whereby to determine what estates are forfeited by force of this act, and whereby those persons who may be accused of offenses in this act described may have their estates defended in the best manner that their situations will admit of;" and providing for the number of jurors to be drawn to attend such trials, and for notice to a respondent, and that "any person or persons who have claim to the same estate in such information or complaint mentioned" might, "either in their own right or on the part and behalf of the person accused or of any person whomsoever," come and defend, "and the issue shall be tried by a jury in the known and ordinary course of law used and approved in this state, to try whether such estate demanded or any part

thereof is forfeited by force of this act," etc.

In 1780, in Newport county, sundry informations were preferred by the attorney general, alleging violations of this act, and praying for a forfeiture to the state of the respondents' lands bounded and described as set forth in the informations. In the single case tried by a jury at that term the verdict was in favor of the respondent; but in 22 cases the respondent made default, and in each case judgment of forfeiture to the state of the respondent's lands was rendered by the court upon default. Inasmuch as these proceedings were had in the superior court of judicature, this action of the highest court in the state in thus divesting title to real estate upon default must be accepted as "the known and ordinary course of law used and approved in this state" at that time.

By the act creating the superior court of judicature it was expressly given all the powers which were vested in the courts of law in England; since at the June session, 1729, the general assembly of this colony enacted "An Act for Establishing of Inferior Courts of Common Pleas in the Several Counties of This Colony," to which courts were given "Cognizance of all Civil Actions arising or happening within such County Tryable at the Common Law of what Nature, Kind or Quality soever," with a right of appeal to the supreme court of judicature created by the same act, to which was also given "Cognizance of all Pleas, real, personal, and mixt, as also Pleas of the Crown and Causes criminal and Matters relating to the Conservation of the Peace and Punishment of Offenders and generally of all other Matters as fully and amply to all Intents and Purposes whatsoever as the Court of Common Pleas, King's Bench or Exchequer in His Majesty's Kingdom of England have or ought to have, and are Impowered to give Judgment therein and to award Execution thereon and make such necessary Rules of Practice as the Judges shall from time to time see needful"—thereby conferring the same jurisdiction conferred upon the "Generall Court of Tryalls" by the act of 1666 (Digest of 1719, p. 15).

The practice in the inferior court of common pleas was from the beginning that damages should be assessed by the court, even in tort actions. Thus, at the November term, 1730, in Newport county, in an action of trespass for the unlawful taking and abuse of the plaintiff's horse, upon the defendant's default damages were assessed

by the court, as was also the procedure at the same term in an action of detinue.

The first records of this court in Providence county begin with the June term, 1731. At that term in divers cases judgment was given for the plaintiff by the default of the defendant, and in each case the damages were assessed by the court, and in no case was a writ of inquiry of damages issued, and among these were 15 cases in debt and 21 actions of the case. Nor was the assessment of damages by the court confined to actions *ex contractu*, since in each of the following cases the defendant made default, and in each instance the damages were assessed by the court: In 1740, in case by bail against principal who had failed to appear in the original action and had not satisfied the judgment therein; in 1741, in trover after general issue pleaded *et de hoc*, etc.; in 1743, in trespass *de bonis asportatis* for entering the plaintiff's close and carrying away "229 oak rails of the plaintiff, of the value of £7, and other enormities unto the plaintiff, the defendant did then and there do," after general issue pleaded and prayer to the country; in 1743, in trespass for an assault after *son assault demeene* pleaded; in 1774, in trespass charging that defendant "did cut down and carry off from said land (of plaintiffs) Ten Timber Trees," after title pleaded from respondent's grantor by warranty deed and summons *ad warrantizandum* issued and served; in 1776, in trespass on the case against a truckman for negligence in transportation of certain goods of the plaintiff, whereby they were destroyed; in 1776, in trespass for an assault, and "not guilty" pleaded and prayer to the country; and in the same year in trespass alleging that the defendant "set fire to the Brush and Leaves and other dry stuff lying on Plaintiff's land, also after 'not guilty' pleaded and prayer to the country."

The present Constitution of the state took effect on the first Tuesday of May, 1843. Section 15 of article 1 contains this provision, "The right of trial by jury shall remain inviolate;" and this court has held in *Bishop v. Tripp*, 15 R. I. 486, 8 Atl. 692, that this does not extend the right of jury trial, but preserves it as it was at that time. An examination of the record of the court of common pleas in Providence county for the December term, 1842, which was the last term before the present Constitution became operative, shows that there were 289 defaulted cases at that term, in each of which the damages were assessed by the court, and that in no defaulted case were the damages assessed by a jury. And the

statute in that behalf then existing is, in substance, identical with the statute now in force.

Nor are decisions wanting in the courts of other states and of the United States which sustain the power of the court to assess damages in defaulted cases without the intervention of a jury.

In *Brown v. Van Braam*, 3 Dall. 344, 1 L. ed. 629, the Supreme Court of the United States decided, in 1797, in a case arising under the law of Rhode Island, that damages were properly assessed by the court in this state without the intervention of a jury, and overruled an exception to their assessment by the court on the ground that the law and the practice in Rhode Island expressly authorized the assessment of damages by the court. Mr. Justice Chase concurring, because, in his opinion, such was the provision of the common law. And see opinion of Mr. Justice Story in *Renner v. Marshall* (1816) 1 Wheat. 215, 4 L. ed. 74.

In *Raymond v. Danbury & N. R. Co.* (1877) 14 Blatchf. 133, Fed. Cas. No. 11,593, it is said by the United States circuit court for the district of Connecticut, in an action for negligence, that "the assessment of damages upon a default, either in actions of tort or of contract, stood upon a different footing from the trial of issues of fact. . . . The conclusion is that the assessment of damages by a jury upon a default is matter of practice, and not of right."

In *Hopkins v. Ladd* (1864) 35 Ill. 178, the court said of a case where damages were assessed by the court upon the defendant's demurrer being overruled: "This is a mere matter of practice none will deny, and, being so, the assessment of damages could be made by the court without a jury. The idea that a party has a constitutional right to have a trial by jury is not controverted. Here was no trial in any sense of that term. The defendant has declined putting his case on trial by abiding the judgment on the demurrer."

In *Hanley v. Sutherland* (1882) 74 Me. 212, the court said: "The assessment of damages by a jury, when done, is a matter of practice rather than of right."

In *Lennon v. Rawitzer* (1889) 57 Conn. 583, 19 Atl. 334, the full court sustained the assessment of damages by the court on default in an action to recover damages for personal injuries, although the plaintiff desired a jury to assess the damages, saying: "This practice has also in repeated instances received the express sanction of this court. The last time was in 1885, in *Seeley v. Bridgeport*, 53 Conn. 1, 22 Atl. 65 L. R. A.

1017; and for other instances see the cases there cited on page 2, 53 Conn., and page 1047, 22 Atl."

In *Parker v. Roberts* (1885) 63 N. H. 431, the court says: "A default admits all the material allegations of the writ except the amount of damages, which are assessed by the court, unless for special reasons an inquiry by the jury is ordered." And see cases cited.

Deane v. Willamette Bridge Co. (1892) 22 Or. 167, 15 L. R. A. 614, 29 Pac. 440, was almost identical with the case at bar. The action was for damages for personal injuries alleged to have been sustained on a car of the defendant company by reason of its negligence. The defendant suffered a default, and claimed that the court should assess the damages under the law of Oregon of 1891 (chapter 173), viz.: "In other actions including all actions sounding in damages or tort . . . where judgment is rendered otherwise than on a verdict in favor of the plaintiff, the court, without the intervention of the jury, shall assess the damages which he shall recover," etc. But upon demand of the plaintiff the court ordered the clerk to call a jury to assess the damages, which was done, and verdict for the plaintiff. The question thus presented to the supreme court by the defendant was the question presented here. The provision of the state Constitution was almost identical with our own, and was as follows: "In all civil actions the right of trial by jury shall remain inviolate." And the full court said: "This provision of the Constitution creates no new right to trial by jury. It simply secures to suitors the right to trial by jury in all cases where that right existed at the time the Constitution was adopted. . . . Prior to the adoption of the Constitution of this state, construed in the light of our inquiries, the statute did not give to suitors the right to have a jury assess damages in case of failure of the defendant to answer." And the court held the act constitutional, and reversed the judgment upon the finding of the jury, saying, page 172, 22 Or., page 616, 15 L. R. A., and page 442, 29 Pac.: "The only purpose of the writ [of inquiry] in authorizing the jury to inquire into the damages is to inform the mind or conscience of the court. This being its object unless the court choose to issue the writ for its own information it necessarily follows that it is discretionary with the court whether it will issue the writ, or, when issued, whether it will award the amount of damages found by the jury or assess the damages itself without any inquest. This result proceeds

upon the hypothesis that upon default the cause of action upon which issue might have been joined stands admitted, and that there is no issue of fact to try or nothing evolved by the pleadings upon which the case can be a trial by jury." And on page 176, 22 Or., page 618, 15 L. R. A., and page 443, 29 Pac.: "Upon default, as we have shown, there is made by the pleadings of the parties no issue of fact to be tried by a jury. The cause of action is admitted, and there is no occasion for a trial by jury. The common-law right of trial by jury, which it was the purpose of this constitutional provision to secure, relates only to those civil cases or causes of action in which there has been an issue made by the pleadings of the parties,—where the facts alleged constituting the cause of action are denied, and an issue of fact is formed which must be tried by a jury. Such a trial of an action has no application to an inquiry into damages, whether by the court or by a jury, after default, when the cause of action stands confessed."

Our own statute does not prohibit the court from calling to its aid a jury in such a case, as did the statute just referred to. But it does provide, nevertheless, that the damages, when assessed, shall be assessed by the act of the court. Doubtless, in most of the cases where the court might see fit to intrust this question to the consideration of a jury, the court would adopt the finding of the jury, and would assess the damages accordingly. But the inherent power of the court to award more or less than the jury awarded is seen to have existed from remote antiquity, and is of necessity implied, recognized, and authorized in the language of the statute. Here the court refused at first to assess the damages, and there is no record that the finding of the jury has been approved or disapproved by the court, or that the court has taken any action in the matter.

It follows that the defendant takes nothing by its exception to the discretionary action of the trial court in submitting the question of damages to the jury for their judgment thereon; and, inasmuch as the action of the court is necessary to determine the amount of damages to which the plaintiff is entitled, and the court has neither approved nor disapproved the finding of the jury, there has not yet been an assessment of the damages in the case, and consequently the question of the amount of damages is not properly before us, if, indeed, that question can be raised at all.

Case remitted to the Common Pleas Division for assessment of damages by the court in accordance with this opinion.
65 L. R. A.

William R. JOHNSON

v.

J. Ellis WHITE, City Treasurer.

(.....R. I.....)

A municipal corporation is liable for injuries to property upon which it casts surface water in a body across intervening land by means of a drain or culvert in a highway, although no more water is collected than would have naturally flowed upon the property in a diffused condition.

(June 9, 1904.)

PETITION by defendant for new trial of an action brought to recover damages for injuries alleged to have been caused by wrongfully turning surface water upon plaintiff's land, which resulted in a verdict in plaintiff's favor. *Denied.*

The facts are stated in the opinion.

Mr. Edward W. Blodgett for defendant.

NOTE.—*Rights and duties of municipal corporations with respect to surface-water.*

I. Duty to care for.

- a. *In general*, 250.
- b. *Upon raising grade of street*, 253.
- c. *Upon gathering water in body*, 256.
- d. *Drainage of highway*, 259.

II. Negligent or wrongful acts.

- a. *Changing course of drainage*, 261.
- b. *Casting collected body on adjoining property*, 262.
- c. *Accelerating or increasing flow*, 265.
- d. *Damming back*, 266.
- e. *Consequential injuries*, 269.
- f. *Pollution of water*, 273.

III. Acquiring right of way for drain, 273.

IV. Plans, 274.

V. Obstructed drains, 275.

VI. Unusual storms, 277.

VII. Right and duty of individual.

- a. *To avoid injury*, 277.
- b. *Casting water into street*, 279.

VIII. Nuisance, 280.

IX. Embankments, 281.

X. Remedy.

- a. *In general*, 281.
- b. *Who may sue*, 283.
- c. *Liability*, 283.
- d. *Damages*, 284.
- e. *Limitation*, 285.

XI. Abandonment of drain, 286.

I. Duty to care for.

- a. *In general*.

A municipal corporation has no duty to provide drainage for the benefit of its inhabitants in the absence of a statute imposing such duty upon it. See note as to *Duty and liability of municipality with respect to drainage*, 61 L. R. A. 673.

The same rule applies with reference to caring for surface water. *Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322; *Alden v. Minneapolis*, 24 Minn. 254; *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811; *Carr v.*

Messrs. Page & Page & Cushing, for plaintiff:

It was not at all necessary for the plaintiff to show that the water was collected, and deposited on plaintiff's land, from an area from which it did not flow before the streets complained of were laid out. If, previous to the changes made by the defendant, the water had flowed upon the plaintiff's land gently and over a wide area and without damage, then it is enough that the defendant gathered together the same water artificially, and discharged the same in a damaging mass or stream onto the plaintiff's land.

Gray v. McWilliams, 98 Cal. 157, 21 L. R. A. 593-607, 35 Am. St. Rep. 163, 32 Pac. 976; *Gould, Waters*, § 272.

The evidence clearly showed that the de-

fendant brought surface water down both Nashua street and Ann Mary street to this catch-basin, and through this catch-basin discharged the same in a torrent in the direction of the plaintiff's land; and that a large quantity, at least, of this surface water had, previous to the establishing of said catch-basin, been carried off over a large area in a harmless manner; but that said sharp stream caused damage. Such facts rendered defendant liable.

Inman v. Tripp, 11 R. I. 520, 23 Am. Rep. 520; *Willoughby v. Allen* (R. I.) 56 Atl. 1109; *O'Donnell v. White*, 23 R. I. 318, 50 Atl. 333.

If the water necessarily found its way to the property of the plaintiffs, and thereby caused an injury thereto, the city would be responsible.

Weir v. Plymouth, 148 Pa. 566, 24 Atl.

Northern Liberties, 85 Pa. 324, 78 Am. Dec. 342; *Fair v. Philadelphia*, 88 Pa. 809, 32 Am. Rep. 455; *Gould v. Booth*, 66 N. Y. 62; *Mills v. Brooklyn*, 32 N. Y. 489; *Union v. Durkes*, 38 N. J. L. 21.

A city is not bound to furnish drains or sewers to relieve a lot of its surface water, whether its own or that flowing from other premises. *Jordan v. Benwood*, 42 W. Va. 312, 38 L. R. A. 519, 26 S. E. 266.

It is not even bound to provide a sewer to abate a nuisance caused by water running from its streets along a natural depression over abutting property. *Miller v. Newport News*, 101 Va. 432, 44 S. E. 712.

It is not, as matter of law, the duty of a municipality to enlarge or dig deeper a ditch constructed for drainage purposes, after an alleged increase of the flow of surface water therein. *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

A city which voluntarily constructs a sewer or drain for carrying off mere surface water is not bound to construct such a sewer or drain as will be sufficient to carry off all surface water in all cases and under all circumstances. *Atchison v. Challiss*, 9 Kan. 603.

A city is not bound to protect from surface waters those who may be so unfortunate as to own property below the general level of the street, and is not liable for failure to provide for the drainage and disposition of surface waters or for the adoption of an imperfect plan or insufficient drainways to carry off waters in case of excessive storms, so as to prevent injury to improvements made on land below the city grade. *Aicher v. Denver*, 10 Colo. App. 413, 52 Pac. 86.

A municipal corporation is not bound to protect one from surface water who owns land below the level of the street. *Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89.

A city is not bound to construct its surface drains of sufficient capacity to relieve private property of surface water naturally coming thereon. *Dudley v. Buffalo*, 73 Minn. 347, 76 N. W. 44.

A city, in the lawful exercise of its power to grade the streets, is not bound to drain ponds of surface water which collect on private property below the grades established, in the absence of any illegal act or neglect on its part. *Clark v. Wilmington*, 5 Harr. (Del.) 243.

65 L. R. A.

It has, however, the authority in most cases to provide for the drainage of surface water, and in some cases it is its duty to do so.

The authority of a municipal corporation to construct gutters along a highway for the removal of surface water cannot be questioned. *Bohan v. Avoca*, 154 Pa. 404, 26 Atl. 604. See also *infra*, I. d.

The power of a municipal corporation to open and lay out streets, to have sidewalks kept in order, and to levy a street tax implies the power to provide for the flowing of surface water in the streets in such a way as to do the least damage, and authorizes the construction of a sewer for that purpose, instead of allowing it to pass into an open ditch. *Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89.

The duty to keep the streets in safe condition requires the disposal of the water which naturally accumulates upon them; but this duty is owing to travelers on the highway, and not to the owners of abutting property. As said in *Smith v. Tripp*, 13 R. I. 152, in an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute, and that he would not have been injured if the duty had been performed; but he must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his security from the injury; and, where a statute is passed requiring the city to keep the streets in repair, and such statute is passed for the purpose of having the streets kept safe and convenient for travel, the owner of a lot abutting on a street cannot recover for damages to his land by an overflow caused by the failure of the city to keep the street in repair, on the ground that it has violated a statutory duty to his injury.

A municipal corporation is not liable for injury to abutting property from water accumulated on a street which the municipality has neglected to drain. *Flagg v. Worcester*, 13 Gray, 601.

In *Byrne v. Farmington*, 64 Conn. 374, 30 Atl. 138, *Hamersley, J.*, said: "In the discharge of its obligations in the maintenance of a highway, a town, if it has any duty to an adjoining proprietor in reference to the flow of surface water, has no greater duty than is imposed on an individual owner of land."

One may not maintain an action against a

94; *Dennison v. Somerset & C. R. Co.* 21 Pa. Super. Ct. 248.

Tillinghast, J., delivered the opinion of the court:

This action is brought to recover damages which the plaintiff claims to have sustained by reason of the turning of surface water upon his land by the acts of the defendant city. The declaration alleges that the defendant constructed a large culvert or drain at the junction of Nashua and Ann Mary streets, and thereby collected quantities of surface water, and discharged the same artificially in a channel over certain intervening land onto a large tract of land belonging to the plaintiff. It also alleges that the water so discharged was far in ex-

cess of the amount that would have been discharged upon the plaintiff's premises if said culvert or drain had not been constructed as aforesaid, and that, by reason of its being collected as aforesaid and flowing across plaintiff's premises, it washed out a deep channel across the same, and rendered a part thereof unfit for tillage or pasturage, and decreased the value thereof. At the trial of the case in the common pleas division the plaintiff recovered a verdict in the sum of \$500, and the defendant now petitions for a new trial on the grounds that no cause of action is shown, and that the verdict was against the evidence, in this: That no evidence was produced by the plaintiff to show that water was collected from any area and turned

city if, in grading streets to the authorized grades, the plan of grading is inadequate to drain a lot of the surface water, or if it makes it more difficult or expensive for the owner to drain it. *Tate v. St. Paul*, 56 Minn. 527, 58 N. W. 158; *Acker v. Newcastle*, 48 Hun, 312, 1 N. Y. Supp. 323.

The general question of liability for the expense of drainage is treated in a note to *Heffner v. Cass & Morgan Counties*, 58 L. R. A. 353; but it may be suggested here that the authority to grade the streets and provide for their safety involves an exercise of the taxing power, so as to justify the imposition of the expense on abutting owners if it becomes necessary to make some provision for surface water. So, a municipality, in grading a street, may impose upon the adjoining land the cost of constructing temporary culverts for the purpose of protecting the work done from surface waters, under its charter providing for the grading of streets and assessing the cost on adjoining property, and, in a subsequent section, authorizing the city to construct such temporary culverts without providing for the manner of paying the cost. *Russell v. Adkins*, 24 Mo. App. 605.

But, under the rule that the assessment cannot be laid upon a particular district or parcel of property, unless, by reason of its relation to the improvement, it should equitably bear the expense thereof, it has been held that assessments for the paving of a street and the providing of all drainage necessary therefor are void, and cannot be enforced in an action by the city for the benefit of the contractor, although such work was done in the manner directed by the officers to whose discretion the points and manner of making such a drainage were left by the contract, where the necessary drainage was not furnished at all; since, as to the landowners on the street, there is a contract for the furnishing of the necessary drainage, which must be fulfilled. *Toledo use of Wernert v. Grasser*, 5 Ohio S. & C. P. Dec. 178.

Duty to keep street water off from abutting property.

Steps for the improvement of a highway cannot proceed far before natural conditions are changed, and the surface water from the street becomes a more serious burden upon the abutting owner; and the question then arises as to the duty of the municipality with respect to it. 95 L. R. A.

In the natural condition of the highway, the surface water flows naturally to the lowest level, and the burden rests where it falls, either on the highway, or on the adjoining property. Neither the public, nor the abutting owner, is under any obligation to care for the water for the benefit of the other.

The mere existence of a highway does not make it the duty of the town or city where the highway is to keep the water flowing in it from overflowing on the adjoining lands. Such a duty devolves on a town or city only when it has done something to increase the volume of the water, or to accumulate it in unusual quantities at some particular point of the highway. *Smith v. Tripp*, 13 R. I. 152.

A village is not liable for the overflow of private property resulting from the inadequacy of its drains constructed for the purpose of carrying off the surface water from its streets, where such property was the natural depository of all the waters discharged thereon. *Dudley v. Buffalo*, 73 Minn. 347, 76 N. W. 44.

A municipal corporation is not liable for the flooding of premises due to the want of drainage in a particular street in which the city has not exercised its general power to construct sewers and drains in the public streets by providing drainage therefor. *Daniels v. Denver*, 2 Colo. 669.

It is not the duty of a municipal corporation to prevent the flow of water from its streets onto the lands of abutting proprietors. *Montgomery v. Gilmer*, 38 Ala. 116, 70 Am. Dec. 562.

A municipal corporation is not liable for failure to take steps to prevent surface water from a large area of territory from flowing in its natural course, so as to flow and accumulate upon the land of a particular individual. *Beals v. Brookline*, 174 Mass. 1, 54 N. E. 339.

A recovery cannot be had against a municipal corporation for the flowing of surface water upon an owner's land from adjacent public streets or lots, merely because such land is below the level of such streets or lots. *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

One who erects his shop below the level of the highway cannot complain if it is flooded with surface water from the road. *Young v. Leedom*, 67 Pa. 351.

One whose property is below the grade of the street may not recover for the overflow thereon of water from a street, which would not have occurred had the property and area around been

onto plaintiff's land, from which area the surface water did not flow thereon before the streets in question were laid out. The defendant also claims that the damages are excessive.

As the evidence submitted fails to show that any appreciable amount of surface water was collected and turned upon the plaintiff's land, by reason of the construction of the culvert or drain aforesaid, in excess of what would have flowed thereon by reason of the natural contour of the adjoining land, as related to that of the plaintiff, the only question of law presented is whether the plaintiff has any cause of action. The defendant's counsel contends that, as there has been no diversion of surface water, other than that which would

naturally have found its way to and upon the plaintiff's land, had not said drain been built, the city cannot be held liable for any damages in the premises. He argues that, in view of this fact, the case does not fall within the rule laid down by this court in *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520, which is relied on by the plaintiff, in so far as the general principle involved is concerned, as sustaining his position. It is true, the facts in that case were quite different from those in the case at bar. There the city, by changing the grade of certain streets, caused surface water to be collected from a wide area, and to flow upon the plaintiff's land and into his cellar and well, and the court held that it was liable in damages therefor. In

filled to the level of the street. *Knostman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887.

The mere fact that water falling on a street runs down onto adjoining property will not give a right of action. *Alden v. Minneapolis*, 24 Minn. 254; *Lee v. Minneapolis*, 22 Minn. 13.

A municipal corporation is not liable for damage because of the mere insufficiency of the curbing on an ungraded street to prevent surface water from flowing onto private lands. *Costello v. Conshohocken*, 8 Pa. Co. Ct. 639.

A municipal corporation is not liable for damages to property by surface water which naturally found its way to a river at the point where a ravine was formed by the wash thereof partly within a street and partly on the property damaged, where the proof fails to show either a tortious omission, or breach of duty on its part with reference to filling up or repairing such ditch or ravine. *Gilmer v. Montgomery*, 26 Ala. 665; *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562.

The fact that a city, after notice that drains constructed to carry off street surface water are insufficient, fails to use ordinary diligence to make them serve the purpose intended, does not render the city liable for an overflow of private property by surface water from the street, where it did not accelerate the flow of water, or collect the same, and discharge it on such property otherwise than it would naturally have been discharged thereon, when it was not negligent either in devising or adopting the plan of the drains. *Knostman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887.

But the action of the surface water is a serious menace to the safety of the highway, and one of the first steps for its improvement is the adoption of means to relieve it of such menace. This may be accomplished by raising the grade so as to prevent the water from settling on the street, by making the surface more impervious, to prevent the water from saturating the roadway, and by the construction of drains to carry it to some other point. All of these proceedings have more or less effect on the adjoining property. The general rule is that, so far as the circumstances of the case and public necessities will permit, the same rules concerning injuries to private property by the overflow of water should be applied to municipal corporations in the management and improvement of their streets as would be applied to pri-

vate individuals in the management and use of their property. *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767; *Pye v. Mankato*, 36 Minn. 373, 31 N. W. 863.

See also authorities collected in *note* to *Gray v. McWilliams* (Cal.) 21 L. R. A. 598.

The general rule applicable to surface waters in the rural districts should not be applied in the cities, since the enjoyment of rural lands is, generally, as they are naturally formed, while in the cities it depends very much upon changes prescribed by the authorities. *Cedar Falls v. Hansen*, 104 Iowa, 189, 73 N. W. 585.

Even when a cause of action exists it must be properly pleaded; and, therefore, a recovery cannot be had against a municipality for damages to land and crops from the overflow thereof by the waters of a ditch maintained by it, even if it is its duty to care for it, under a complaint alleging failure to keep the ditch cleaned out, to keep it in proper repair, and to erect an embankment or other work to confine the water within the ditch, in the absence of any facts showing that it was its legal duty to construct such embankment. *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

b. Upon raising grade of street.

Adjoining proprietors have a right to improve their property as they see fit, and one cannot complain of the ordinary injuries consequent upon the other's improvements. This rule includes the altering of the grade of the property, so that one cannot complain if, by reason of the other's raising the surface of his land, the natural flow of surface water is altered. Municipal corporations are entitled to the benefit of this rule. Consequently, when they do no more than merely raise the grade of a street, they are not liable for thereby preventing surface water from flowing onto the street from adjoining property, except (in some states) where a natural course of drainage is obstructed; nor are they liable for causing the water to flow in the other direction onto the adjoining property. There is, therefore, no duty to provide for carrying away the water so interfered with.

A town is not liable for allowing water to flow from a highway onto the land of another, where it appears that the water would naturally flow from the highway upon the land; and in such a case an action will not lie for the results of such usual changes of grade as must be pre-

the case at bar the defendant has only collected such surface water as would have found its way upon the plaintiff's premises by natural causes as aforesaid; and hence we are asked to hold that the rule referred to is not controlling.

We think, however, that the principle involved in the *Inman Case* is applicable here. That principle, briefly stated, is this: That no one has a right to collect surface water in any considerable quantity upon his own premises, and then turn the same in a concentrated form upon the premises of his neighbor in such a manner as to cause him damage. Not that an owner of land may not so change the grade or surface thereof as to cause surface water to flow in a different direction from what it did before

the natural contour thereof was changed, for this such owner doubtless may lawfully do. But he may not collect and concentrate such water by means of drains or otherwise, and then turn it upon his neighbor's land in a volume. And the law doubtless is that a city has no greater power over its streets, in the matter of disposing of surface water which accumulates thereon, than a private individual has in disposing of the surface water which falls or collects upon his own land; and, as held in the case referred to, a city "cannot, under the specious plea of public convenience, be permitted to exercise that dominion, to the injury of another's property, in a mode that would render a private individual responsible in damages, without being re-

sumed to have been contemplated and paid for at the lay-out of the highway. *Wakefield v. Newell*, 12 R. I. 75, 84 Am. Rep. 598.

Authority to establish grades for streets, and to graduate them accordingly, involves the right to make changes in the surface of the ground which may affect injuriously the adjacent property owners; but, where the power is not exceeded, there is no liability unless created by statute, and then only in the mode and to the extent provided, for the consequences of its being exercised and properly carried into execution. The owner of the property may take such measures as he deems expedient to keep surface water off from him, or turn it away from the premises onto the street; and, on the other hand, the municipal authorities may exercise their power in respect to the gradation, improvement, and repair of streets, without being liable for the consequential damages caused by surface water to adjacent property. *Allen v. Paris*, 1 Tex. App. Civ. Cas. (White & W.) § 885, p. 506.

A municipal corporation is not liable for raising the grade of a street in such a way that surface water flows more readily from it onto adjoining property. *Kehrer v. Richmond City*, 81 Va. 745.

A municipality is not liable for damage sustained by an abutting owner on account of the escape of the natural flow of water from a highway onto his land on account of the original establishment of the grade. *O'Donnell v. White* (R. I.) 53 Atl. 633.

A municipal corporation is not liable for damages to abutting property from surface water flowing thereon merely because the land was below grade after the city raised the grade of the street in a careful and skillful manner, as such damages are merely consequential, and afford no basis for a recovery. *Hirth v. Indianapolis*, 18 Ind. App. 673, 48 N. E. 876; *Imler v. Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Stewart v. Clinton*, 79 Mo. 603; *Kavanagh v. Brooklyn*, 38 Barb. 232; *Wels v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Downs v. Ansonia*, 73 Conn. 33, 46 Atl. 243; *Slason v. Stonington*, 73 Conn. 348, 47 Atl. 662; *Bronson v. Wallingford*, 54 Conn. 513, 9 Atl. 393; *Wakefield v. Newell*, 12 R. I. 75, 34 Am. Rep. 598; *Freiburg v. Davenport*, 63 Iowa, 119, 50 Am. Rep. 737, 18 N. W. 705; *Morris v. Council Bluffs*, 67 Iowa, 343, 56 Am. Rep. 343, 25 N. W. 274.
65 L. R. A.

If, by reason of the grading of a street, abutting property is subjected to no greater burden than before rested on it, there can be no liability on the part of the municipal corporation. *Watson v. Kingston*, 114 N. Y. 88, 21 N. E. 102.

If, when a city's duty to the public requires that it raise the level of its streets through low places to such height as to make them suitable to travel by keeping them drained of surface water, the adjoining property is thereby overflowed during heavy rains because it is lower than the street, the event is *damnum absque injuria*, and the owner has no legal claim upon the city for the construction of a drain, either for his premises or the street. His proper protection is to raise the grade of his lots. *Alden v. Minneapolis*, 24 Minn. 254.

A municipality exercising due care in grading and paving a street pursuant to its charter is not liable for injuries resulting from surface water flowing therefrom and onto the land of adjoining owners. *St. Louis v. Gurno*, 12 Mo. 414.

Very few cases present the simple fact of changing the grade so that the course of the water between the adjacent land is merely altered. In addition to this, additional facts usually exist, such as the gathering of the water, or the change of outlet for a flow coming from an extended territory. Either of these facts would give a right of action against a private individual (see note to *Gray v. McWilliams* [Cal.] 21 L. R. A. 593), and there is no reason why it should not do so against the municipality. In the cases in which the courts have denied the right of action, the full effect of the principles involved does not seem to have been considered. In many instances a street improvement consists, in part, at least, of the hardening of the surface so as to make it impervious to water. The effect of this hardening, together with the slope given to the surface, is to accumulate the water at the edge of the street and cast it in a body on the land of the abutting owner. The principal reason at the bottom of the rule that there is no liability for altering the grade of land so as to interfere with the flow of surface water is that most of the water coming from rain and melting snow finds its way immediately into the ground, and there is no great quantity to flow along the surface. The hardening of the surface of the street interferes with this natural condition as much as the placing of a building on the land with

sponsible itself." In *Wakefield v. Newell*, 12 R. I. 70, 34 Am. Rep. 598, the doctrine announced in the *Inman Case* was somewhat explained and amplified, but not modified. It was there held that the "mere neglect by an individual to retain on his own land water which, falling there, would naturally flow onto his neighbor's land, is no cause of action, unless he first accumulates it by artificial means so as considerably to increase the volume and detrimental effect with which it would flow on his neighbor's land." It clearly follows by necessary implication from the language thus used that, if one does accumulate surface water in the manner suggested, and then turn it upon his neighbor's land, he thereby renders himself liable in an action of this sort. In

Benard v. Woonsocket Bobbin Co. 23 R. I. 581, 51 Atl. 209, Stiness, Ch. J., in delivering the opinion of the court, seems to hold that the *Inman Case* stands for the doctrine which we have above stated.

We do not wish to be understood as holding that a town or city is liable merely because, in the construction or grading of a street or highway, surface water is thereby turned upon adjoining land, for such a result is inevitable, and is merely incidental to the making or grading of the street. It is only when, in connection with the doing of such work, the town or city collects the water in some manner, and then discharges it in a considerable volume upon the land of another, that it renders itself liable for the damages sustained thereby.

a roof extending over its entire surface. And no one contends that a private owner can place such a building on his land, and allow the eaves to cast the water immediately on his neighbor's land, without making any provision for caring for it. Another element which is involved in the improvement of a highway is the bringing of the surface to a uniform grade over long stretches of territory, the effect of which is to cause the water to flow along the street for a considerable distance, thereby changing its natural course and gathering it in a body; and, when it is in that condition, no private owner can cast it immediately on his neighbor's land without liability. The rules governing the rights with regard to surface water, as between individuals, would make the municipality liable for its acts in either case if it did not make some provision to care for the water so accumulated and concentrated. Few of the courts, however, have considered these principles, but have regarded the street improvement merely as a change of grade, which was held to cast no liability upon the municipality for its acts. When these principles have not been considered, and the courts have decided that there was no liability on the ground that the injury was consequential, or for some other equally evasive reason, the decision can be regarded as of little value, upon the principle of jurisprudence involved; and such decision is practically worthless as a precedent whatever its effect may be on the rights of the parties to the litigation. Therefore, in determining the correctness of any decision denying the liability of the municipality, the question must be kept in mind, whether it did anything more than merely alter the grade so as to change the direction of flow of the surface water between the highway and the adjoining land. If it did, on principle it is liable.

It has been decided that no compensation can be awarded for the flooding of land as a consequence of the raising of the grade of the highway in proceedings to assess the damages for such raising. *Hubbard v. Webster*, 118 Mass. 599.

The owner of property injured by the raising, to conform to a bridge grade, of a highway, which lessened the value of the building, and caused water to flow into its lower story, has no cause of action against the town or its agents doing the work, shown to have been done lawfully and in a proper manner. *Benden v. Nashua*, 17 N. H. 477.
65 L. R. A.

Surface water must be turned from the road-bed into drains and gutters, and at times will flow in considerable quantity. It would be practically impossible for towns, cities, and boroughs in most cases to prevent such water from flowing onto the lands of the adjoining proprietors. To hold them responsible for not doing so in all cases would be unreasonable. It is only in special cases, where wanton or unnecessary damage is done, or where damage results from negligence, that they can be held responsible. *Bronson v. Wallingford*, 54 Conn. 513, 9 Atl. 393.

A municipal corporation is not liable for damage to private lands in consequence of changes in a highway pursuant to authority of law, as where more surface water is thrown on adjoining lands by the paving of the road. *Field v. West Orange Twp.* 46 N. J. Eq. 183, 2 Atl. 236.

But in California it was held that a city is bound to provide means for conducting away surface water in a street, the accumulation of which is the necessary consequence of the paving of the street; and is liable for damages to the adjoining premises at grade with the street, caused by its failure to provide such means. *Stanford v. San Francisco*, 111 Cal. 198, 43 Pac. 605.

In so far as the above cases attempt to lay down general rules, and to deny liability in cases where the city has increased the natural burden or cut off natural drains, they cannot be regarded as sound.

Some of the courts, however, have recognized the analogy between the cases holding individuals liable and the cases against the municipality, and have held the latter liable.

The doctrine of dominant and servient heritages applies as well between municipal corporations and private individuals as between private individuals alone. *Keithsburg v. Simpson*, 70 Ill. App. 467.

If a municipal corporation, in changing the grade of a street, flows water on an abutting lot that does not naturally flow there, it is liable for the damages. *Bloomington v. Brokaw*, 77 Ill. 194.

A municipal corporation is liable for damages sustained by the owner of real estate from the flowing of water thereon caused by the raising of the grade of the street in front without constructing a sewer of sufficient capacity to carry the water off. *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591.

A municipal corporation must cause its streets

In this connection we may observe that we fail to see that it is material whether the water thus collected would have flowed upon the plaintiff's land in a given case, or not, but for some artificial structure. For it is evident that, while a given piece of land may receive a large amount of surface water without injury thereto when it gently flows thereon from natural causes, as it is alleged was the case here before the construction complained of, yet, when collected and discharged in considerable volume at a given point, it may become very destructive and injurious.

Almy v. Coggeshall, 19 R. I. 549, 36 Atl. 1124, cited by counsel for defendant as sustaining his contention that the *Inman Case* only holds that a municipality is liable for damages when it collects surface water from a large area, and turns it in a different direction from that in which it would have naturally flowed, does not seem to us to be well taken. That case was

brought to recover damages by reason of changing the grade of a street on which the plaintiff's lot abutted, so that the street, which before that time had been lower than the surface of the lot was raised 2 feet higher than the surface thereof, whereby the water falling on the lot was prevented from flowing therefrom, and the water falling on the street was turned upon the lot, forming ponds thereon and flowing into the cellar of the plaintiff's house. As the grade of said street was changed in accordance with the procedure pointed out in the statute, we held that the only remedy which the plaintiff had in the premises was by taking an appeal from the doings of the board of aldermen in ordering the change; that the statutory remedy in such case must be regarded as exclusive. The reference which is made in the opinion by Matteson, Ch. J., to the *Inman Case* was merely to show that the plaintiff's action was not controlled thereby. The language

to be constructed in such manner, and with sufficient side draining, as to remove, without injury to adjacent lots, such surface water as from experience and knowledge of the past may be reasonably anticipated to fall, and may be provided for. *Wright v. Wilmington*, 92 N. C. 156.

A municipal corporation raising the grade of a street by an embankment so as to form a levee along a river front is bound to make sufficient drains or sewers by the side of the embankment to carry off all water flowing from the levee so as to keep it away from adjacent property; and a failure so to do will render it liable for injuries to adjacent land overflowed thereby; but if it is prevented from doing so by an injunction at the suit of a citizen, such citizen cannot recover for any injury occasioned to his property by the want of drains which he has himself prevented the city from making. *Shawneetown v. Mason*, 82 Ill. 837, 25 Am. Rep. 821.

As will be seen in a subsequent place (II. d), there is no right to obstruct natural drainways; and this rule applies to a municipality, so that it cannot destroy natural drainage by grading a street, and provide no adequate means for the escape of the surface water. *Wilbur v. Ft. Dodge*, 120 Iowa, 555, 95 N. W. 186.

The Constitution and statutes in some of the states have changed the rule formerly applied by the courts.

The owner of land adjoining a highway "sustains damage in his property," within the meaning of a statute giving compensation to such a person upon the raising of the grade of the highway causing such damages, if surface water is made to flow on the land, or to remain, thereby rendering it wet, unhealthy, and less valuable. *Woodbury v. Beverly*, 158 Mass. 245, 26 N. E. 851.

One whose land is injured by such changes being made in the public highway, under the direction of the road commissioners, that water is caused to flow on such land, is, since the Constitution of 1877, entitled to damages to the amount of the depreciation of the market value of the land. *Barfield v. Macon County*, 109 Ga. 386, 34 S. E. 596.

66 L. R. A.

So, a municipal corporation is liable if the grade of a street is unlawfully changed, whereby surface water is cast upon adjoining property. *Addy v. Janesville*, 70 Wis. 401, 35 N. W. 981.

But the raising of the grade of a highway, though it cause the surface water to flow into the dooryard of an adjoining proprietor, is not the making of a water course or place for draining off the water from a highway, within the meaning of a statute authorizing such acts, provided the water is not drained into a dooryard in front of a dwelling house. *Downs v. Ansonia*, 73 Conn. 38, 46 Atl. 243.

c. Upon gathering water in body.

As indicated above, if the municipality conducts surface water out of its course, or collects it in a body, it is bound to care for it, and, while some of the cases there cited lose sight of this principle, the great weight of the decisions accords with *JOHNSON v. WHITT* in holding that water gathered together cannot be cast onto abutting property; and the corollary is also true that a municipal corporation cannot gather together a body of surface water and then abandon it to the injury of abutting owners.

If a corporation collects a body of water so that it ceases to be a mere drainage of surface water, and casts it in a mass upon a lot, it is liable. *McCray v. Fairmount*, 46 W. Va. 442, 33 S. E. 245.

Where a municipal corporation, in improving its streets, accumulates surface water, it is its duty to take care of it if reasonably practicable, and prevent its injuring others. *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470; *Indianapolis v. Lawyer*, 38 Ind. 348; *Indianapolis v. Tate*, 39 Ind. 282; *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Byrnes v. Cohoes*, 67 N. Y. 204.

A municipality is bound to protect a lot from the overflow from a street of waters diverted from their natural channel, although it is below grade. *Arndt v. Cullman*, 132 Ala. 540, 81 So. 478.

used clearly points out the difference between the two cases, but does not, as we read it, modify the principle enunciated thereby, as hereinbefore summarized. *Smith v. Tripp*, 13 R. I. 152, cited by defendant's counsel, is clearly distinguishable from the case at bar. That case was based upon the neglect of the city to keep a certain highway in proper repair, whereby surface water was turned upon the plaintiff's premises; and the court held that the declaration did not state any cause of action, because the only action which could be maintained against the city for neglecting to keep the street safe and convenient for travel is one for injury suffered in consequence of the street's being unsafe for travel, and not for injury suffered by the overflow of surface water therefrom. It has no bearing, therefore, on the case at bar. We have examined the other Rhode Island cases cited, but do not find that they sustain the defendant's position.

It is also to be observed that the plaintiff's land does not abut on either of the streets above mentioned, and hence no presumption arises like that suggested in the leading case of *Callender v. Marsh*, 1 Pick. 418, upon the question of the changing of the grade of the highway, which case was to the effect that such change should theoretically be regarded as having been taken into account in fixing the damages for the original taking of the land.

For a collection of cases bearing upon the rule relating to the liability of municipal corporations in cases of this sort, see note "d" to *Gray v. McWilliams*, 21 L. R. A. 597.

Upon a careful consideration of the record submitted, we cannot say that the verdict was against the evidence, or that the damages awarded were clearly excessive.

Defendant's petition for a new trial denied, and case remanded for judgment on the verdict.

A municipal corporation, which collects into one channel and conducts to the land of another a body of water which would not otherwise flow there, is bound to provide a suitable outlet therefor, and not cast it upon such land; and this duty extends both to the capacity, and mechanism, of the outlet. *Wels v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

A municipal corporation is liable to a landowner for injury from surface water collected by it, if its conduct in failing to guard against possible injury from the surface water so collected is unreasonable under the circumstances. *Flanders v. Franklin*, 70 N. H. 168, 47 Atl. 88.

Wrongfully to cause the surface water of a street to collect and remain in front of one's premises, and cause him damage, is a nuisance; and, although it may be a public nuisance, yet, if he suffers peculiar and special damage therefrom, he may maintain a private action to recover the same. *Sweet v. Conley*, 20 R. I. 381, 39 Atl. 326.

Although a city is not bound to furnish ditches or sewers for the purpose of draining plaintiff's property, when it collects water from other territory and concentrates it in the ditch which it has dug along the street in front of plaintiff's property, it is bound to provide sufficient outlet for it, so that water will not be forced upon plaintiff's land. *Houston v. Bryan*, 2 Tex. Civ. App. 553, 22 S. W. 231.

A city is liable for so constructing its streets and sewers that surface water is accumulated and no adequate provision is made for carrying it off, thereby causing overflow and damage to property; but it is not liable for failing to provide adequate drains for carrying off surface water which accumulates naturally. *Thoman v. Covington*, 23 Ky. L. Rep. 117, 62 S. W. 721.

A municipal corporation has no right to collect surface water and carry it out of its natural course to the vicinity of an owner's premises without furnishing a sufficient outlet therefor. *Efingham v. Surrells*, 77 Ill. App. 460.

A municipality is liable for flooding land where it collects surface water from a large area by means of gutters, and fails to provide

a proper method for its escape. *Carson v. Springfield*, 53 Mo. App. 289.

A municipal corporation must take care of the surface waters accumulated in grading its streets, if it can be done practically and at a reasonable expense. *Schuett v. Stillwater*, 80 Minn. 287, 83 N. W. 180.

A municipal corporation receiving an accumulated flow of surface water along a highway from another municipal corporation becomes responsible for its further flow. *Huddleston v. West Bellevue*, 111 Pa. 110, 2 Atl. 200.

It is the duty of a municipal corporation, having diverted surface water from its natural course by means of an artificial channel, to continue such channel in such a manner that the collected water will not be discharged upon adjacent property to its injury. *Valparaiso v. Kyes* (Ind. App.) 66 N. E. 175.

A municipal corporation which voluntarily undertakes to receive the drainage from a street, and conveys it across the land of an individual by a drain, is bound to do the work skillfully. *Ludlow v. Yonkers*, 43 Barb. 493.

After interfering with the natural flow of surface water, and undertaking to gather up and conduct it in another direction by an artificial channel, it is the city's duty to use reasonable care to do this in such a way as not to cause a positive trespass upon the lands of another. *Pye v. Mankato*, 36 Minn. 373, 31 N. W. 863.

The removal of water from a pond, caused by a municipality raising the grade of one of its streets without constructing a culvert, is a ministerial act in the performance of which the city is bound to take all such reasonable care and precaution against possible contingent injuries to others as a discreet and cautious individual would and ought to under like circumstances were the whole loss or risk to be his alone. *Kobs v. Minneapolis*, 22 Minn. 159.

A city is jointly liable with a railroad company for damages caused by the overflow of surface water when it granted by ordinance the right to the railroad company to construct and maintain an embankment along a public street upon condition that it maintain culverts of sufficient size to carry away the accumulation

of water, and then, although the culvert constructed was insufficient, the city maintained a drain leading to it, resulting in an accumulation of water which the outlet was insufficient in size to carry away. *Kelly v. Pittsburgh*, C. C. & St. L. R. Co. 28 Ind. App. 457, 63 N. E. 233.

But it has been held that a city is not liable for waters running along its streets and finally spreading over adjoining land, where it does not appear that the water would not flood the land in the same way if there were no streets there. If there was any remedy by reason of the laying out of streets, it would be under the statutes, and not by a common-law action. *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 327.

A city is liable for an injury to the wall of a building due to the collection of a large quantity of water in the street at an excavation made where the street is being graded, when such injury might have been avoided by the contemporaneous excavation of an avenue crossing the street, or by the construction of a drain. *Lacour v. New York*, 3 Duer, 406.

If a city is negligent in its provision for the escape of surface water which it has collected from a large tract, and it overflows the land of an individual to his injury, the municipal corporation is liable if it had notice of the defective condition; and if the injury would not have occurred but for that cause, it is no defense that the cellar floor of the house was cut down and earth between it and the street removed so that when the water was raised a few inches in the gutter it ran into the cellar. *Hitchins Bros. v. Frostburg*, 68 Md. 100, 11 Atl. 826, 70 Md. 56, 16 Atl. 380.

A municipal corporation is liable for injury to property from the backing of surface water thereon by reason of its negligent construction of a sewer for carrying off such water diverted by it from its natural channel. *Frostburg v. Duffy*, 70 Md. 47, 16 Atl. 642.

But a borough is not liable for damage to private land in a township by surface water which is drained from its highway into the township highway without objection from the latter, which thus accepts the burden of taking care of it. *West Bellevue v. Huddleston*, 1 Monaghan, 129, 10 Atl. 764.

Collecting surface water in a body in an alley, and failing to provide reasonably sufficient means for its escape, causing the same to overflow adjoining premises and remain standing in the alley, is a continuing nuisance rendering a municipal corporation liable to the owner of the injured property, for successive actions, and cannot be regarded as a permanent, lawful improvement negligently constructed, for which all damages must be recovered by the owner at the time the work is done. *New Albany v. Lines*, 21 Ind. App. 380, 51 N. E. 346.

Where a city collects water by means of ditches which empty into a ditch in front of the plaintiff's lot, and such ditch is not sufficient to carry off the water emptied therein, and the plaintiff's property is thereby overflowed, the city is liable, although it appears that the plaintiff's lot is as well drained as it would have been had the ditch not been constructed; as the liability of the city depends on the sufficiency of the ditch to conduct away the water diverted into it. *Houston v. Bryan*, 2 Tex. Civ. App. 553, 22 S. W. 231.

A municipal corporation will be liable for injuries to property abutting on a street if it raises the grade of the street in such a way as

to interfere with the natural flow of surface water from that section of the city and turn it along the improved street, and then leaves the street in an unfinished condition opposite the property injured, so that the water flows from the street upon such property, causing the injury. *Follmann v. Mankato*, 45 Minn. 457, 48 N. W. 192.

An abutting owner may maintain an action against a municipal corporation for collecting surface water from several streets and conducting it by means of gutters to the end of a street opposite such owner's property, where it is permitted to stand and become stagnant, emit offensive odors, and, upon occasions of heavy rains, overflow the sidewalk and flood such owner's property, entering the cellar, washing out the soil, and doing other injury. *Clark v. Rochester*, 43 Hun, 271.

A municipal corporation has no right to collect surface water in an artificial channel and flow it against an insufficient culvert, and thus cast it in a body upon another's land, the water having, before the construction of the drain, flowed off without injury to his property. *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

A municipal corporation cannot escape liability for the flooding of an owner's premises caused by the insufficiency and want of repair of a culvert, on the ground that the culvert was constructed by a railroad company where its road crosses a public highway, a right of way for which was granted by the city upon condition that suitable culverts, etc., be built and kept in repair, where the city had adopted the culvert as a part of its system of drainage, and conducted large quantities of water thereto from adjacent territory. *Indianapolis v. Lawyer*, 38 Ind. 348; *Indianapolis v. Tate*, 39 Ind. 282.

Or, where the municipality made use of it as a water way for the discharge of surplus surface water, and participated in its construction, and filled up the old drain by which the waters had previously been carried off without injury to the adjoining landowners. *Crawfordsville v. Bond*, 96 Ind. 236.

A municipal corporation has no right, even by skillful plans and careful execution, to accumulate by its system of drainage large quantities of surface water in one channel and pour it out upon a public street, without making provision for a sufficient escape of the water so as not to damage adjoining property owners. *Ibid*.

A municipal corporation is liable for injury to property caused by the improvement of an alley so as to collect surface water in a body, and in failing to provide reasonably sufficient means for its escape, whereby it remains standing in the alley near such premises, creating unwholesome and noxious odors and overflowing the premises. *New Albany v. Lines*, 21 Ind. App. 380, 51 N. E. 346.

A township will be enjoined from maintaining an unauthorized culvert across a highway, the effect of which is to unite artificial water channels, change the natural flow, and increase the volume of the water on one side of the highway without providing an outlet therefor, thereby causing an increased volume of water upon private land. *Patoka Twp. v. Hopkins*, 131 Ind. 142, 30 N. E. 896.

A municipal corporation can acquire no prescriptive right to allow a ditch through which it conducts water out of its natural course to remain stopped up after notice of its obstruction, and to refuse to provide any means of escape of the water it has collected and brought

into proximity with the premises of an owner, to the injury thereof. *Effingham v. Surrells*, 77 Ill. App. 460.

Where a city is required to keep its streets in proper repair, and is authorized, in the discharge of this duty, to grade them and to alter their grades, the city has no right to grade its streets so as to collect the water from a wide area, some of it from distant puddles or ponds, and bring it, charged with all the miscellaneous filth of the streets, to the margin of the plaintiff's land, and then empty it upon his land, and into his cellar and well; where the city also has power to make drains and culverts. *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520.

But the court, in *Wakefield v. Newell*, 12 R. I. 75, 34 Am. Rep. 598, in discussing the case of *Inman v. Tripp*, said in that case "we did not mean to decide that a town or city has any less power over its streets or highways, in respect of surface water, than an individual has over his own land, but only that it has no greater power; or, in other words, that it is liable for discharging such water from his own land in its streets and highways to the same, or very much the same, extent as an individual is liable for discharging such water from his own land upon his neighbor's. If this action were against an individual instead of a town, we do not think a declaration similar in form would be sufficient. For mere neglect by an individual to retain on his own land water which, falling there, would naturally flow onto his neighbor's land, there is no cause of action, unless he first accumulates it by artificial means so as considerably to increase the volume and detrimental effect with which it would flow on his neighbor's land.

The act of a highway supervisor in offering to dig a ditch over an owner's land by which damage thereto from the flowage of water through a culvert built by him in the highway would be averted, and the refusal of such owner to permit the same to be dug, do not relieve him from liability for the damage caused by such flowage by virtue of a statute authorizing him to enter upon and construct ditches upon land adjoining a highway when necessary for the construction or repair of such highway, without showing that the culvert was necessary for the construction, repair, or preservation of the highway, and that it was constructed at a proper place. *Conwell v. Emrie*, 4 Ind. 209.

A declaration alleging that a municipal corporation cut a ditch along and close to one line of plaintiff's residence lot, and left the ditch in such a condition that the water coming or falling into the same could not run off in any direction, and that water has accumulated in said ditch, stood and stagnated there, in consequence whereof there has been all the time on the premises of plaintiff such a sickly and unwholesome stench that his premises have been unfit for occupation, and malarial diseases have been generated thereby on his premises, causing sickness in his family,—makes a *prima facie* case, at least, of special damage, for which he is entitled to recover. *Hamilton v. Columbus*, 52 Ga. 435.

When a city, in grading a street, encounters a ravine in which during each year a large amount of surface water is collected and carried off, across which it raises an embankment and constructs a sluiceway for carrying off the water, it is the duty of the city to see that the sluiceway is kept open, exercising reasonable care and diligence in that behalf to prevent the

creation of a reservoir of water which, by undermining the street and rushing down the ravine, would inflict injury. *Stoehr v. St. Paul*, 54 Minn. 549, 56 N. W. 250.

A municipal corporation is not liable for the consequence of a pond which is formed in a street because of the laying of the tracks of a railroad, which it has permitted to be placed in the street. *Swenson v. Lexington*, 69 Mo. 157.

But a municipal corporation is liable for the flooding of an owner's premises caused by an insufficient and obstructed culvert, on a street, provided to carry off the water accumulated thereon by the system of drainage adopted by the municipal corporation, although the culvert was constructed by a railroad company under a permit from the city to occupy and cross such street upon condition that it provide suitable drains and culverts and keep the same in repair. *Indianapolis v. Lawyer*, 38 Ind. 348; *Indianapolis v. Tate*, 39 Ind. 282.

A municipal corporation which enters into a contract with an independent contractor for the regrading of a street, by the terms of which it may assume control and finish the work at his expense upon unreasonable delay in its prosecution, will be liable for injury done to abutting property by water collected from surface drainage and a natural water course, and thrown thereon by excavations made by the contractor, and left without any attempt to complete the work for fourteen years. This ruling was placed on the ground that the nuisance was permitted by the city to remain to the injury of the abutting owners. *Vogel v. New York*, 92 N. Y. 10, 44 Am. Rep. 349.

A property owner has a right of action against a city to recover for damages caused by successive overflows of his land, where it is shown that the city so unskillfully graded and paved its streets and alleys as to raise them above the plaintiff's property and close the natural outlet of water so as to concentrate it upon his lot, and then negligently constructed its sewer and closed up the manhole or drain so as to let the water accumulate upon the plaintiff's property. *Dallas v. Cooper* (Tex. Civ. App.) 34 S. W. 321.

d. Drainage of highway.

While the question of the duty of the municipality to keep its highways safe for travelers is not strictly within the scope of this note, it being intended to state the rights and duties with respect to neighboring property owners, yet, for the purpose of considering the rights and liabilities with respect to water in the highway, such duty must be referred to as a foundation for the development of the rules as to what may be done with the water. The duty of the municipality to keep its streets safe includes the duty to keep them free from pools and holes which, by accumulating water, will render the way foundrous and unsafe. See *Farnham, Waters*, § 434. This duty requires the filling of holes and the finding of an outlet for water which comes upon the street in such quantities or manner as to interfere with the safety of the way. But the duty which the municipality owes to the public is not great enough to permit it to shift its burden on abutting property owners. It may fill the uneven places and bring the surface to grade; but it must conduct the surplus water to some natural drainway. On the one hand, the water must be disposed of so that equity will not restrain the highway

supervisors in improving the drainage of a public road when they act in the exercise of their judgment to the benefit of the road and pecuniary advantage of the township and without injury to the plaintiff. *McCormick v. Kinsey*, 10 Pa. Super. Ct. 607.

Where the surface flow of water has been concentrated into an artificial channel insufficient for the purpose, an injunction will not be granted against a city to prevent the enlargement of the channel so as to carry off the natural flow of water. *Scranton's Appeal*, 121 Pa. 97, 15 Atl. 483, *Reversing Goulden v. Scranton*, 3 Lanc. L. Rev. 340.

A court of equity will not enjoin highway commissioners from draining the roadway by a ditch, at the suit of an adjoining landowner, on the ground that such ditch will overflow his land by changing the direction of the natural flow of the water, where such commissioners are clothed by law with the power of determining the best method of improving the public roads, and it does not clearly appear that the ditch about to be dug would have resulted in the injury complained of. *Hotz v. Hoyt*, 135 Ill. 388, 25 N. E. 753, *Reversing* 34 Ill. App. 488.

Highway commissioners have the right, by means of a ditch, to drain a pond into a highway, and discharge the same upon the land of an adjoining owner at the same place it naturally flowed, without increasing the flow, or doing such landowner any actual damage, although to drain the pond it is necessary to cut the ditch in a different direction than the water had formerly flowed, through slight elevations in the land. *Palmer v. O'Donnell*, 15 Ill. App. 324.

Highway commissioners have the right, in the exercise of their power and duties to keep the roads in repair, to fill up a ditch along a highway, and cut a culvert across the same, so as to restore the flow of water to its natural direction, and prevent injury to an adjoining landowner by the throwing of water on his premises not rightfully belonging there; and an adjoining landowner cannot complain, although his land has drained into such filled-up ditch for more than twenty years, where he will receive the same advantage by the drainage as before, and at as little cost. *Henline v. Stack*, 48 Ill. App. 67.

So, there is no liability on the part of highway commissioners for the digging of a ditch along a highway so as to discharge the water into a natural drain over the lands of another, if the flow of the water has not been increased. *Crohen v. Ewers*, 39 Ill. App. 34.

The owner of a servient estate cannot recover from highway commissioners for the construction, by the latter, for the benefit of a highway, of a ditch along the same so as to conduct the water along natural channels in the direction it naturally flowed,—especially if in so doing the flow of water over his land was not increased so as to damage him in any degree. *Crohen v. Ewers*, 39 Ill. App. 34.

Highway commissioners have the right to drain a highway by means of a ditch along the same, so as to conduct the water into a natural channel into which it would naturally flow, but in less volume, although, by the unevenness of the ground, ponds had, prior to the construction of the ditch, formed thereon; and a landowner cannot complain of the increased flow in such natural channel, caused thereby. *Highway Comrs. v. Whitsitt*, 15 Ill. App. 318.

On the other hand, highway commissioners

are bound to provide for the water on the highways, so that it shall not injure adjoining proprietors. *Kensington v. Wood*, 10 Pa. 93, 49 Am. Dec. 583.

Consequently, the municipality is liable for injuries wrongfully inflicted upon private citizens through its attempt to perform its public duty. It cannot impair their property rights for its advantage without making compensation therefor.

When the supervisors of a town, for the purpose of improving one of its highways by ditches and sluices, divert large quantities of water into the slough of a landowner, situated on premises adjoining the highway which he had improved for meadow, pasture, and crops, and replace the bridge beneath which waters from the slough had flowed with culverts insufficient to drain the slough properly, the town will be liable for the injuries sustained by the landowner. *Peters v. Fergus Falls*, 35 Minn. 549, 29 N. W. 586.

It has been held that highway supervisors ought not to change the drainage of the country to the injury of anyone, whether the existing form of it be new or old, unless the public rights really require it. If they do so with recklessness, partiality, or malice, it is but just they should answer for it. *Warfel v. Cochran*, 34 Pa. 381.

So, commissioners of highways, in draining a public road, have no right to divert the water from its natural course and drain it upon the land of another; and, if they attempt to do so, the owner of such land can invoke the aid of a court of equity to enjoin such proposed action. *Young v. Highway Comrs.* 134 Ill. 569, 25 N. E. 689.

Highway commissioners have no power or right to divert water from its regular channel or the place where it would naturally flow off, and carry it along the line of the highway in ditches for such a distance as they may desire or think proper, and then discharge it upon the land of an owner. *Young v. Highway Comrs.* 134 Ill. 569, 25 N. E. 689, *Reversing* 34 Ill. App. 178.

An overseer of highways, in making repairs upon a highway, has no right to change the natural course of surface-water drainage, or to considerably increase its quantity, so as to cast it upon lands of an abutting owner, where it had not been previously accustomed to flow, to his injury. *Moran v. McClearn*, 63 Barb. 185, 44 How. Fr. 30.

Highway commissioners may be enjoined from cutting a ditch through the highway, which will discharge water upon the land of an adjoining owner at a point where it would not come in a state of nature,—especially where their proposed action is not for the purpose of improving the highway, or for the public good, but is for the benefit of other landowners upon the other side of the highway. *Jewett v. Sweet*, 178 Ill. 96, 52 N. E. 962, *Affirming* 77 Ill. App. 641.

Land adjoining a highway which crosses an elevation or ridge several feet higher than the surface of the soil on either side, and over which it is impossible for water to flow naturally, cannot be considered as servient to the land on the opposite side of the ridge; and the highway commissioners have no right, by means of a ditch through such elevation, to divert the surface water along the highway from its natural channel, and drain it upon such land. *Graham v. Keene*, 143 Ill. 425, 32 N. E. 180, *Affirming* 34 Ill. App. 87.

But it is not always possible to provide adequate drainage without altering the course of the water. Therefore, highway commissioners have the discretion of determining whether the necessity exists for a ditch draining the water from a highway in a different direction than the natural flow, the exercise of which will not be interfered with by the courts in the absence of fraud or clear purpose of oppression. *Baughman v. Heinzelman*, 180 Ill. 251, 54 N. E. 313.

The remedy, if injury is inflicted upon private property, is under the eminent-domain statutes, or an action for damages.

An overseer of highways cannot, in attempting to restore a ditch along a highway to its condition before an improvement had been made in it by his predecessor, close a sluice which would carry water from the ditch to his own land, while opening another sluice that would carry the water upon the land of his neighbor. *Moran v. McClearn*, 63 Barb. 185.

A road supervisor has no authority, under a statute authorizing him to open a water course from a road to a natural water course, to open a water course to a pond, as that is not a water course in contemplation of the statute. *McLaughlin v. Sandusky*, 17 Neb. 110, 22 N. W. 241.

When a highway drainage act provides that nothing therein contained shall be so construed as to allow such drainage into or upon any dooryard in front of any dwelling house, the prohibition must be held to extend to the "whole front dooryard," since the act being in derogation of private rights, must be strictly construed. *Torrington v. Messenger*, 74 Conn. 321, 50 Atl. 873.

In view of the fact that the highway officials are always individually liable for their wrongful acts, and that in some of the states the liability of the municipality is much restricted, while in all cases the remedy against it is apt to be less certain and direct than that against the responsible individual, it is often desirable to bring the action against the official (see also *infra*, N. c.).

An overseer of highways has no more right than a private person to cut drains, the necessary result of which will be to flood the land of individuals; and, when he is liable for a lawless act, all of his assistants are liable for the consequent injury. *Cubit v. O'Dett*, 51 Mich. 347, 16 N. W. 679.

Highway authorities of a municipal corporation are individually liable for the lawless cutting of drains along a highway which results in flooding the land of individuals. *Breen v. Hyde*, 130 Mich. 1, 89 N. W. 732.

Damages may be recovered from a highway surveyor for draining a highway through a properly constructed ditch onto improved pasture lands, where he sought to justify under a law authorizing him to remove any obstacle, natural or artificial, that obstructs, or is likely to obstruct or render dangerous, the passage of any highway or townway; but it is held that he had no authority to appropriate the land of individuals, lying without the limit of the roads, and inclosed, to the convenience or necessities of the public. *Plummer v. Sturtevant*, 32 Me. 325.

A landowner upon whose land surface water is caused to flow by the negligent performance, on the part of a highway commissioner, of a contract with such owner and his neighbors to lower and extend the ditches in the highways so as to relieve their lands of water, though en-

titled to sue upon contract, may bring an action in tort to recover the damages sustained by such negligence. *Fromm v. Ide*, 68 Hun. 310, 23 N. Y. Supp. 56.

But an overseer of highways, who grants permission to another to clean out a shallow ditch existing by the highway, provided it will benefit the road which it had theretofore drained, is not liable for waters thereby carried on the premises of the plaintiff, even though the person obtaining the permission goes too far, and trenches injuriously on the plaintiff's interests. *Parker v. Fields*, 48 Mich. 250, 12 N. W. 194.

II. *Negligent or wrongful acts.*

a. *Changing course of drainage.*

The rule almost universally accepted at the present time is that a municipality is liable for injuries caused by negligent or wrongful acts for which it is responsible. The only point of difference, then, is as to what acts are wrongful.

The rule almost universally followed between individuals is that the course of drainage cannot be changed and the water cast upon land which is not ordinarily subject to such burden.

And a municipal corporation stands on the same footing as a private individual, and incurs the same liability, when it damages another's land by throwing thereon waters which do not naturally flow there. *Arndt v. Cullman*, 132 Ala. 540, 31 So. 478.

A municipal corporation is liable for throwing upon private lands water which would not have flowed there naturally. *Torrey v. Scranton*, 138 Pa. 173, 19 Atl. 351.

If the municipal corporation changes the grade of a street so as to make the surface water flowing in the gutter pass onto the property of an individual, it is liable for the injury. *Rice v. Flint*, 67 Mich. 401, 34 N. W. 719.

But the change in the direction or volume of the water must be substantial to render a municipal corporation liable for injury caused by a change of grade of streets. *Rutherford v. Holley*, 105 N. Y. 632, 11 N. E. 818.

While an owner of lands may, for the purpose of improving them, raise or lower the surface so as to interfere with the flow of surface water, he has no right to turn such water in destructive currents upon adjoining lands unless it be necessary to the proper improvement of his own land; and the same rule applies to municipal corporations with respect to their streets. *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470.

A municipal corporation is liable when, by changing the grade of a street, it changes the course of surface water, causing an increased flowage onto the land of an adjoining owner. *Brunhouse v. York*, 13 Lanc. L. Rev. 397.

A municipality cannot divert surface water flowing naturally upon a highway from adjoining land, and cast it on other land of the same owner. *Slack v. Lawrence Twp.* (N. J. Eq.) 19 Atl. 663.

An individual who, or corporation which, changes the flow of surface water is liable in damages to one injured thereby. *Arn v. Kansas City*, 5 McCrary. 558, 14 Fed. 236.

The authorities of a county have no right, by the construction of a drain along a highway, to cast water upon one's land in a different manner from what the same would naturally flow upon

it, to his injury. *Holmes v. Calhoun County*, 97 Iowa, 360, 97 N. W. 145.

A few courts have refused to follow this rule. The Wisconsin court holds that the arrangement of gutters, ditches, etc., by a city in the course of grading and adjusting its streets, whereby the course of surface water is changed and its flow in certain directions or at a certain place increased, is not actionable, although, by the grading of a street, the outlet is obstructed so that the water backs upon private property to its injury. *Harp v. Baraboo*, 101 Wis. 368, 77 N. W. 744.

So, a diversion of surface water from its usual course of flow in a highway, by a change of grade, does not give a right of action to a person whose land is injured thereby, although the work is done upon a defective plan. *Champion v. Crandon*, 84 Wis. 405, 19 L. R. A. 856, 54 N. W. 775.

Where a municipal corporation, in constructing drains and gutters, changes the flow of surface water, it is not liable, although land is injured thereby, if the water still spreads out as surface water, notwithstanding a change in its flow. But the corporation cannot collect the surface water in a body, and, as such, cast it upon land so as to furrow it out and create or enlarge drain courses through it. *Clay v. St. Albans*, 43 W. Va. 539, 27 S. E. 368.

A municipal corporation has the right to improve and change the grade of its streets, although the effect may be to change the course of surface water and cause it to flow upon land which it did not previously reach; and it is not bound to provide drainage to prevent such flow in that direction. *Flagg v. Worcester*, 13 Gray, 601.

A few cases which deny the liability of the municipality have been placed, not upon the general principle that the water can be cast upon private property with impunity, but upon the peculiar New England doctrine which holds that many public officials, although performing the work of the municipality, are not in fact its agents.

Where, under statutory authority, a highway surveyor cleans out a highway drain and thereby causes a flowage upon private property, the municipality is not liable for attendant damages. *Gardiner v. Camden*, 86 Me. 377, 30 Atl. 13.

Thus, a municipal highway surveyor is not the agent of the municipality when, without authority from the municipality of the legislature, he drains a catch basin into a private drain, thereby causing damage to the owner of said drain. *Bryant v. Westbrook*, 86 Me. 450, 29 Atl. 1109.

In a suit against commissioners of highways for changing the flow of surface water, the commissioners cannot plead prescriptive rights as to the flow of the water existing in the owners of adjoining land, who are neither parties to the suit, nor asking for any relief in the premises. *Jewett v. Sweet*, 178 Ill. 96, 52 N. E. 962.

b. Casting collected body on adjoining property.

Notwithstanding the difference of opinion as to liability for changing the course of drainage, there is practical unanimity in holding that the water cannot be gathered up and cast in a body on the adjoining property.

A municipal corporation cannot drain ponds onto land of adjoining proprietors; and it is 65 L. R. A.

immaterial that the drain terminates before reaching the private property if natural forces will carry the water upon it. *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50.

It is prima facie wrongful and a nuisance for a municipality to construct a ditch across one of its streets, whereby a large and unusual quantity of water is turned upon another's premises with destructive force and to his injury, although the drainage is necessary for sanitary purposes to remove stagnant water from a pond caused by the city's grading a street without a culvert; and the city will be liable for neglecting to dispose of the water in another way, not so much more costly than the way adopted as to justify a reasonably prudent man, regardless of the rights of others, in disposing of the water in that way. *Kobs v. Minneapolis*, 22 Minn. 159.

A municipal corporation cannot collect surface water and discharge it in a mass onto the land of a private owner. *Field v. West Orange Twp.* 36 N. J. Eq. 118, Affirming 37 N. J. Eq. 600, 45 Am. Rep. 670; *Clark v. Rochester*, 43 Hun, 271; *Gillison v. Charleston*, 16 W. Va. 285, 37 Am. Rep. 777; *Patoka Twp. v. Hopkins*, 131 Ind. 142, 30 N. E. 896; *Soule v. Passaic*, 47 N. J. Eq. 28, 20 Atl. 346; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Weir v. Plymouth*, 148 Pa. 568, 24 Atl. 94; *Troy v. Coleman*, 58 Ala. 570; *Enfaula v. Simmons*, 86 Ala. 515, 6 So. 47; *Kobs v. Minneapolis*, 22 Minn. 159; *Pye v. Mankato*, 36 Minn. 373, 31 N. W. 863; *Rychlicki v. St. Louis*, 98 Mo. 497, 4 L. R. A. 594, 11 S. W. 1001; *West Bellevue v. Huddleston*, 1 Monaghan, 129, 16 Atl. 764; *Bohan v. Avoca*, 154 Pa. 404, 26 Atl. 604; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Wels v. Madison*, 75 Ind. 241, 39 Am. Rep. 135, thereby overruling whatever contrary doctrine may be found in *Vincennes v. Richards*, 23 Ind. 381; *O'Brien v. St. Paul*, 25 Minn. 333, 33 Am. Rep. 470; *Follmann v. Mankato*, 45 Minn. 457, 48 N. W. 192; *Hoffman v. Muscatine*, 118 Iowa, 332, 85 N. W. 17; *Valparaiso v. Kyes* (Ind. App.) 66 N. E. 175; *Thornton v. Fugate*, 21 Ind. App. 537, 52 N. E. 763; *Slack v. Lawrence Twp.* (N. J. Eq.) 19 Atl. 663; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *North Vernon v. Voegler*, 89 Ind. 77; *Princeton v. Gieske*, 93 Ind. 102; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300; *Davis v. Crawfordsville*, 119 Ind. 1, 21 N. E. 449; *Young v. Maquon Twp. Highway Comrs.* 134 Ill. 569, 25 N. E. 689; *Robbins v. Willmar*, 71 Minn. 403, 73 N. W. 1097; *Sleight v. Kingston*, 11 Hun, 594, Appeal Dismissed in 73 N. Y. 592; *Bastable v. Syracuse*, 8 Hun, 587, Appeal Dismissed in 72 N. Y. 64; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Bohan v. Avoca*, 154 Pa. 404, 26 Atl. 604; *Weir v. Plymouth*, 148 Pa. 568, 24 Atl. 94; *Derinzy v. Ottawa*, 15 Ont. App. Rep. 712; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 26 S. E. 266.

Highway commissioners have no right to collect water by means of a ditch along a highway, and throw it upon the land of an adjoining owner at a point and in a manner in which it would not naturally flow, although the same is done in good faith, for the betterment of the road. *Allen v. Michel*, 38 Ill. App. 313.

The same rule applies to road drainage as to drainage of private property. Pre-emption

Highway Comrs. v. Whitsitt, 15 Ill. App. 318; Palmer v. O'Donnell, 15 Ill. App. 324.

A city's liability when, by grading, it diverts water from its natural course and throws it on private property where it has not previously run, is not excused because the property is below grade. Beach v. Scranton, 5 Lack. L. News, 25.

That a lot is below grade will not defeat a recovery for the turning of surface water from a street into it, if injury would have resulted had it been at grade. Hoffman v. Muscatine, 113 Iowa, 332, 85 N. W. 17.

A borough is liable for throwing an artificially accumulated flow of surface water on private land, although led across the premises of an intermediate owner with his consent. Weir v. Plymouth, 148 Pa. 566, 24 Atl. 94.

A city will be liable if it collects surface water by artificial means, such as sewers and drains, and casts it upon the premises of another in increased and injurious quantities. Such an act amounts to a positive trespass, and it is immaterial whether the gutter be expressly constructed for the purpose of thus casting the water on another's land, or whether it be so constructed that the flooding is a necessary result. I've v. Mankato, 36 Minn. 373, 31 N. W. 863.

A city cannot discharge surface drainage upon private land without compensation. Goulden v. Scranton, 3 Lanc. L. Rev. 340.

A town has no more right, for the purpose of draining a highway, to cast water upon private land, than has an individual in the improvement of his property, unless the right has been acquired in some legal manner. Sheehan v. Flynn, 59 Minn. 436, 26 L. R. A. 632, 61 N. W. 462.

If a city, in grading streets, turns a stream of mud and water onto adjoining property, or creates a stagnant pool in his vicinity, it is liable for the resulting damage. Nevins v. Peoria, 41 Ill. 502, 59 Am. Dec. 392; Shawnee-town v. Mason, 82 Ill. 337, 25 Am. Rep. 321; Stack v. East St. Louis, 85 Ill. 377, 28 Am. Rep. 619; Aurora v. Gillett, 56 Ill. 132.

A municipal corporation is liable for an injury to an owner's lot from the diversion of water from its natural course by the changing of the grades of streets so as to increase the flow of surface water beyond the capacity of a box sewer constructed by such owner to conduct the water ordinarily flowing across his premises, thereby causing the same to burst and flood his premises. Elgin v. Hoag, 25 Ill. App. 650.

Surface water naturally flowing down a ravine cannot be diverted into highway drains without liability being incurred for the damage resulting from so accumulating it. Huddleston v. West Bellevue, 111 Pa. 110, 2 Atl. 200.

A municipal corporation is liable for damages to abutting property on which it throws surface water, which, by a change in the grade of its streets and the construction of the drains, it has diverted from its natural flow and concentrated in volume, irrespective of negligence in the work on its streets, or in the construction of its drains. Guest v. Church Hill, 90 Md. 689, 45 Atl. 882.

A city which, on changing the grade of a street, diverts surface water from its natural flow, and casts it in considerable volume upon the premises of a property owner, making gullies thereon, tearing away piazza posts, and flooding the stable, is liable for the injury done. 66 L. R. A.

Bedell v. Sea Cliff, 18 App. Div. 261, 46 N. Y. Supp. 226.

A municipal corporation may grade, or change the grade of, its streets when it deems it necessary to do so, and property owners cannot complain although surface water is thrown upon the land in larger quantity than formerly, or is prevented from flowing therefrom; but no right exists to collect a material body of water by diverting it from its natural flow, or by other means to gather it together, and to conduct it by any artificial channel and discharge it in a body upon private property. Carll v. Northport, 11 App. Div. 120, 42 N. Y. Supp. 576.

It is trespass for a city to collect large quantities of surface water on its streets, and, instead of conducting it into some proper natural drain, construct its improvements so that the water is necessarily cast on private property. Netzer v. Crookston, 59 Minn. 244, 61 N. W. 21.

A municipality has no right by artificial drains to divert surface water from the course it would otherwise take and cast it, in a body large enough to do substantial injury, on land, where, but for such artificial drains, it would not go. Field v. West Orange Twp. 46 N. J. Eq. 183, 2 Atl. 236.

The maintenance by a city of a cesspool draining a large area, whereby water which would have flowed elsewhere, and sewage, are cast upon the premises of a property owner by reason of an obstructed sewer, renders it liable for the damage sustained. Daggett v. Cohoes, 27 N. Y. S. R. 630, 7 N. Y. Supp. 882.

It is one thing to grade a highway and cast off surface water as a consequence of the grading, and quite another thing to change the natural flow, unite artificial channels, increase the volume of water, and cause it to flow upon private property in an increased volume. Patoka Twp. v. Hopkins, 131 Ind. 142, 30 N. E. 896.

The flooding of an owner's land by the construction of a sewer or drain so as to gather large quantities of water on one side of a highway and discharge it through a culvert to the other side, from whence it flowed onto the land of an abutting owner, when, before such acts, it had flowed off without injury to his land, is not mere consequential injury for which a municipal corporation is not liable in the exercise of its right to construct drains in and improve its streets, and is a direct injury, for which the municipality is responsible. Crawfordsville v. Bond, 96 Ind. 236.

A municipal corporation is liable for the flowing of an owner's premises caused by its so grading a public street as to collect in an artificial channel the surface water from the adjoining territory which did not before that time flow upon such premises, and to pour the same thereon to its injury; and the fact that the grading was done in pursuance of an ordinance does not relieve the municipality from liability. North Vernon v. Voegler, 89 Ind. 79.

Where a city, in grading its streets by cutting ditches and drains, collects large amounts of surface water, diverting it from its natural course, and casts it in a body upon the land of a lower proprietor, unless the water is so cast into a natural water course, the proprietor sustains a legal injury, and may have his action therefor. Gillison v. Charleston, 16 W. Va. 282, 37 Am. Rep. 763.

A municipal corporation may not accumulate waters which fall upon land within its limits,

and, by means of a ditch or ditches, discharge them in volume upon the land of another, outside; and injunction restraining such wrongful discharge of surface water is the proper remedy. *Andrews v. Steele City* (Neb.) 89 N. W. 739.

While a municipality is not liable for changing the flow of surface water so as to cast it onto adjoining property by changing the grade of its streets, it is liable where by street improvements it collects such water in one place and then discharges it in a body onto adjoining land. *Cannon v. St. Joseph*, 67 Mo. App. 367.

A municipal corporation is liable for damages to property where, by the construction of sewers and ditches in improving and draining streets, it diverts rain water which would naturally flow in another direction, so as to cast it upon such property in destructive quantities, whether the work was done negligently or not. *Eufaula v. Simmons*, 36 Ala. 515, 6 So. 47.

A municipal corporation has no right to conduct surface water by artificial channels from where it would otherwise be discharged and pour it upon private lands, as such action would be a condemning of private property to public use without compensation. *West Orange Twp. v. Field*, 37 N. J. Eq. 600, 45 Am. Rep. 670, Affirming 36 N. J. Eq. 118.

A highway culvert cannot be maintained which unlawfully discharges surface water collected from a wide area onto private property at one place. *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61.

A municipal corporation has no right to collect water from the streets in a body and discharge it on private property to the injury thereof, or in the private drain running through it on property adjacent thereto when to its injury, as the municipal authorities have no right to single out the owner thereof to bear, without compensation therefor, a public burden, to the relief of the property of his neighbors. *Field v. West Orange Twp.* 36 N. J. Eq. 118.

The fact that land is marshy and already lawfully subjected to a considerable drainage from other lands will not justify a municipal corporation in collecting water from a large area and casting it thereon by artificial means. *Soule v. Passaic*, 47 N. J. Eq. 28, 20 Atl. 346.

A township is liable for flooding land adjoining a highway where it opens a continuous drain for a long distance along the highway and then casts the accumulated water upon the adjoining land, although it would not have been liable for ordinary surface water flowing from the highway onto adjoining land. *Rowe v. Rochester*, 29 U. C. Q. B. 590.

An unauthorized casting of water upon lands which have not been condemned, even though done by public authority, creates a nuisance which is remediable. *Merritt Twp. v. Harp* (Mich.) 9 Det. L. N. 302, 91 N. W. 156.

The supervisors of a town may not lawfully collect surface water in artificial drains or ditches out of its natural course and cause it to flow upon the adjoining lands to their owner's damage, nor in a greater volume or quantity than it would naturally or otherwise do. *Blakeley Twp. v. Devine*, 36 Minn. 53, 29 N. W. 342.

When a city has constructed a street crossing a ravine in which large quantities of collected surface water are accustomed to find an outlet, and has endeavored to divert it into a sewer which is insufficient to admit all the water in ordinary seasons; and when that 65 L. R. A.

which overflows upon the street is prevented from again entering the ravine at the other end of the sewer, and thus turned into another street and over adjoining property,—the city will be responsible for the injury which it does, when reasonable care and skill would have provided better facilities. *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767.

While a borough succeeding to the ownership and control of the highways constructed by a town within the limits of the borough is liable for the continuance of a nuisance created by constructing the highway in such a manner that it carries the surface waters onto the adjoining premises, the continuance must be intentional, with knowledge of its existence. *Morse v. Fair Haven East*, 48 Conn. 220.

A city which creates a nuisance by the excavation of ditches whereby surface water is thrown upon the land of a private owner is prima facie liable for its continuance. *Pennoyer v. Saginaw*, 8 Mich. 534.

In *Perdue v. Chinguaconsy*, 25 U. C. Q. B. 61, an action against a municipality for cutting a ditch in a highway, thereby overflowing the plaintiff's land, the defendant's plea averred that it necessarily made the ditch in order to repair the highway. The court sustained the demurrer to the plea upon the ground that, although the cutting of the ditch may have been necessary, the defendant should have further alleged the necessity of using the plaintiff's land as a receptacle for the drainage, though the court, without deciding, expressed a doubt as to the right of the conservators of the highway to flood the plaintiff's land, even if no other method were obtainable, saying that, if public convenience requires the destruction of private property, the owner of the latter has the right to compensation.

A municipality which diverts the usual course of surface water, carrying with it sand, mud, and gravel, by placing a wooden box in a ditch, thereby conducting it so as to discharge the sand, mud, and gravel upon property used for marine railways and shipyards, on which such water would not otherwise have flowed, is liable for damages resulting from the abandonment of the premises for such purpose, necessitated by the deposits so thrown thereon, irrespective of negligence in the construction of such artificial drain. *Cahill v. Baltimore*, 93 Md. 233, 48 Atl. 705.

A municipal corporation cannot drain a public road by throwing the water on an adjoining proprietor, unless a statute compels him to receive it, and it is necessary for the good of the community. *Brown v. Sarnia*, 11 U. C. Q. B. 87.

In considering the weight of that decision it must be remembered that there are no constitutional guaranties in Canada.

The authority given to a municipal corporation to open and repair roads does not authorize it to cast water flowing along the road onto the land of adjoining proprietors. *Rowe v. Rochester*, 29 U. C. C. P. 319, Affirmed in 29 U. C. Q. B. 590; *Perdue v. Chinguaconsy*, 25 U. C. Q. B. 61.

A municipality is, after notice and neglect to remedy, subject to an injunction against continuing, and liable for past damages from, a drain built on premises adjoining a public highway and discharging surface water collected therefrom to the owner's injury; and due notice is imputable to it when its governing officials

have personal knowledge of the conditions out of which the wrong arises. *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533.

A property owner upon whose premises surface water diverted from its natural flow is cast, to his injury, in consequence of the grading of a public street, may maintain an action to recover the damage sustained up to the commencement of the action, and may maintain successive actions for the recovery of the damage until the nuisance is abated; and he may, by action in equity, recover the entire damage as and for a permanent appropriation of the property. *Carll v. Northport*, 11 App. Div. 120, 42 N. Y. Supp. 576.

The wrongful and negligent construction, by highway commissioners, of a ditch so as to divert the surface water from its natural flow, and discharge it upon the land of an adjoining owner to his injury, may be regarded as a nuisance, for the continuance of which fresh actions may be brought as often as actual injury is occasioned thereby; and in such case evidence as to damages subsequent to the commencement of the suit is inadmissible. *Allen v. Michel*, 38 Ill. App. 313.

One whose lot is damaged by the increased flow of surface water cast upon it by a sewer constructed by the city may recover such sum as will restore the lot to its former condition. *Arn v. Kansas*, 4 McCrary, 558, 14 Fed. 236.

The diversion of the flow of surface water by the construction of waterworks by a municipal corporation upon an elevated lot so as to throw it upon lower land in a larger quantity than before renders the municipality liable to the owner for the damage arising from the increased flow thereon, and the consequent diminution of the value of the land, under a constitutional provision that private property shall not be taken or damaged for public purposes without making just and adequate compensation. *Albany v. Sikes*, 94 Ga. 30, 26 L. R. A. 653, 20 S. E. 257.

A municipal corporation cannot so grade its streets as to cause water to flow over the premises of an individual without becoming liable for the injuries caused thereby; and it makes no difference that the improvement of the street was made before such owner erected a building upon his premises; nor can its liability be changed by showing that others filled up a portion of the street in front of their property so as to turn the water upon this property; nor is it a defense to show that such owner might have protected his property from loss by digging ditches or making other improvements. *Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1.

A city cannot be liable under a charge of originating a nuisance by casting surface water on private property, where it appears that it merely continued the nuisance after territory on which it had been created was annexed to it; and liability for continuing is different from that for originating. *Rychlicki v. St. Louis*, 115 Mo. 602, 22 S. W. 908.

In contrast with that mass of authority, are the following decisions:

A municipal corporation is not liable for damages to land by the flowing thereon of surface water from a street into which such water is thrown by the mere grading of surrounding streets in such a way as naturally to lead thereto, as such damages are the mere consequential result of the improvement of such streets, and not within the rule of municipal liability for 65 L. R. A.

the collection of water in one channel and throwing it in a body on lands where it is not accustomed to flow. *Davis v. Crawfordsville*, 119 Ind. 1, 21 N. E. 449.

A municipality is not liable for flowing merely surface water on a citizen's land, by collecting it from a hill top and sending it in volume through streets cut deeply with great incline toward the injured land, when there is no complaint but what the opening and grading of the streets forming the channels was properly done for public purposes; but when it is made to appear that, in addition to the surface water, there was drawn off and discharged swamp water that formerly ran elsewhere in natural water courses, a judgment against the municipality for damages will be upheld. *Union v. Durkes*, 38 N. J. L. 21.

Those cases seem to have made an unwarranted application of the doctrine of "consequential injuries" (see *infra*, II. e), and to have, in consequence, reached an erroneous conclusion.

The owner of land which adjoins a highway cannot maintain an action at law against the town, which is bound to keep the highway in repair, for the acts of the town officers in so repairing the highway and constructing the water bars within its limits as to cause surface waters to flow in large quantities upon his land to his injury. *Turner v. Dartmouth*, 13 Allen, 291.

That decision is governed by the peculiar New England theory of nonliability of municipal corporations.

The relinquishment by a municipal corporation of the right to convey surface water from a highway onto private land is not a ministerial act, but relates to the surrender of a valuable right, and must be made in due form. *Eshleman v. Martic Twp.* 152 Pa. 68, 25 Atl. 178.

So, the corporation cannot lose a right to convey surface water from a highway onto private land by nonuser for three years. *Ibid.*

c. Accelerating or increasing flow.

Drainage is absolutely necessary to render highways safe for public use. Along the natural channels of drainage, the lower land is subject to a natural servitude to carry off the water falling on higher land. This servitude is not increased by causing the water to flow off more rapidly than it would naturally; but it does not justify the addition to the natural flow of water falling outside the watershed.

A municipal corporation cannot throw on adjoining lots more surface water than would naturally flow there. *Aurora v. Love*, 93 Ill. 521.

A city cannot increase the flow of surface water upon the lot of an individual without being liable for the injury done to him thereby. *Arn v. Kansas*, 4 McCrary, 558, 14 Fed. 236.

A municipal corporation is liable for damages resulting from its causing more water to flow onto private lands than would have done so naturally. *Elliott v. Oil City*, 129 Pa. 570, 18 Atl. 553.

A village which collects the surface water of a large area, and casts it in a solid stream upon the land of an individual, is liable therefor, although the position of such land is such that it would receive in its natural course the flow of a large, but much less, body of surface water. *McCarthy v. Far Rockaway*, 3 App. Div. 379, 38 N. Y. Supp. 980.

A municipal corporation is liable for damage resulting from its increasing the natural flow of surface water from a highway onto private land. *Frederick v. Lansdale*, 156 Pa. 613, 27 Alt. 563.

A municipal corporation has no right, by means of ditches, drains, canals, and pipes from adjacent streets and ponds, so to increase the quantity of water in a pond as to flood private property previously free from the water of such pond, and will be liable in damages for the injuries caused thereby. *Burton v. Chattanooga*, 7 Lea, 739.

Under a right to drain highway surface water into a ditch on private property, a municipal corporation cannot justify an increase of the flow of such water by the addition of waste water from a rubber mill. *Hamilton Twp. v. Wainwright*, 52 N. J. Eq. 419, 29 Atl. 200.

But in *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61, it was held that a municipal corporation is not liable for throwing larger quantities of surface water on private lands by making a highway conform to the established grade and paving it, as a consequence of which the area from which the water is collected is enlarged, and more water is drained from the roadbed.

The right to drain upon and over lower lands without making compensation for such privilege is the same whether the higher land is the farm of an individual owner or is a public highway; and highway commissioners have the right to have the surface water, falling or coming naturally upon the highway, drain through the natural and usual channel upon and over lower lands; and have the right to construct ditches or drains for the purpose of conducting such surface water, even though it is accumulated in ponds, into such natural and usual channels, although the effect may be to increase the volume of water thus carried upon lower lands. *Graham v. Keene*, 143 Ill. 425, 32 N. E. 180.

A municipal corporation, in constructing its streets and sewers, is bound so to construct them as to protect the property of its citizens, as far as possible, from damage by overflow of water, which damage is not to be ascertained by the one idea of an increased quantity of water, but by the force, flow, and effect as well. *McArthur v. Dayton*, 19 Ky. L. Rep. 882, 42 S. W. 343.

All that portion of a highway which would naturally drain in one direction may be so drained, although the flow may be thereby increased. *Young v. Maquon Twp.* Highway Comrs. 134 Ill. 569, 25 N. E. 689.

A village is not liable for the increased flow of surface water along its natural course due to the grading of streets, paving of walks and gutters, and the improvement of private grounds. It cannot be compelled to construct drains for the disposal of surface water, or to destroy its streets, or remove its gutters or paving. *Anchor Brewing Co. v. Dobbs Ferry*, 84 Hun, 274, 32 N. Y. Supp. 371.

A municipal corporation is not liable for constructing a culvert in such a way as to carry the water along its ancient course, without increasing the quantity. *Noble v. St. Albans*, 56 Vt. 522.

A municipal corporation has the right to fight surface water from the public highways, and for that purpose may enlarge an outlet or culvert for its escape without becoming liable for the overflow of another's land thereby, in the 45 L. R. A.

absence of anything showing that it had collected the surface water in one body, and caused it to flow to that culvert. *Wels v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

A municipal corporation is not liable for consequential damages to abutting property from overflow resulting from the grading of its streets in a careful and skillful manner, although it may thereby have greatly increased the flow of surface water along such property, provided such overflow is not caused by the collection of water into one channel, and negligently failing to provide a sufficient outlet therefor. *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139.

So, a city cannot be restrained by an abutting lot owner from constructing drains along the side of, and culverts across, streets, or from grading the streets, merely because such acts will greatly increase the flow of surface water on his lot, so that whenever a flood or heavy rain occurs it will stand upon the yard, fill the cellar, and injure flowers, trees, and shrubbery. *Heth v. Fond du Lac*, 63 Wis. 228, 53 Am. Rep. 279, 23 N. W. 495.

But if a municipal corporation, by means of paved gutters, collects surface water from so large an area that, upon casting it into a natural stream, the filth carried by it clogs the stream and causes a nuisance to a riparian owner by overflowing his land, it will be liable therefor. *Manning v. Lowell*, 130 Mass. 21.

And a municipal corporation is liable to a property owner for damages to his land caused by an increased flow of water, or the manner in which the water is discharged thereon from a defectively or improperly constructed sewer. *McArthur v. Dayton*, 19 Ky. L. Rep. 882, 42 S. W. 343.

The Georgia court has pushed the doctrine of this subdivision to the verge of sound principle, if not beyond, in holding that the mere fact that the water which naturally accumulates by the rains which fall upon a city and the surrounding more elevated land is collected into one stream, is not sufficient to support an action against the municipal corporation for damage caused by the discharge thereof upon adjoining lands which are the natural outlet of such water, even though it otherwise would have flowed over such lands in many small streams. *Phinizy v. Augusta*, 47 Ga. 260.

The correctness of that doctrine must depend upon the particular facts of each case. If the act of the municipality in fact amounts to a gathering of the water, and casting it in a mass on the lower property, so that it exceeds the capacity of the drains, the municipality must be liable. But if it is merely an improvement of the drainage, and the water can be accommodated as well under the new conditions as under the old, there is no liability.

d. Damming back.

In considering the question of liability for damming back surface water, the character of the flow which is interrupted must always be kept in mind. Every landowner has a right to make improvements in his property which merely change the direction of the flow of such temporary or ephemeral currents as result from rains or melting snow while they are in a diffused state, spreading over or percolating along the surface of the ground. But in all climates where there is a considerable rainfall, and the surface is undulating, the surface waters, in

seeking their natural outlets, accumulate in and follow the course of depressions, which their action gradually deepens, so that they frequently have the characteristics of water courses for short periods of time. When the surface water is so excessive that it cannot readily be absorbed by the soil, these drainways are absolutely necessary to keep the land fit for use, and in many cases they formerly constituted the beds of flowing streams, before the country was deforested, so that the moisture remained nearer the surface. To close such drainways may cause serious injury to large tracts of land, and has always been forbidden by both the civil and the common law. See *Farnham, Waters*, § 889.

The rule forbidding the obstruction of such drainways applies to municipal corporations; so that in case the obstruction is of surface water flowing in these drainways, it is wrongful. Recently, however, a doctrine known as the "common enemy" doctrine, which had its source in some illly considered Massachusetts and New Jersey decisions (see *Farnham, Waters*, § 889c), has been applied to the settlement of cases involving this question. Under this doctrine, everyone has a right to fight surface water as he pleases without liability for injuries inflicted by his act; and, therefore, it is held that the municipality is not liable, even for obstructing natural drainways. The doctrine is utterly without foundation in principle, is absurd in theory, and incapable of application in practice; but the majority of the courts, without independent investigation, have applied the "common enemy" doctrine to the damming back of surface water by municipal corporations, and have denied redress, even when they have closed natural drainways.

Thus it is held that a municipal corporation is not liable for turning back the flow of surface water. *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811.

A municipal corporation is not liable for obstructing a flow of surface water by raising a street to grade, as it will be regarded as the method of action of surface water produced by the surface form of the land; and the municipal corporation cannot be held responsible for results caused primarily by the situation of the land below grade. *Herring v. District of Columbia*, 3 Mackev, 572.

A municipal corporation is not liable for damages resulting from the proper construction of an embankment in the necessary and lawful grading of a street, which merely causes the surface water upon an abutting lot situated below the level of the official grade to accumulate thereon instead of flowing freely therefrom, as before the grading, where such water had not found for itself a definite channel in which it was accustomed to flow. *Lampe v. San Francisco*, 124 Cal. 546, 57 Pac. 461, 1001.

A municipal corporation is not liable for the obstruction of surface water or a change in its natural flow so as to overflow the land of another, resulting from the exercise of its right to repair a public street in a careful and skillful manner. *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

Both the city, with respect to one of its streets, and an owner of a lot adjoining it have the right to use and improve the property in such a way as to protect it against the incur-

sion of mere surface water. *Alden v. Minneapolis*, 24 Minn. 254.

In *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719, the liability of the corporation for raising the grade of streets so as to obstruct the flow of surface water was denied; but it was on the ground that the duties in connection with the raising of the grade were public, for which a private action would not lie, rather than that there was a right to interrupt the flow of surface water.

That case was followed in *Kavanagh v. Brooklyn*, 38 Barb. 232.

An action to abate, as a nuisance, the prevention of the flow of surface water from the lot of a private owner, and for damages resulting from the accumulation thereof on such lot by reason of the lawful raising of the grade of a street, cannot be maintained against the municipality, where such surface water does not run in a natural channel across the lot. *Corcoran v. Benicia*, 96 Cal. 1, 30 Pac. 798.

A township, in repairing a highway, is not liable for the destruction of a culvert across the highway through which surface water from the adjoining land had been accustomed to pass, as the landowner has no right of drainage across the highway for surface water. *Darby v. Crowland Twp.* 38 U. C. Q. B. 338.

A municipal corporation may raise its streets to grade without providing outlets under them for surface drainage from adjacent lots; and it is unimportant that a water course once existed at the place in question, if it is there no longer. *Broomall v. Chester*, 1 W. N. C. 228.

In Delaware, a municipal corporation was held not liable for interrupting surface drainage by raising the grade of a street. *Clark v. Wilmington*, 5 Harr. (Del.) 243.

But that decision is explained in *Magarity v. Wilmington*, 5 Houst. (Del.) 530, as being based on the ground that a municipal corporation is not liable for damages resulting from an act done or authorized by it in the due exercise of a discretion conferred upon it by law.

A city is not liable for damages to a landowner because change of grade of a street prevents surface water of the lot from flowing off. It is not different, even if the surface water is, by reason of such change of grade, increased in quantity upon the lot, if not cast in a mass or body upon the premises; nor is a city liable for mere surface water flowing from the street upon an adjoining lot. *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 26 S. E. 266.

One who petitions for the establishment of a grade and the improvement of a street upon which his lots front, and who, without objection, pays an assessment for benefits without exercising his right to appear before the common council and urge his claim for damages on account of the stoppage of water and the temporary flowage of his land, cannot thereafter maintain an independent proceeding to recover damages for such cause. *Hembling v. Big Rapids*, 89 Mich. 1, 50 N. W. 741; *Collins v. Grand Rapids*, 95 Mich. 286, 54 N. W. 889.

Highway commissioners are not liable for injuries caused by raising the grade of the highway in such a manner as to prevent surface water from flowing off from abutting property over the highway. *Gould v. Booth*, 66 N. Y. 62.

And successors of commissioners of highways, who, in constructing an embankment upon a highway, neglected to provide a sufficient culvert to carry off the surface water on abutting

property, are not personally liable for injuries caused by such surface water. *Ibid.*

Most of those cases involve merely an alteration of the flow of diffused surface water, and, in so far as they do, they are undoubtedly correct; but it will be observed that the language used is general, and in some cases the rule is applied to the closing of natural drainways. In so far as it is so applied, the decisions are erroneous, and opposed to better considered cases elsewhere. Moreover such rulings are forbidden by constitutional provision in some states.

A city is liable for damages from an overflow caused by its raising the level of a private street near the land overflowed, and filling up a gully by which the water was more easily carried away, so as to expose such land to overflow,—especially when the sewer which the city placed in such street was insufficient, in case of a heavy rain, to carry off the surface water. *Scanlan v. Montreal*, Rap. Jud. Quebec, 17 C. S. 363.

In *Rowe v. Addison*, 34 N. H. 306, it is said by Eastman, J., that surveyors of highways are not authorized to make embankments on the sides of roads so as to throw back upon adjoining owners the water that naturally flows into the highways; it being their duty to make culverts or bridges for it to pass across the roads, or to make channels or canals by the sides of the highways so that it may flow off without injury. Therefore, a surveyor of highways, and those acting under him, were held liable for damages caused by the construction of an embankment across a road in his district, causing water which would naturally pass through his district to flow into an adjoining district, and upon the premises of a private owner; being bound to consider the effects of his acts, not only upon private land situated in his district, but upon that situated in an adjoining district.

A turnpike company, in converting an open ditch, which was of sufficient capacity to carry off the water from the road, into a covered drain, is liable for constructing gratings and catch pits insufficient to enable the water to enter the drain, whereby land was flooded. *Whitehouse v. Fellowes*, 30 L. J. C. P. N. S. 305, 10 C. B. N. S. 765, 4 L. T. N. S. 177, 9 Week. Rep. 557.

Under a constitutional provision imposing liability for all injuries arising from a taking or injuring of private property by exercise of eminent domain, a municipal corporation is liable for injuring the drainage of abutting lots by reason of the change of a street grade. *Re Chatham Street*, 191 Pa. 604, 43 Atl. 365.

A municipal corporation cannot, by changing the grade of streets, cut off the natural drainage of water so as to flow it back on adjoining proprietors. *Kemper v. Louisville*, 14 Bush, 87; *Bowman v. New Orleans*, 27 La. Ann. 501.

A municipal corporation cannot back surface water. *Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1; *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591; *Lake v. Bok*, 33 Ill. App. 45; *Maguire v. Cartersville*, 76 Ga. 84.

A municipal corporation is liable for injury to an owner's land caused by its act in throwing water back thereon, and the fact that the acts of others contribute to increase the flow does not relieve it from liability. *Edwards v. Peoria*, 66 Ill. App. 68.

An action for damages may be maintained by 65 L. R. A.

a land holder against a city for changing the grade of its streets by making an embankment in front of the land and providing no sewer for any of the accumulating waters, which therefore flowed onto and damaged the land. *Mt. Sterling v. Jephson*, 21 Ky. L. Rep. 1028, 53 S. W. 1046.

Recovery against a city for damages to land by the backing of surface water caused by the grading of a street is not defeated under the rule that no recovery can be had where the injury may be avoided by the grading of the property so as to conform to the established grade, where such surface water has formed for itself a definite channel in which it is accustomed to flow. *Los Angeles Cemetery Assn. v. Los Angeles*, 103 Cal. 461, 87 Pac. 375.

A municipal corporation is liable to a property owner for the flooding of his premises caused by the damming back of the water naturally flowing there so that it could not reach its natural outlet by the raising of the grade of an alley. *Edwards v. Peoria*, 66 Ill. App. 68.

A municipal corporation is liable if, in grading and improving its streets, the work is done so negligently and unskillfully as to prevent surface water falling or naturally flowing on abutting land from surrounding territory from escaping or running off. *Princeton v. Gleake*, 93 Ind. 102.

A municipal corporation is liable for damages to an owner's premises from back water caused by the grading of a street and the construction of a sewer of insufficient capacity to allow the escape of water during heavy rains, and permitting the same to become obstructed. *Logansport v. Wright*, 25 Ind. 512.

A municipal corporation is responsible to one whose property abuts on one of its streets and alleys when, by reason of an embankment made by the city in front of the lot, during the improvement of the street, the water flowing over the lot is so obstructed as to injure the property of the abutting owner, if by properly constructing temporary drains and culverts the injury could have been prevented. *Cotes v. Davenport*, 9 Iowa, 227.

A town is liable to the owner of a lot for damages resulting from the backing thereon of surface water due to the grading of a street in such a manner as to stop the flow of such water in a channel in which it is accustomed to flow, the principle that a town is not responsible for consequential damages in the regular performance of its legitimate functions in grading a street being inapplicable to such a direct invasion of property. *Larrabee v. Cloverdale*, 131 Cal. 96, 63 Pac. 143.

There is no implication in a contract for sale of lots that the corporate authorities shall have power so to change and improve streets dedicated on the plat thereof as to make them safe and convenient highways for the public, which will relieve the municipality from its liability, under a constitutional provision that it shall make just compensation for all property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, for damages caused by raising the grade of a street so as to check the natural flow of water from one of such lots and cause it to stand thereon. *Avondale v. McFarland*, 101 Ala. 381, 13 So. 504.

In assessing damages upon the improvement of a highway, which from the plan and specification thereof it appears will result in the flood-

ing of adjoining lands by reason of failure to provide for the extension across such highway of a culvert placed therein on a partial improvement thereof, thereby shutting off the natural drainage of such lands, the jury are confined to the plan and specification, and cannot consider the statement of members of the village council that if it becomes necessary the village will extend the culvert and take other means to prevent such flooding. *Martin v. Bond Hill*, 7 Ohio C. C. 271.

Injury to lands by the filling of streets and raising of catch basins so as to render useless drains previously established and paid for, and causing water to flow back thereon, which would otherwise have been carried off, is a continuing nuisance. *Toledo v. Lewis*, 17 Ohio C. C. 588.

Obstructing swales.

The rule adopted in Wisconsin, that the owner of the inferior or lower estate may obstruct or repel the flow of surface water of the upper estate without liability for the injuries occasioned by such act, is held, in *Hoyt v. Hudson*, 27 Wis. 630, 9 Am. Rep. 473, to be applicable to a municipality which, by the raising and grading of its streets, obstructs and turns back surface water flowing down a ravine on the plaintiff's premises and crossing the street.

So, the stoppage of surface water flowing in a ravine by the grading of a street across it in such a way that the road embankment constitutes a dam to the waters will give no right of action against the city to a landowner whose property is injured by the water so set back. *Harp v. Baraboo*, 101 Wis. 368, 77 N. W. 744.

But in California it is held that the general rule that municipal corporations, in the grading and improvement of streets, are not bound to provide for the escape of mere surface water, has an exception where such water, owing to the confirmation of the adjoining country, has formed for itself a definite channel in which it is accustomed to flow, although such channel does not come within the common-law definition of a water course. *Los Angeles Cemetery Asso. v. Los Angeles*, 108 Cal. 461, 37 Pac. 375.

So, when, in the judgment of a municipal corporation, it becomes necessary, in making a public improvement, to obstruct the natural channel of a stream formed by surface water made up of rains and melted snow which has fallen on the sides of the ravine in which the water flows, or on the sides of those ravines tributary thereto, and where the water often flows with the rapidity of a torrent and the volume of a small river,—the city is bound to provide artificial channels to carry off the water without injury to the property of others, and to exercise reasonable care, skill, and diligence in doing the work. If it becomes necessary to divert the water upon private property the right must be procured by condemnation proceedings. *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 787.

A city, in grading its streets, may fill a swale which it knows, or is bound to know, is the natural conduit of surface water from a large area of surrounding country to a river; but it is charged with the duty of constructing sufficient outlets for such water. *Beatrice v. Leary*, 45 Neb. 149, 63 N. W. 370.

One who petitions a city to grade and pave one of its streets near the petitioner's property will not thereby be estopped from claiming dam-

ages because of the city's negligence in failing to provide suitable and sufficient outlet for the surface waters frequently running in a draw, the outlet of which is stopped by the grading of the street, particularly under the Nebraska Constitution, providing that private property shall neither be taken nor damaged for public use without compensation. *Ibid.*

Where the rule prevails that even natural drainways may be obstructed, the private property owner is entitled to its benefit, as well as the municipality.

A lot owner may fill up his lot and thereby obstruct a swale into which street gutters empty, without either building, or permitting the city to build, any drain in its stead, unless a prescriptive right to such a passage has been acquired by the municipality. *Bangor v. Lansil*, 51 Me. 521.

e. Consequential injuries.

In turning water upon abutting property so as to flood it, or in obstructing a natural drainway, there is an element of active wrong which renders the municipality liable for its act. In addition to this ground of liability, it is generally conceded that the municipality is liable for injuries caused by the negligent performance of its duties. Thus, it is held that injury to land along a highway by the flowing of surface water thereon, on account of the unskilful and careless manner in which highway commissioners constructed a ditch or drain and a grade or embankment along the highway, was not one of the consequential damages for which such owner received compensation, when the right of way for such highway was condemned through his land some twenty years prior to the acts complained of. Such damages were too remote and uncertain to have been taken into consideration in assessing the damages that would result to his land by reason of the construction of such highway. *Tearney v. Smith*, 86 Ill. 891.

In holding that the municipality is liable for its negligent acts some of the courts have lost sight of the commission of active torts as an additional ground of liability, and have held that, if there was no negligence, there was no liability.

In *Powell v. Wytheville*, 95 Va. 73, 27 S. E. 805, the complaint alleged that in the improvement of a street the defendant had filled up a ditch or gutter which carried the surface water flowing along the street in such a way as to cast the water onto plaintiff's lot, and the court held that, if the work was not executed in a proper and skilful manner, there arose a common-law liability for all injuries not necessarily incident to the work, and which were chargeable to the unskilful or improper manner of exercising it; and that the questions whether, in doing the work, it was necessary to fill up the ditch or gutter, and, if necessary, whether it was practicable to substitute other means of drainage to take the water off, were matters of fact to be considered on the trial, in connection with other circumstances and facts of the case, in determining whether the defendant was guilty of negligence in executing the work.

It will be observed that the implication from that ruling is that, if there was no negligence there was no liability, regardless of the injury inflicted. Such a rule loses sight of a very large field of liability because of active interference with private right when no negligence can be found in the prosecution of the work. The

logical effect of this rule is to hold that, if a sewer system is carefully devised and constructed, the municipality is not liable, although it empties its contents directly upon private property. The true rule is that the municipality is liable if it actively injures private property by surface water, whether such injury is the necessary result of work carefully performed in the prosecution of its own enterprises, or the unlooked-for result of the negligent performance of work which, if properly done, would be innocuous.

When the doing of the act does not necessarily involve a trespass upon the adjoining property, but the injury is an incidental effect of the act, there is a tendency on the part of some courts to call it consequential, and to hold the municipality free from liability. Calling an injury consequential is, however, a very unsatisfactory way to dispose of the case. Some injuries may be indirect and yet plainly entitle the injured person to compensation, and others may be direct and yet be *injuria sine damno*. A consequential injury for which there is no liability to make amends is one which attends the doing of an act which the person doing it has a perfect right to do in the way in which he does it. So that to determine whether or not an injury is consequential the lawfulness of the act causing it must first be ascertained. This is a task frequently evaded by declaring the injury consequential because not the result of a trespass when it may, nevertheless, be the result of some other act which in law is wrongful. When the act is done by the state, there is no redress unless expressly given by the Constitution or statutes, and, under the old forms of the Constitution, which provided compensation for property taken only, a strict construction would exclude compensation where the property was merely injured. Later constitutions have changed this rule by providing compensation for property damaged. Municipal corporations are not entitled to all the immunity belonging to the state. They become liable, not only when compensation is provided by the Constitution or statute, but also when they are guilty of negligence. In fact, in respect to their dealings with surface water, their liability is that of an individual under like circumstances. Notwithstanding this fact, there are many cases in which the liability of the municipality has been denied on the ground of consequential injury when an individual would be liable.

Judge Lawrence said that the theory that private rights are ever to be sacrificed to public convenience or necessity without full compensation is fraught with danger, and should find no lodgment in American jurisprudence. *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392.

If the necessary result of the act of the municipality, no matter how rightful when considered by itself, is to interfere with the private right of the abutting owner to be free from having surface water cast in unusual quantities onto his property, or from having natural drainways obstructed, the municipality cannot escape liability by calling the injury consequential.

Where a city, in the exercise of its powers, grades streets and raises them above the surface of adjoining lots, causing thereby the overflow of lots and consequent damage, the lot owners have a cause of action against the city under a constitutional provision that no person's property shall be taken, damaged, or destroyed for 65 L. R. A.

or applied to a public use without adequate compensation. *Cooper v. Dallas*, 83 Tex. 239, 18 S. W. 565.

In case a municipal corporation, in the exercise of eminent domain, diverts surface water in such a way as to do injury to an individual, just compensation must be made for the injury inflicted. *Churchill v. Beethe*, 48 Neb. 87, 35 L. R. A. 442, 66 N. W. 992.

It seems, that if a statute should expressly authorize a city to grade its streets without regard to the throwing thereby of surface water upon the abutting land, it would be unconstitutional, as authorizing the taking of private property for public use without just compensation. *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520.

Although the Connecticut court held that a statute permitting persons charged with the repair of highways to drain off water therefrom onto or across the land of others, with a proviso that it shall not be drained into any dooryard, in front of any dwelling house, or into an inclosure used exclusively for the storage and sale of merchandise, thereby exempts towns from liability for injuries inflicted by such drainage. *Bronson v. Wallingford*, 54 Conn. 513, 9 Atl. 393.

A municipal corporation is liable for injuries to the premises of a private citizen, caused by the grading of a public street so as to throw surface water thereon, by virtue of the constitutional provision that no man's property shall be taken or applied to public use without just compensation therefor. *Gray v. Knoxville*, 85 Tenn. 99, 1 S. W. 622.

Although it has been held that municipal actions, like the establishment of grades for streets, building of drains, or the construction of sewers under a positive and direct legislative authority, so long as they do not directly encroach on contiguous property, although they may impair their use by indirect consequences, do not constitute a taking of private property for a public use without just compensation within the constitutional meaning. *Aicher v. Denver*, 10 Colo. App. 413, 52 Pac. 86.

A constitutional provision that private property shall not be taken or damaged for public use without just compensation does not render a city liable for damages to property from surface water where a private individual would not be liable. *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 26 S. E. 266.

So, when, in repairing a highway, breaks are made across it to conduct surface water without changing its natural course or draining more water on lower lands than they were naturally servient to, there is no construction, alteration, or enlargement of a public work within a constitutional provision requiring payment of consequential damages. *Warner v. Muncy Twp.* 18 Pa. Co. Ct. 582.

Exemption from liability for consequential injuries.

Injury to, or depreciation in the value of, abutting property because of lawful improvements carefully made upon city property give the owner no right of action, unless some legal right belonging to him is infringed. Such injuries are consequential.

A municipal corporation is not liable in tort for damages consequential to private property by changing a highway grade. *Hoster v. Philadelphia*, 12 Pa. Super. Ct. 224.

And the flowing of surface water is treated as consequential damages. *Lee v. Minneapolis*, 22 Minn. 13.

A municipal corporation is not liable in North Carolina, when, as an incident to the construction or changing of the grade of a street, an owner of adjacent land is injured by the consequential diverting of the surface water, whereby his premises are flooded or his building rendered insecure. *State v. Wilson*, 107 N. C. 865, 12 S. E. 320.

A municipal corporation, having ample statutory power to grade its streets, is not liable for the flowage of surface water upon private property caused by the skillful and careful raising, in good faith, of the grade of a street, as such damage is the result of the exercise of the discretionary power conferred by law upon the city, subject to which private property is held. *Magarity v. Wilmington*, 5 Houst. (Del.) 530.

An embankment which is not an unnecessary or improper improvement of a highway, when there is no negligence in either its design or construction, does not give rise to a cause of action to an adjoining landowner by diverting the natural flow of surface water so as to turn it over his land. *Churchill v. Beethe*, 48 Neb. 87, 35 L. R. A. 442, 66 N. W. 992.

Where a municipal corporation, in grading its streets, raises the grade so as to cast the surface water on an adjoining lot, if the grade of the street is not raised in violation of the Constitution, or some statute law, or the charter of the corporation, no action can be maintained by the adjoining lot owner for damages sustained by reason of the flow of surface water on his lot. *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234.

Unless expressly so declared by charter or statute, a municipal corporation clothed with full power to grade and improve its streets is not liable to property owners for consequential damages necessarily resulting from the action of its governing body in establishing the grade of a street and causing it to be improved in conformity therewith, whereby surface water is cast on an adjoining lot. *Lee v. Minneapolis*, 22 Minn. 13.

A city is not liable for consequential injury to adjoining property resulting from raising the grade of a street, although the result may be to interfere with the flow of surface water and cause it to accumulate on the premises of another. *Pye v. Mankato*, 36 Minn. 373, 31 N. W. 863.

A municipality constructing a ditch in a prudent and careful manner along a highway for the purpose of draining the same is not liable for injuries caused thereby to adjoining land. *Lambar v. St. Louis*, 15 Mo. 610.

One whose property is injured by water caused to flow upon it by the unskillful manner in which an adjoining street is graded, is entitled to recover irrespective of the question whether or not he improved his property by the grade furnished him by the city engineer; but if the injury was not caused by the negligent or unskillful way of doing the work, he may not recover for injury consequential to the work, although his improvement was in harmony with the grade furnished him by the city engineer. *Russell v. Burlington*, 30 Iowa, 262.

In the absence of negligence, a municipality is not liable for injuries resulting to adjoining property from the grade of its streets draining more surface water into a sewer than its capac-

ity would enable it to carry off. *Steinmeyer v. St. Louis*, 3 Mo. App. 256.

Damages to an owner's land from flooding resulting from the grading by a municipal corporation of a public street does not constitute a taking of property within the meaning of the Constitution. *Weiss v. Madison*, 75 Ind. 241, 39 Am. Rep. 135.

A municipal corporation, authorized by law to construct drains in public highways outside its corporate limits, is not responsible for consequential damages to abutting property owners resulting from the proper and reasonable exercise of that authority. *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618.

It is very apparent that the fact that the municipality was carrying forward a public enterprise in a lawful manner prevented the court, in some of the above cases, from seeing that, notwithstanding the lawfulness of the enterprise as between the municipality and its taxpayers and the public, its direct effect was to cast gathered water in an unlawful manner upon the abutting owner's property, or to obstruct his drainways, and that, as to him, the city's act was, therefore, wrongful, and he had a right of action. This obscurity of vision resulted in erroneous decisions.

In some of the earlier cases the nonliability was placed on the ground that a municipal corporation is not liable for exercising its authority. *Roll v. Augusta*, 34 Ga. 326.

Liable for negligence.

Surface water cannot be gathered into a body and abandoned so near a neighbor's line as to find way onto his land to his injury. The maxim, *Sic utere tuo ut alienum non laedas*, applies. Violation of this rule is negligence which will give a right of action. So, if an attempt is made to conduct surface water in a ditch along a neighbor's line the same rule requires that reasonable care shall be exercised to construct a ditch suitable for the purpose for which it is intended.

A municipal corporation has no more power over its streets than a private individual has over his own land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages without being responsible itself. *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392.

A municipal corporation is liable for negligently casting water on adjoining property. *Wallace v. Muscatine*, 4 G. Greene, 373, 60 Am. Dec. 131; *Cotes v. Davenport*, 9 Iowa, 227; *Templin v. Iowa City*, 14 Iowa, 59, 81 Am. Dec. 455; *Ellis v. Iowa City*, 29 Iowa, 229; *Russell v. Burlington*, 30 Iowa, 262.

Though the act of changing grades or providing sewers, or refusing to change them or to provide them, may involve a discretion, yet this is not a sufficient defense to an action against the city when private property has been invaded and its use impaired without compensation, by having surface water thrown thereon as a result of the grading of a street. *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520.

When a public work is in itself lawful, and the flooding of private property is not the necessary consequence of the improvement, but of some careless act or omission in erecting, managing, or maintaining the same, the municipal corporation should be held only to ordinary care,

and not to a high degree of care, or as an insurer. *Netzer v. Crookston*, 59 Minn. 244, 61 N. W. 21.

If a city collects and turns into its sewers such quantities of surface water that the capacity of the sewers is exceeded, by reason of which the water is backed up in private drains to the damage of their owners, the city may be compelled to answer in damages. *Bates v. Westborough*, 151 Mass. 182, 7 L. R. A. 156, 23 N. E. 1070; *Emrey v. Lowell*, 104 Mass. 16.

In a suit for damages alleging the flooding of plaintiff's premises and injuring goods in his cellar because of the negligence of a municipality in constructing an embankment in raising the grade of a street, a charge to the jury is imperfect unless the question of negligence *vel non* is submitted. *Kearney v. Thomeason*, 25 Neb. 147, 41 N. W. 115.

If a city attempts to provide for the surface water, and is negligent in doing so, there may be a liability. *Damour v. Lyons City*, 44 Iowa, 276.

A highway culvert is negligently constructed if upon an improper location, or if placed where it will destroy or render expensive the use of a private way. *DeLauder v. Baltimore County*, 94 Md. 1, 50 Atl. 427.

If a city, in grading its streets, does the work in an unskilful and improper manner by making improper or insufficient gutters, by reason of which the water is caused to flow from the street upon the premises of an abutting owner, such owner will be entitled to recover for the injuries resulting. *Ellis v. Iowa City*, 29 Iowa, 229.

A municipal corporation, although having a right to build an embankment to raise the grade of a street, may be liable for injuries caused by surface water thrown upon adjoining property by the negligent manner of the exercise of the right. *Kearney v. Thomeason*, 48 Neb. 74, 66 N. W. 996.

A municipal corporation is liable for negligently grading a street in such manner as to cause water to flow in upon a lot and into the cellar of a building thereon. *Templin v. Iowa City*, 14 Iowa, 59, 81 Am. Dec. 455.

A municipal corporation may be found negligent in constructing a culvert to carry water flowing in a gutter under the street so as to leave a gas pipe across it, the result of which is that in a heavy storm refuse floating with the water becomes jammed against the pipe and backs the water upon abutting property to its injury. *Buchanan v. Duluth*, 40 Minn. 402, 42 N. W. 204.

If, in raising the grade of a street, the city negligently fails to provide for the escape of surface water, it is liable for the injury. *Ross v. Clinton*, 46 Iowa, 606, 26 Am. Rep. 169.

A city is liable for injuries occasioned by the negligent and unskilful construction of a gutter along private property, and for its failure to keep the gutter free from obstructions, whereby surface water flows thereon which otherwise would not have flowed there, although the lot is below grade. *Gilluly v. Madison*, 68 Wis. 518, 52 Am. Rep. 299, 24 N. W. 187.

An adjoining lot owner is entitled to damages which may be proximately the result of negligent construction of drains or ditches by a city, causing injury to the value of the lots or danger to those using the property. *Groos v. Lampasas*, 74 Tex. 195, 11 S. W. 1086.

Discretionary power to construct a drain does 65 L. R. A.

not confer a right to throw waters onto lower lands where they do not naturally flow; so that, when a municipal corporation under its statutory powers constructs a ditch, it is liable if it surcharges and so maintains it as to allow adjoining lands to be damaged. *Williams v. Raleigh Twp.* 21 Can. S. C. 103, Affirmed in [1893] A. C. 540, 63 L. J. P. C. N. S. 1, 1 Reports, 431, 69 L. T. N. S. 506.

An invasion of an individual's property rights for which a city is liable results through its maintenance of a faulty and insufficient system of drains, whereby the surface water is unreasonably turned upon such individual's premises. *Flanders v. Franklin*, 70 N. H. 168, 47 Atl. 88.

A municipal corporation is liable for injury done to private premises by a flowage of water thereon due to the negligent manner in which the work of grading a street and sidewalk was executed, although it is not liable for such damages as are necessarily incident to the property by reason of its location by the bringing of the street and sidewalk to the grade existing when the owner purchased the property, and of which grade he was bound to take notice. *Benson v. Wilmington*, 9 Houst. (Del.) 359, 32 Atl. 1047.

A city which, in accordance with power given it, directs a culvert to be made to conduct the water of a natural stream which has previously been the outlet through which surface water of a portion of the city has been carried, will be liable for injuries resulting from the unskilful construction of the culvert so small that it will not carry all the water naturally flowing to it. *Rochester White Lead Co. v. Rochester*, 8 N. Y. 463, 53 Am. Dec. 316.

A municipal corporation, although it is not bound to build sewers or culverts to carry off surface water, is responsible for damages to property by the backing thereon of surface water by reason of the negligent construction of a sewer to carry off such water, which it has seen fit to exercise its discretionary power to construct. *Frostburg v. Hitchins*, 70 Md. 56, 16 Atl. 380.

A municipal corporation is liable for injury to an owner's property from flooding caused by its negligence in constructing a sewer for surface water in a street, and allowing the same to become obstructed and filled up. *Peoria v. Eisler*, 62 Ill. App. 26.

A municipal corporation is liable to the owner of private property for damage thereto from flooding, caused by the defective construction by such municipality of street gutters and drains or sewers, or by negligently allowing the same to become obstructed, whereby the surface water from the street is thrown upon such owner's property. *Aurora v. Gillett*, 56 Ill. 132.

While a city may change the grade of a street at its own will or pleasure, yet, when the grade is changed and sewers or drains are constructed for the purpose of carrying off surface water, and are constructed in such an imperfect manner that the water is turned into the basement of a building of a lot owner, the city will be liable for the damages sustained thereby. *Elgin v. Kimball*, 90 Ill. 356.

In constructing ditches for drainage made necessary by the erection of walls by a lot owner to protect against surface water, it is the duty of the city to construct them with ordinary skill, and to cause thereby as little injury to the adjacent lot owner as would be consistent with the right to make the improvement. *Groos v. Lampasas*, 74 Tex. 195, 11 S. W. 1086.

A municipal corporation in the construction of a culvert to carry a stream which is the outlet of surface water must exercise that care and prudence which a discreet and cautious individual ought to exercise if the whole risk or loss were to be his alone. *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316.

A municipal corporation is liable for the damages resulting to an owner's lot from an obstruction to the drainage thereof, caused by the negligent manner in which the United States government placed the sewer and catch-basin when it raised the grade of a street so as to enable the same to cross a levee constructed by it to protect government property, where the municipal corporation consented to the performance of the work, and exercised some authority in the regulation of the mode of constructing the approach; and the fact that such owner consented to a proper construction of the work constitutes no bar to the action. *Jeffersonville v. Myers*, 2 Ind. App. 532, 28 N. E. 999.

The fact that a city lot is below the grade of a street does not preclude its owner from recovering compensation from the city for injuries to property on such lot resulting from a failure of the city to keep a storm-water drain pipe open, if such a pipe, when open, would have prevented the injury. *Parker v. Laredo*, 9 Tex. Civ. App. 221, 28 S. W. 1048.

Where there is a natural drain or depression across land abutting on a street, which has existed from time immemorial, and which has been the means for carrying off surface water after rainfalls; but the drain has no perceptible bank or bed where it crosses the city street,—the owner of such land abutting on the street may protect it from the flow of the surface water, and build a wall upon it for that purpose; and, having this right, he has the same right that any other landowner has to exact of the city in which the land lies, in case it undertakes to construct drains for the carrying off of such surface water, that they shall not injure his property. *Groos v. Lampasas*, 74 Tex. 195, 11 S. W. 1086.

A municipal corporation is not relieved from liability for injuries caused by its negligent construction of a culvert on a public street by the fact that the money to pay therefor was obtained from the county. *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622.

Wrongful acts.

A city which has power to establish the grade of streets by ordinance will be liable for injuries caused to the adjoining property by surface water by raising a street to a grade otherwise established. *Amemanson v. Kearney*, 35 Neb. 881, 58 N. W. 1009.

But where a culvert for the escape of surface water, constructed under a railroad track, was subsequently extended by a city across a street and into vacant property, but without any resolutions as to it being passed by the city council, or authorized acts being done by the mayor or other officers or agents in relation thereto, the city is not liable for damages arising from its subsequent obstruction and overflow, resulting in injury to property. *Robinson v. Danville (Va.)* 43 S. E. 337.

f. Pollution of water.

A city is liable for collecting surface water contaminated by filth, and discharging it on 65 L. R. A.

private property, thereby injuring wells, and producing noxious smells on the premises, and reducing their rental value. *Holmes v. Atlanta*, 113 Ga. 961, 39 S. E. 458.

A city is liable in damages for the act of its commissioner in depositing large quantities of rubbish and offal, offensive and injurious to health, in a lane adjoining plaintiff's cottages, by which the lane was raised 3 or 4 feet, thus wrongfully causing water and filth to flow in and upon said cottages, and rendering a well attached to the houses unfit for use; but the expense of raising one of the houses and removing the kitchen cannot, however, be recovered. *Lewis v. Toronto*, 39 U. C. Q. B. 343.

In an action against a municipal corporation for injury to an owner's lot from overflow caused by the diversion of surface water from its natural course and discharging the same into a box sewer across such owner's premises, thereby increasing the quantity of the flow beyond the capacity of such sewer, and causing the same to burst, the fact that the additional waters were polluted by the drainage from privies, cesspools, barnyards, etc., belong its course belonging to third parties, thereby rendering the compound which flooded his premises foul, noxious, and unwholesome, is a proper element to be considered by the jury, although the municipal corporation may not have consented to the contamination, or directed it, or been aware of its existence. *Elgin v. Hoag*, 25 Ill. App. 650.

But a municipality which made a culvert across a highway to carry surface water only is not liable for an injury caused by sewage discharged therefrom deposited by individuals without its permission or sufferance. *Noble v. St. Albans*, 56 Vt. 522.

III. Acquiring right of way for drain.

A municipal corporation will be enjoined from constructing a ditch along a highway through a railroad embankment across such highway, until some provision is made for the payment of the damages sustained by the railroad company thereby, where the latter had a lawful right to the use of such street in the manner occupied by it, subject to the rights of the public to all the ordinary and proper uses of a highway, and such ditch is to be constructed solely as a means of draining adjacent lands, thereby subjecting the street to a new use to which such right of way is not subject. *Chicago & N. W. R. Co. v. Jefferson*, 14 Ill. App. 615.

Under the Bill of Rights of South Dakota, which declares that "private property shall not be taken for public use, or damaged, without just compensation," and under the statute of that state which requires that a just compensation be made to one whose land is taken for a public highway, the supervisors, in estimating the value to such lands, may take into consideration the fact that the construction of the road will make a farm over which it passes liable to injury from water accumulating thereon to such an extent that it will interfere with passage from one portion of the farm to another. *Bockoven v. Lincoln Twp.* 13 S. D. 317, 83 N. W. 335.

An adjoining owner is entitled, as part of the damages for injuries from the laying out of a highway, to damages for water which is likely to be cast upon his land by the construction of a culvert under the highway. *Churchill v. 18*

Beethe, 48 Neb. 87, 35 L. R. A. 442, 66 N. W. 992.

A landowner may not recover damages when, in the proper and necessary improvement of the highway a culvert is put in so that surface waters which collect on the opposite side of the highway are discharged upon his land; nor may he enjoin the improvement, since he must be presumed to have received compensation for such injury, or have had an opportunity to receive it when the highway was constructed. *Ibid.*

Impairment of the value of property by surface water running down from a viaduct constructed as part of a system of street improvement into adjoining property is a proper element of damages under a constitution requiring compensation for the taking or damaging of property for public use. *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820.

Within the limits of a highway, the officers of a town may construct drains and culverts; and, if the surface water, after flowing in them for some distance, turns upon the land of an adjoining proprietor, no action lies for an injury thereby occasioned. When the highway is laid out a compensation is allowed to the proprietor of the land for all the damages it will occasion, both direct and incidental. *Turner v. Dartmouth*, 13 Allen, 291.

When a highway is constructed a culvert may be put in notwithstanding any injury it may cause an adjoining owner by turning water upon his land, provided he be compensated therefor. *Churchill v. Beethe*, 48 Neb. 87, 35 L. R. A. 442, 66 N. W. 992.

A municipal corporation, having appointed appraisers to adjust the damages that would result to the property of an owner by reason of the flowing of water thereon by a proposed change in the grade of one of its streets, whose report awarding damages in a certain sum was duly approved and confirmed by the common council, cannot afterwards, after the work is completed, refuse to pay the assessment on the ground that it is powerless so to do until the damages to such land are ascertained under the eminent domain law, where such landowner had filed a bill for an injunction, which had been granted, and such adjustment of his damages was made in consideration of his not suing out the injunction, but allowing the work to proceed, and it appears from his bill for such injunction that his grounds therefor formed at least a claim for damages apparently just, which was a proper subject for adjustment and compromise. *Bloomington v. Brokaw*, 77 Ill. 194.

IV. Plans.

Some of the courts have held that the adoption of plans was a judicial or governmental proceeding, so that the municipality was exempt, although they were defective. But the better-considered cases hold that due care must be exercised in the formation of the plan, as well as in the construction of the work. They must be devised by a competent person, and be adapted to the end for which they are intended.

A municipal corporation is liable for injury to land from overflow and washing caused by the negligent manner in which the city devised the plan and executed the work of regrading an alley and constructing a gutter therein and a connecting culvert across a highway. *Stein v. Lafayette*, 6 Ind. App. 414, 33 N. E. 912, 65 L. R. A.

A municipal corporation is responsible for injuries to owner's land from overflow caused by its negligence in devising the plan as well as executing the work of grading one of its public streets; but is not liable for mere error of judgment as to the plan. *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821.

The rule that a municipal corporation is not liable for defects in the plan of its improvements will not relieve it from liability for injuries caused by the inadequacy of culverts to carry off water collected by it in unusual quantities. *Weiss v. Madison*, 75 Ind. 241, 39 Am. Rep. 185.

A municipal corporation, having exclusive control of its streets and alleys and the establishing and maintenance of drains and sewers, is liable for injuries to premises from flooding caused by the adoption by it of imperfect plans for the drainage of an alley, in accordance to which a contractor executed the work, whereby a large body of surface water was collected in a basin in the alley adjoining such premises without any outlet therefor. *New Albany v. Ray*, 3 Ind. App. 321, 29 N. E. 611.

The decision as to the sufficiency of the capacity of a culvert to carry water under a public street is not such a judicial function as to relieve the municipality from liability for injuries caused by negligent performance of such duty. *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622.

If a city exercises legislative functions in adopting a plan for disposing of water which sometimes runs through a swale the outlet of which is stopped by grading a street, and if it would not be liable for the deficiency and imperfection of the plan, nevertheless, as its execution would be a ministerial act, the city would be liable for negligence in executing it by constructing the ditches of insufficient capacity, if, as a proximate result, injury is done by the water stopped by the street grade. *Beatrice v. Leary*, 45 Neb. 149, 63 N. W. 370.

Under Me. Rev. Stat. chap. 18, § 67, the municipality was held liable in an action of assumpsit for the value of alterations made, by direction of the selectmen, to a ditch constructed by surveyors of highways "by the side of a way so as to incommode" a person's house or other building. *Getchell v. Oakland*, 89 Me. 426, 38 Atl. 627.

A municipal corporation is not liable for water cast upon property adjoining one of its streets owing to the insufficiency of the culvert to carry off the water which fell in unusually heavy showers, when the engineer, who constructed the culvert in the exercise of his best judgment, said that it was sufficient, and when he was competent for the work and sanctioned it, as it is only for the negligence or failure to exercise ordinary care that the city can be held liable. *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622.

On the other hand, liability has been denied in the following cases:

A municipal corporation may adopt such appropriate means to carry surface water along the side of a street as it sees fit; and, if the sewer or ditch constructed for that purpose proves inadequate from lack of judgment as to capacity, and water backs up therefrom or overflows upon private property, it is not liable for resulting damages. *Sullivan v. Pittsburg*, 5 Pa. Super. Ct. 357.

If a municipal corporation fails to exercise

its power to construct sewers, or if, acting, it adopts a plan, however inefficient, and constructs its drains in conformity thereto, and injury results to an individual in consequence of the plan being defective, or of the drain not being of sufficient size to accommodate all the water, there is no resulting liability to the city. *Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

A municipality in opening and grading a street is not liable for injuries to adjoining property resulting from its failure, in adopting a plan for the construction of the road, to provide a method for carrying off surface water, as it is liable only for negligence in the execution of the plan adopted, and not for defects in the plan itself. *Foster v. St. Louis*, 71 Mo. 157.

A municipal corporation is not liable for damages to lands by overflow caused by a defect in the plans of a culvert across a street, due to a mere error of judgment. *Peru v. Brown*, 10 Ind. App. 597, 38 N. E. 223.

In laying out a street across a ravine in which there is a flow of water to be provided for, when it is deciding what route the street shall take, the expediency of laying it out, or its grade, the city is exercising judicial duties, and it will not be responsible for errors of judgment, but, having decided it expedient to obstruct the natural channel of these waters, and to divert them into another and artificial channel, then in executing this plan, including the construction of the sewer and fixing upon its size or capacity, the city exercises purely ministerial duties, in the performance of which it is held to the exercise of reasonable care. *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767.

Negligence in devising the plan of a culvert having an outlet in another culvert intersecting it nearly at right angles, whereby it became filled up by accumulation of sand and dirt, will not be imputed, as a matter of law, to a municipal corporation, so as to render it liable for the overflow of adjacent land, in the absence of evidence showing the details as to size and construction of both culverts and the care exercised in adopting the plan,—especially when the work was done with the knowledge and consent of the complaining owner, and upon the recommendation of the street committee of which he was a member. *Peru v. Brown*, 10 Ind. App. 597, 38 N. E. 223.

V. Obstructed drains.

The rule as to rights in surface water does not apply to a case where a city has dammed up a gutter at the side of the street so as to cause water to flow onto the land of an abutting owner; and the city may be liable for such action. *McInery v. St. Joseph*, 45 Mo. App. 296.

A municipal corporation, having exercised its charter right to construct a gutter for the purpose of conducting the water along a street, is bound to keep the same in repair, and is liable for an injury to adjoining property by the flooding thereof on account of a break in such gutter. *Alton v. Hope*, 68 Ill. 167; *Wessman v. Brooklyn*, 40 N. Y. S. R. 698, 16 N. Y. Supp. 97.

While no legal obligation rests upon a municipal corporation to provide water ways of sufficient capacity to protect the property of citizens from overflow and damages, yet such as have been provided must be kept in repair and

free from obstruction. This rule is subject to the right of the city to make necessary municipal improvements in a prudent and skillful manner, although the work may cause a partial obstruction of the drains to an improved street. *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729.

A city which negligently permits a gutter and culvert connected with the public highway to become obstructed, whereby water is thrown back upon the plaintiff's land and dwelling house, is liable for the resulting damage, although the obstructed culvert is within the limits of a railroad crossing, and under the care of the railroad. *Parker v. Nashua*, 59 N. H. 402.

A municipal corporation is liable to a landowner for injury to his premises from the backing up of water thereon from a ditch, into which the city has collected surface water out of its natural course, caused by an obstruction placed therein by the act of a third party, of which obstruction the city had notice. *Effingham v. Surrells*, 77 Ill. App. 460.

Where a culvert is constructed by a city in the place of the channel through which the water drained from a portion of the city naturally flowed, and the city, through negligence, permits the culvert to be stopped up, it is liable for the damage caused to a property owner by the flooding of his premises. *Dallas v. Schultz* (Tex. Civ. App.) 27 S. W. 292.

If a municipal corporation unnecessarily dams up a gutter, or permits an obstruction to remain therein an unreasonable time, so as to cast the water on an adjoining proprietor, it is liable. *Harper v. Milwaukee*, 30 Wis. 365.

A landowner may maintain an action at common law against a township to recover damages sustained from the overflowing of a highway drain which had been allowed to get out of repair and be destroyed, so that it failed to carry off the water, which flooded the plaintiff's land, covered it with sand, and damaged his cellar and buildings. *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175.

A city is liable for negligently permitting a gas pipe to be run through a sewer, which causes the water to overflow the property of an abutting property owner; and it is no defense that the water is merely returned to its ancient course. The city has no right to abandon a sewer. *Powers v. Council Bluffs*, 50 Iowa, 197.

A city may be held responsible for the injuries caused by water, resulting from the obstruction of a gutter with earth and other materials placed there in the construction of a sewer, although the expense of the sewer is borne by adjoining owners, and although the work was being done under a contract, where the city board of public works retained full and complete control of the mode and manner of doing the work. *Harper v. Milwaukee*, 30 Wis. 365.

A municipal corporation is liable for the overflow of private property caused by the temporary obstruction of the entire width of a street by the construction of a sewer in an intersecting street, so as to prevent the escape of surface water along the drains provided for it, from which liability it is not relieved because the overflow occurred during an unusual storm, if it was such as might be reasonably anticipated, and the drains provided would have been ample to conduct the waters harmlessly away if they had not been so obstructed. *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729.

A city is not relieved from liability for the unnecessary obstruction of the drains of an improved street by the negligent construction of a sewer in an intersecting street, because the contractor to whom, as the lowest bidder, the work was let, as required by statute, was an independent contractor, as that relation does not exist where the city exercises a supervisory control over the work and a discretionary power over the contract itself. *Ibid.*

When permission has been given to divert surface water from flowing from the highway onto private land by digging a ditch in the highway, it will not be presumed that the municipal corporation undertook to keep it open and in repair. *Eshleman v. Martie Twp.* 152 Pa. 68, 25 Atl. 178.

A village which changes the grade of a street and destroys a gutter theretofore constructed by it is liable for the resulting injury, where the waters previously carried away by the gutter are, by reason of the change of grade, cast upon the premises of the owner of a foundry building which was built below the surface of the street, so that the water entered at the windows and flooded the molding room. *Morley v. Buchanan*, 124 Mich. 128, 82 N. W. 802.

A municipal corporation is liable for the overflow of adjacent premises caused by its negligence in failing to keep an open ditch in a street for the drainage of surface water in repair and allowing the same to become filled up, and by placing obstructions therein, by reason of which the water backed up and overflowed the ditch. *Valparaiso v. Cartwright*, 8 Ind. App. 429, 35 N. E. 1051.

A municipal corporation, in exercising its power of control over its highways, is liable for negligence in bridging a gutter so that the flow of water in ordinarily severe showers is obstructed and thus caused to flow in and upon adjoining premises. *Allentown v. Kramer*, 78 Pa. 406.

If a municipal corporation, in improving a street, fills it up in such a way that water which has been before carried off in gutters is thrown back on adjoining lots, it is liable for the injury, if by proper care it could be prevented. *Smith v. Alexandria*, 33 Gratt. 208, 36 Am. Rep. 788.

A municipality negligently failing to remove obstructions from the catch-basin of a sewer which it had constructed for the purpose of carrying off surface water is liable to an adjoining owner whose property was overflowed. *Woods v. Kansas*, 58 Mo. App. 272.

A municipal corporation is liable for damages to property by the settling and pounding of surface water thereon, due to the failure of the city authorities to keep street drains cleaned out so as to carry it off. *Brunswick v. Tucker*, 103 Ga. 283, 29 S. E. 701.

A municipality is not relieved from liability for damages to adjoining premises by the overflowing thereof due to the obstruction of a gutter during the construction of a sewer, by a statute providing that it shall not be held liable for the damages or injuries incurred or happening "at" any place where work is being done and improvements made on streets under contract, as such injury cannot be said to have occurred at the place where the work was done, and the object of such statute is rather to restrict its statutory liability for injuries to the person or property of travelers in the streets. *Harper v. Milwaukee*, 30 Wis. 365.

65 L. R. A.

A city is chargeable with actual notice of the obstruction of a gutter and culvert and the unprotected condition of a trench liable to be flooded in case of a storm, where such condition has existed for two days upon a much-traveled street, and an inspector representing the city is on the spot watching the progress of the work. *Schumacher v. New York*, 166 N. Y. 108, 59 N. E. 773.

The work of constructing an underground sewer is not conducted with that degree of prudence, care, and skill which the law requires to relieve a municipal corporation from liability if the intersecting street was thereby so obstructed during a rain storm as to cause the falling water to dam up entirely across the street and flow back upon private property, which water, but for such obstruction, would have flowed off without any damage, in the channels provided for it by the city. *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729.

A city which, by the terms of its permit to allow a corporation to lay pneumatic tubes in the street, intends supervision of the work, is liable for the damages suffered by a property owner whose cellar is flooded after a rain storm by water which penetrates therein because the gutter and culvert are obstructed by material excavated from the ditch, which is not properly protected. *Schumacher v. New York*, 40 App. Div. 320, 57 N. Y. Supp. 968.

A city which allows a culvert and gutter to be blocked, and permits an excavation in the street to be left exposed to the water which the culvert and gutter should have carried away, is liable for the resulting damage, where the water from a heavy rain entered the trench, and percolated therefrom into the basement of the adjoining buildings, although the storm was heavy and unexpected, when such a storm was likely to happen at any time. *Schumacher v. New York*, 166 N. Y. 108, 59 N. E. 773.

An action cannot be maintained against a city for negligently constructing a culvert under a public street and altering drains so that more water was directed through said culvert than it could carry off, and for allowing the culvert to become obstructed, whereby plaintiff's premises were overflowed, where it appears that the culvert has existed for twenty years under a public street in the city, but it is not shown by or for whom it was made, nor when the obstruction took place, nor that it had been brought to the city's knowledge. *Bateman v. Hamilton*, 33 U. C. Q. B. 244.

It is not the duty of the owner of land abutting on a street to keep free from obstruction a blind ditch covered with planking and soil, under an ordinance requiring abutting owners to keep all gutters opposite their premises in good repair and free from obstruction, so as to relieve the city from liability for damages to his lot and building from surface water occasioned by failure to keep the ditch free from obstruction, as such ordinance applies only to ordinary open gutters along the street. *Gilluly v. Madison*, 63 Wis. 518, 52 Am. Rep. 299, 24 N. W. 137.

A city is not responsible for the defective condition of a street gutter occasioned by the path taken by wagons from an adjoining lot having been cut by use lower than the gutter, because of which water ran down the path to the lot and thence into an adjoining basement, where the city had no notice, express or implied, of the existence of these

conditions. *Pottner v. Minneapolis*, 41 Minn. 73, 42 N. W. 784.

But it has been held that a town is not liable to the owner of land abutting on a highway for injuries caused by surface water turned onto the land in consequence of allowing a drain under the highway, and the highway itself, to remain out of repair. *Murray v. Allen*, 20 R. I. 268, 38 Atl. 497; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520, distinguished on the ground that in that case water was brought from distant places and thrown on the land of an abutting owner.

So, a municipal corporation, not being bound to make provision against the back flow of surface water from its streets upon adjoining lands, is not liable for mere consequential damages to land from the back flow of surface water, caused by the obstruction of a culvert maintained by it under a street. *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811.

So, where a town, in constructing its highway across low ground, constructs a culvert for the purpose of enabling surface water to pass across the highway, it is under no duty to adjoining owners to keep the culvert free from obstructions. *Byrne v. Farmington*, 64 Conn. 367, 30 Atl. 138.

VI. Unusual storms.

A municipal corporation is not responsible for damages to land by the backing up of water due to the insufficiency, for the purpose of carrying off surface water arising from an unusually heavy rain, of a culvert in an embankment constructed across a natural water course for the passage of storm water, which was properly constructed and sufficient for the ordinary flow of surface water. *Los Angeles Cemetery Assn. v. Los Angeles*, 103 Cal. 461, 37 Pac. 375.

The mere fact that a municipal corporation constructed a ditch for the purpose of carrying off the water along a street in front of an owner's premises to another outlet, which served that purpose except in case of unusually heavy rains, does not render it liable for the overflow of his premises at such times, where the water naturally accumulated in that vicinity and found its outlet over his premises, and the digging of the ditch did not increase the volume and flow of water thereover. *Keithsburg v. Simpson*, 70 Ill. App. 467.

A city, in changing the grade of a street, is obliged to provide only waterways sufficient to carry off the water that reasonably might be expected to accumulate. *Damour v. Lyons City*, 44 Iowa, 276.

A municipal corporation is bound to exercise only reasonable care to construct ditches of sufficient capacity to carry off the surface water which can be reasonably expected to gather at the point in question, and is guilty of no negligence in failing to anticipate "cloud bursts" and extraordinary floods. *Keithsburg v. Simpson*, 70 Ill. App. 467.

A municipal corporation is bound to provide ample capacity to carry off all the water likely to fall or accumulate upon the streets on all ordinary occasions, but it is not guilty of negligence in failing to anticipate and provide for unexpected and extraordinary storms, the occurrence of which cannot be foreseen and provided for. *Peoria v. Adams*, 72 Ill. App. 662.

An injunction will not lie at the instance of an adjacent landowner to control the judgment 65 L. R. A.

of municipal authorities in the construction of a sewer for the carrying off of surface water, on the ground that it will not be large enough for the purpose in the heaviest rains, and will therefore overflow onto his property injuring it and producing sickness in his family, where the legal right to make such improvement is in no way exceeded. *Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89.

Punitive damages are not recoverable against a city for the flooding of land with surface water from a storm overflow constructed in connection with its sewer system, where the flooding only occurs at long intervals and as a result of extraordinary storms. *Costich v. Rochester*, 68 App. Div. 628, 73 N. Y. Supp. 835.

In an early Kansas case it was held that a municipal corporation is responsible for damages to property from the grading of a street, causing to flow upon and accumulate thereon surface water diverted thereby out of its usual course, and from the insufficiency of a sewer to carry off such water in case of excessive rainfall; and the fact that, in the judgment of the municipal officers, the work on the street and sewer was properly and sufficiently done to answer the purposes intended, is immaterial. *Leavenworth v. Casey*, *McCahon*, 124. The court says that a municipality is bound to make a sewer of sufficient size to guard against accidental obstructions and extraordinary freshets, and that it is no excuse for failure so to construct it that the engineer, or any other person who constructed it, thought it sufficient; and it is bound to exercise such caution and prudence in the construction and care of the work as a discreet and cautious individual would if the whole risk were to be his alone. The language of the opinion is criticised in *Atchison v. Challiss*, 9 Kan. 603, the court saying that such has never been the law when applied to surface water, as in the earlier case. But, although the first decision seems, from the language of the opinion, to have been based more on the insufficient construction of the sewer than anything else, from the allegations of the complaint there would seem to have been in the case the element of the grading of a street so as not merely to stop the flow of surface water from the premises in question, but so as to divert surface water from its natural course and cause it to flow upon the premises. In the latter case a similar situation is stated in the complaint, and seems to be indicated by the statement of facts in the opinion; but the court intimates that liability would exist only where the flow of a natural water course is stopped, and not in the case of mere surface water, without seeming to consider to any extent the fact that the water was caused to flow where it would not otherwise have flowed. However, the evidence as to what really caused the injury, and as to its extent, was not fully presented to the court by the record. The questions specially before it on the rulings were as to the extent of capacity which a city must give to a drain for mere surface water where it actually does construct such a drain, and as to whether, having once constructed a drain, it may abandon it.

VII. Right and duty of individual.

a. To avoid injury.

One who owns land abutting the street in which the grade is such as to cause water to

flow upon his land is not entitled to recover from the city for the injury occasioned thereby, unless he has used ordinary care to prevent the injury; but he is not obliged to have the wall under his building sufficient to repel the water. *Bartle v. Des Moines*, 38 Iowa, 414.

And there can be no recovery by an abutting owner for the casting of water onto his property if he could have prevented the injury by the use of ordinary efforts, or at moderate expense. *Simpson v. Keokuk*, 34 Iowa, 568.

An abutting lot owner is obliged to protect his property from the effect of the negligent construction of a culvert by the municipal corporation, if he can do so by ordinary care and with reasonable expense. *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622.

The owner of premises is bound to use reasonable care to protect herself, and lessen, if there is a way to do so, the damages likely to be suffered from the backing of water thereon caused by the filling of streets and raising of catch-basins so as to render useless drainage previously established. *Toledo v. Lewis*, 17 Ohio C. C. 588.

Recovery for damages to premises by the overflowing thereof by water diverted thereto by reason of the negligence of a city in permitting a culvert to become obstructed is precluded by negligence of the plaintiff in repairing and strengthening walls after a prior overflow, only in case such negligence contributes directly to the injury from the subsequent overflow. *Johnson v. Cincinnati*, 20 Ohio C. C. 657.

A municipal corporation is not liable for an increased flowage of surface water from a highway onto private property, resulting from improvements made to his land by the plaintiff. *Frederick v. Lansdale*, 156 Pa. 613, 27 Atl. 563.

A municipal corporation is not liable to an occupant for injury to a building caused by the flowing of water through open gratings left in the sidewalk and maintained by the occupant for his own benefit, without which no considerable quantity of water would have flowed into the cellar. *Peoria v. Adams*, 72 Ill. App. 662.

Damages suffered by the owner of land who makes an erection in a position to be injured by a natural and accustomed flow of water from streets are attributable to his own act, and not to a breach of duty by the municipality, as its duty, prescribed by charter, of keeping the streets in repair, does not exact the performance of such acts as are necessary to protect adjacent lands from the natural flow of water, or to cure a fault of such lands. *Montgomery v. Glimmer*, 33 Ala. 116, 70 Am. Dec. 562.

A municipal corporation cannot be held liable for water flowing through the bottom of a gutter and a retaining wall of the street upon property lying below grade, where the gutter, under the municipal ordinance, was laid by the abutting owner, and the retaining wall was laid of dry stone after the contractor had offered to lay it with cement if the abutting owner would pay for it, which he refused to do. *Watson v. Kingston*, 114 N. Y. 88, 21 N. E. 102, Affirming 43 Hun, 367.

One who is injured in his property by water flowing thereon by reason of the change in the grade of a street or alley adjoining it may not recover if, by doing some filling in his lots near the alley, and making a drain, by the use of ordinary efforts and at moderate expense, much,

if not all, of his damage might have been avoided. *Simpson v. Keokuk*, 34 Iowa, 568; *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622.

Where property is damaged by overflow of surface water which results from the negligence of the city in stopping up the catch-basin of a sewer, it is the duty of the property owner to use ordinary and reasonable care and means to prevent the injury and the consequence of it, and he can only recover such damage as could not by such means and care be avoided. *Dallas v. Cooper* (Tex. Civ. App.) 34 S. W. 321.

If the flooding of a lot is caused in part by the negligence of a municipal corporation in constructing a sewer of insufficient capacity to carry off the water during heavy rains, and in part by the action of the owner of an adjacent lot in filling up his lot so as to stop a natural drain, the city will not be liable for the entire damages sustained; but in such case it is proper for the jury to make a deduction for that portion of the injury occasioned by the filling up of the adjacent lot. *Paris v. Cracraft*, 85 Ill. 294.

A municipal corporation is not liable for damages to goods in the basement of a store from flooding thereof by water overflowing the sidewalks because of the manner of grading of a street and the insufficiency of sewer facilities to carry off accumulated surface water during ordinary, hard rains, where the damages would not have occurred but for excavations made by the owners, for their own benefit, under the sidewalk, in making which, the fee of the sidewalks being in the city as part of the streets, they are trespassers. *Guthrie v. Nix*, 5 Okla. 555, 49 Pac. 917.

A municipal corporation is not, in the absence of negligence, liable for the washing of earth from filled-in land by water from its gutters into excavations made by an adjoining lot owner with knowledge of the character of the adjacent land, if he did not take proper precautions in thus removing the lateral support thereof to provide against the falling of such earth, as it was not the duty of the municipality to make such a provision. *Curry v. Cincinnati*, 12 Ohio C. C. 736.

An injunction will not be granted a land owner to restrain the continuance of a nuisance by a city, caused by the erection and maintenance of an embankment, obstructing a natural water course for the carrying of surface water, where, by his refusal to permit the connection of his premises with a sewer for the purpose of draining them, he thwarts the efforts of the city to redress in a proper manner the injury done. *Richardson v. Eureka*, 110 Cal. 441, 42 Pac. 965.

Assuming that a city is liable for negligently allowing a drain across a street for carrying off surface water to become filled up, the damages to be recovered by the owner of land overflowed must be confined to such as were directly occasioned by the fact that the escape of the water was thus prevented, and the city is not liable for damages caused by neglect of the landowner to protect his property as far as possible. *Macon v. Dannenberg*, 113 Ga. 1111, 39 S. E. 446.

A lot owner adjacent to a street which is below grade must take notice of any exposure created by bringing the street to grade, and must exercise reasonable diligence to protect himself from water which may be cast upon his

lot by bringing it to grade. *Morris v. Council Bluffs*, 67 Iowa, 343, 56 Am. Rep. 343, 25 N. W. 274.

There rests upon a city no obligation, in grading streets, to keep lots which are below the grade of the streets free from overflow water. The lot owners may escape this annoyance by filling their lots to grade, or by constructing sewers or sloughs to conduct away the water flowing upon them. *Gliffeather v. Council Bluffs*, 69 Iowa, 310, 28 N. W. 610.

The owner of premises abutting on a street will not be guilty of negligence in storing groceries in the cellar, which will prevent his recovering for their loss from the city, which negligently permits an embankment to be erected in the street so as to turn surface water into the cellar. *Damour v. Lyons City*, 44 Iowa, 276.

A city which negligently permits a gutter and culvert to become obstructed, whereby the premises of a property owner are flooded, cannot escape liability for the injury on the ground that the water was detained upon the premises longer than it would otherwise have been by an embankment raised by the property owner in constructing a sidewalk. *Parker v. Nashua*, 59 N. H. 402.

In an action against a city by a lot owner for causing an overflow by raising the grade of a street, it is error for the court to charge the jury that, as it appeared that the owner of the lot could have prevented the injury by raising the level of his lot at an expense of \$500, the lot owner was not entitled to recover. The question as to what constituted reasonable care and means to prevent the injury in such a case is a question for the jury, and they must determine as to the care required under the circumstances. *Cooper v. Dallas*, 83 Tex. 239, 18 S. W. 565.

b. Casting water into street.

A landowner may fill up his land so as to prevent surface water from flowing over it from a highway. *Bangor v. Lansil*, 51 Me. 521.

Highway commissioners cannot prevent a landowner from filling up an artificial ditch upon his premises adjoining a highway, where the public has no easement to drain the highway over his land, although such ditch has been in existence, and has been kept open and maintained by highway commissioners, for a period of thirteen years, and an occupant of the land, though not the owner, has been paid from public funds for improving it under a contract with the commissioners. *Simpson v. Wright*, 21 Ill. App. 67.

The owner of land over which surface water would naturally pass may, as against the municipality, place an embankment on his own land to prevent the flow, where it has been increased and concentrated by ditches into and along the streets. *Sweetwater v. Pate* (Tenn. Ch. App.) 59 S. W. 480.

An abutting owner has the right to drain surface water from his land upon a highway, provided he does not thereby interfere with the use of the highway, rendering it less safe, useful, convenient, or excellent as a public thoroughfare. *Nelson v. Fehd*, 104 Ill. App. 114.

The city may not, after bringing its street to grade, divert surface water from its natural course and cast it into a natural depression on the property of an individual which is not a 65 L. R. A.

water course, and then insist that he may not fill his lot to the grade of the street, no matter what may be the effect upon the flow of the surface water, although he acquiesced in the construction of the city's drain diverting the waters across his lot. *Cedar Falls v. Hansen*, 104 Iowa, 189, 73 N. W. 585.

One upon whose land surface water is thrown by the raising of the grade of adjoining land has a right to erect barriers to prevent such flow. *Flagg v. Worcester*, 13 Gray, 601; *Blakeley Twp. v. Devine*, 36 Minn. 53, 29 N. W. 342.

The owner of land which adjoins a highway may lawfully do any acts upon his own land to prevent surface water from coming thereon from the highway, and may stop up the mouth of a culvert built by the selectmen across the highway for the purpose of conducting the surface water upon his land, provided he can do so without exceeding the limits of his own land. *Franklin v. Fisk*, 13 Allen, 211, 90 Am. Dec. 194.

The landowner may build a wall and keep out water which would otherwise flow upon his property from the street. *Groos v. Lampasas*, 74 Tex. 195, 11 S. W. 1086.

One who stops the flow of artificially accumulated surface water onto his land from a highway, and thereby turns it down the road, is not responsible for its further flow. *Huddleston v. West Bellevue*, 111 Pa. 110, 2 Atl. 200.

An owner of land adjoining a highway has the right to drain his land across or along such highway, following the natural depression of the surface in the direction the water naturally flows, without the consent of the highway commissioners; and the latter have no right to interfere or prevent the same. *Davis v. Highway Comrs.* 143 Ill. 9, 23 N. E. 58.

The purchaser of a town lot as platted has the right to drain the surface water into the highway. *Young v. Leedon*, 67 Pa. 351.

The mere obstruction of a water way so that water shall accumulate on a street, or so as to prevent the flow of water through, or from the streets, does not necessarily and *per se* constitute a public nuisance. *State v. Wilson*, 106 N. C. 718, 11 S. E. 254.

The unauthorized digging of a ditch by an adjoining landowner within the limits of a highway for the fowage of water from his land is *per se* an injury or obstruction thereto within the meaning of a statute prohibiting an injury or obstruction to a public road by digging a ditch thereon, or by draining a current of water so as to saturate or wash the same. *Canoe Creek v. McEniry*, 23 Ill. App. 227.

When a municipal corporation so constructs a highway drain as to throw onto lower lands to their damage an accumulated supply of surface water which would not naturally have flowed there, the injured person cannot, without lawful authority, construct a dam across such ditch if an adjoining landowner be injured thereby. *Galbraith v. Yates*, 79 Minn. 436, 82 N. W. 683.

The owner of lands on one side of a highway cannot, to the impairment of the highway and hindrance of public travel, dam up a culvert through such highway for the purpose of protecting her land from overflow caused by the construction of a system of artificial ditches on lands on the other side of the highway, converging at a point near such culvert so as to discharge an unnatural quantity of surface water from such lands through such culvert onto

her land; and is not entitled to an injunction to restrain the removal of such obstruction by highway officers. *Myers v. Nelson* (Cal.) 44 Pac. 801.

The diversion of the natural flow of surface water by a ditch, so as to force it upon the streets of a town to the injury thereof, constitutes a nuisance which may be abated, and the maintenance of the ditch enjoined at the suit of the municipality. *Cloverdale v. Smith*, 128 Cal. 230, 80 Pac. 851.

A municipal corporation is not liable to a property owner for not permitting water which had been accustomed to flow over his land to be turned down the gutters of a street in order to prevent its flowing in its former course, although the improvement of the street obstructs its flow in the direction in which it naturally ran, and a cut had to be made to carry it across the street and thence by means of a box sewer through his land at or near where it had formerly flowed over the surface. *Bush v. Portland*, 19 Or. 45, 23 Pac. 667.

When a municipality turns surface water onto adjoining property as an incident to maintaining a highway, the owner of the property cannot, without making himself liable to indictment, declare the flooding a nuisance, and abate it in such manner as is calculated to render the street impassable, although the municipal corporation had no right of way for the ditch, or for its use. *State v. Wilson*, 107 N. C. 865, 12 S. E. 820.

Evidence that one who filled up his land at the side of the road so as to throw surface water back on the highway and wash it out acted under the advice of the road officers may be considered by the jury in trying an indictment for wilfully obstructing the highway. *People v. Crounse*, 51 Hun, 489, 4 N. Y. Supp. 266.

A municipal corporation, although it has established the grade of a street, has a right to erect barriers which will prevent surface water from flowing upon the sidewalk from adjoining property in such a way as to freeze and make the walk unsafe. *Keith v. Brocton*, 136 Mass. 119.

A municipal corporation may maintain a suit to enjoin a private individual from obstructing a culvert in a highway for conducting surface water, where the natural depression of the earth's surface is such that all surface water would accumulate and flow across the place where such culvert is located, if no highway were there, and the obstruction of the culvert would cause the highway to become out of repair. *Hamilton Twp. v. Wainwright*, 52 N. J. Eq. 419, 29 Atl. 200.

VIII. Nuisance.

A city which by legislative enactment annexes territory from the county, upon which is a nuisance occasioned by the collection of surface water in a large ditch and conduits and discharging the same upon private land, and which within two months after notice, there being no evidence of what would be a reasonable time therefor, effectually removes the nuisance, is not liable for its maintenance, to the owner of the land alleged to be injured thereby. *Rychlicki v. St. Louis*, 115 Mo. 662, 22 S. W. 908.

No recovery can be had against a municipality for a mud hole on land, caused by the accumulation of surface water in a depression left thereon by the owner thereof on refilling an ex-

cavation made by him for the purpose of connecting a private sewer constructed by him with a private sewer on adjoining land so as to get access through the latter to a city sewer, not done by authority of any ordinance or direction of any city official, except that it was acquiesced in by one alderman. *Richards v. Waupun*, 59 Wis. 45, 17 N. W. 975.

No action lies directly against a city by a contractor to recover the amount of an assessment made upon a lot for work done in abating a nuisance created by the grading of streets, on the ground that the collection thereof might be enjoined by the owner, where it does not appear that he has elected to avail himself of such equitable remedy, and he might elect to sue at law for the damages occasioned by the nuisance, in which case there would be no objection to the enforcement of the assessment. *Smith v. Milwaukee*, 18 Wis. 63.

The enactment of a statute authorizing a city to drain or fill lots at the expense of the owner to prevent stagnant water standing thereon, since the abatement of a nuisance is its main purpose, is a warranted exercise of the police power of the state. *Horbach v. Omaha*, 54 Neb. 83, 74 N. W. 434.

A city may not tax a lot owner to pay for the abatement of a nuisance which was caused by the act of the city in so constructing a street as to cause the water to flow and remain upon the lots, where no compensation has been made for the damage. *Weeks v. Milwaukee*, 10 Wis. 242.

But in *Smith v. Milwaukee*, 18 Wis. 372, it is said that the right of the lot owner is in the nature of an equitable defense, resting upon the injustice of such a use of a proceeding at law; that the owner would have to make his election among his various remedies. If he should recover his damages at law, the assessment might be enforced. If he neglects to resort to his equitable remedy in time, he may be held to have waived it, and be confined to his legal remedy.

A municipal corporation may, by ordinance, require the owners of lots within its limits upon which water becomes stagnant to fill the same. *Independence v. Purdy*, 46 Iowa, 202.

But a municipal corporation cannot require citizens to construct drains to carry off surface water turned on their property by the city. *Hoffman v. Muscatine*, 113 Iowa, 332, 85 N. W. 17.

Under a statute authorizing cities to pass by-laws compelling the draining of "grounds, yards, vacant lots, cellars, private drains, sinks, cess-pools, and privies," and to assess the owners with the costs thereof if done by the council on their default, and to charge the owners of property drained into common sewers with a reasonable rent for the use of the same, a by-law enacting that "all grounds, yards, vacant lots, or other properties abutting on any street" should be drained is not objectionable as including other properties than those mentioned in the statute, as, if it be attempted to enforce the by-law as against any kind of property not mentioned in the statute, the owner or occupier may raise the question that neither the statute nor by-law touches him. *McCutchon v. Toronto*, 22 U. C. Q. B. 613.

The owner of city lots has the right to maintain their surface at any grade that he may desire so long as he creates or maintains no nuisance by so doing, and the city may not order

the lots to be raised to a level higher than necessary for the purpose of preventing water standing upon them to the injury of the public, for the purpose of abating the nuisance of such standing water, and must give notice to the owner before raising the lot to any degree. *Bush v. Dubuque*, 69 Iowa, 233, 28 N. W. 542.

A city which, by ordinance, has granted a franchise to an electric street railway company is not liable for injury sustained by a property owner whose premises were flooded, after a sudden storm, from water which ran into a hole dug in a gutter in front of his premises, by the company, for the purpose of erecting a pole. *Tatman v. Benton Harbor*, 115 Mich. 695, 74 N. W. 187.

IX. Embankments.

A municipal corporation is not responsible for the damage done when a landowner constructs an embankment in a highway, for its convenient use as such, which ponds back surface water which he later precipitates on another's adjoining land to its damage. *Bryce v. Loutit*, 21 Ont. App. Rep. 100.

A municipal corporation is liable to the owner of property abutting on a street for damages thereto, occasioned by obstructions and injuries to the drains and gutters on the street, caused by a railroad company, which had occupied the street by permission of the city; and the fact that the railroad company is by statute made liable for such damages will not affect the liability of the city. *Zanesville v. Fannan*, 58 Ohio St. 605, 42 N. E. 703.

But *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 26 S. E. 266, intimates that, where work is done by a railway company in a street of a city under authority from the city to occupy the street for its track, the city is not liable to adjoining owners for injury to their lots from surface water; but they must look to the company.

A municipal corporation, allowing a railroad company to use a portion of a street for railroad purposes, which use interferes with the natural flow of the surface water, is bound to use reasonable care to provide means for carrying off the water so as to do no additional damage to adjoining property; but no higher duty is imposed upon it than upon a private individual under the same circumstances. *Peoria v. Adams*, 72 Ill. App. 662.

In the absence of a legislative provision for damages, a municipal corporation is not liable for permitting the construction of a railroad track and plank road on a street which results in such an elevation of the street as to cause water to flow upon premises abutting thereon, damaging the owner's houses, and materials and stock in trade in his carriage shop. *Roll v. Augusta*, 34 Ga. 326.

A city will be liable for injuries caused by surface water cast upon the premises adjoining a highway by an embankment constructed to sustain a street railway which it authorizes to be placed in the street. *Damour v. Lyons City*, 44 Iowa, 270.

A municipal corporation is liable for injuries to premises caused by the draining and flowing of water thereon and filling the cellar of the house thereon from an embankment or superstructure which such city authorized and empowered a bridge company to erect in the street upon which such premises front, as an approach 65 L. R. A.

to one end of its bridge. *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619.

Where a municipality permits a railroad company to construct its tracks above the surface of the street under an ordinance permitting it to "construct a track in the street," it is liable for injuries to adjoining property resulting from such elevated track diverting surface water onto the adjoining premises. *Torpey v. Independence*, 24 Mo. App. 288.

A city is not liable for the negligence or wrong of a railroad company in so constructing its road upon private property that injury resulted to an adjoining owner by the collection and overflow of water, although it permitted the company to use one of its streets, and did not require the use of proper culverts. *Callahan v. Des Moines*, 63 Iowa, 705, 17 N. W. 470.

A railroad company receiving a grant from a city of the right to construct an embankment along one of its public streets accepts it subject to the limitation placed by law upon the city, *i. e.*, to refrain from the maintenance of any obstruction to the street which will prevent the free drainage of surface water without providing an adequate means for its discharge. *Kelly v. Pittsburgh*, C. C. & St. L. R. Co. 28 Ind. App. 457, 63 N. E. 233.

While the duty of draining its streets is primarily in the municipal corporation, such additional work or expense in providing an adequate system as may result from railroad tracks being in the street should be done or paid for by the railroad company. *Lake Shore & M. S. R. Co. v. Willey*, 193 Pa. 496, 44 Atl. 583.

The duty of a street railway company to "furnish, construct, put in place, and maintain" all necessary conduits and syphons for carrying surface water in the streets occupied by its tracks does not impose upon the company the duty of cleaning out syphons constructed by it in connection with conduits under the direction of the city, a failure to clean out which does not impair their use, or impede the flow of water through the conduits. *Denver v. Denver City Cable R. Co.* 22 Colo. 565, 45 Pac. 439.

It is not within the police power of a city to hold a street railway company responsible for the unsanitary condition of syphons or catch-basins constructed by it in connection with culverts, under the direction of the city, for the carrying of surface water, where such syphons are not a part of the company's property or system, but are merely a part of the ordinary street improvements in which the company has no more interest than others using the streets, and upon whom the duty of keeping such syphons clean was not imposed by its franchise and is not necessary to the proper maintenance and operation of the culverts. *Ibid.*

A provision in the franchise of a street railway company requiring it to construct such culverts as the city shall require and designate, also containing a reservation to the city of the police and legislative powers and functions with respect to the streets that may be occupied by said railway, does not authorize the city to pass an ordinance imposing upon the company the duty of cleaning out and keeping in a sanitary condition such syphons. *Ibid.*

X. Remedy.

a. In general.

Where a statute providing for the taking of land for park purposes provides a remedy to all

persons who sustain damages by the taking of land or "by other acts," damages for injuries caused by the accumulation and diversion of the flowage of surface water must be sought under the act, and not by action at common law. *Holieran v. Boston*, 176 Mass. 75, 57 N. E. 220.

When a statute gives a complete remedy for damages done to adjoining property through the repair of highways in changing their grade, a property owner cannot maintain an action against the town for damages to his property caused by a repair of the highway in changing the grade so as to cast the surface water onto his property, on the ground merely that originally nothing was awarded him for an improper construction of the way. *Bartlett v. Bristol*, 66 N. H. 420, 24 Atl. 906.

A city, by its proper authorities and agents, is charged with the public duty of constructing and maintaining public streets. It must provide for and dispose of the surface water which falls upon them, and, in the discharge of this duty, neither the city nor the agents can be proceeded against in an action of tort for damages sustained by a private citizen. The laws of the commonwealth provide compensation for such injury, but the remedy must be sought in the manner pointed out by the statutes. If the public work is built so as to cause unnecessary damage by want of reasonable care and skill in its construction, then the right of eminent domain will not protect the persons by whom the work is done, but they will be liable in tort for such unnecessary injury. *Wheeler v. Worcester*, 10 Allen, 591.

Where, for the necessary purposes of draining a highway, water is taken through a ditch and cast into a culvert, which causes it to flow upon the land of an abutting proprietor, no action will lie against the municipal corporation as for a tort, but compensation must be sought under the statutes giving compensation for injuries caused by the improvement of highways. *Flagg v. Worcester*, 13 Gray, 601.

In an action against a city by the owner of a lot abutting on a street for the throwing of surface water on the lot and into the cellar and well of the plaintiff, the water having been collected to some extent from distant pools and puddles, the court held that, if the statute giving an abutting owner who is injured by any change in the grade of a street a peculiar statutory remedy could be considered as applicable, such remedy was cumulative only, and not exclusive. *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520.

Where a city changes the grade of a street on which the plaintiff's land abuts so that the street, which had previously been lower than the surface of the plaintiff's land, is raised 2 feet higher than the surface of the land, whereby the water falling on the land is prevented from flowing therefrom, and the water falling on the street is turned upon the lot and forms ponds thereon, and flows into the cellar of the plaintiff's house, as the turning of the surface water onto the plaintiff's land is merely incidental to the change of grade, an action on the case cannot be maintained, for the remedy in such cases by appeal from the appraisal of damages by the board of aldermen, as provided by statute, is exclusive. *Almy v. Coggeshall*, 19 R. I. 549, 36 Atl. 1124. *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520, was distinguished on the ground that the turning of surface water on abutting land in that case was not incidental to

a change of grade; but surface water from other streets, which formerly flowed down the streets, and water from distant ponds, was turned on the land.

Statutory provisions for the abatement of nuisances, such as the backing of surface water on premises by the closing of a sewer so as to prevent its running into it, must be followed in the absence of an allegation of any special facts showing that the remedy is insufficient or inadequate. *Broomhead v. Grant*, 83 Ga. 451, 10 S. E. 116.

If, in consequence of changes made by a municipal corporation in the surface of a highway for the purpose of making it safe for travel, the water accumulating upon the surface of the way by the fall of rain or melting of snow passes onto adjoining land in different places, or in somewhat greater quantities in particular places, than it otherwise would have done, that is to be considered as one of the natural, probable, or necessary consequences resulting from the establishment and maintenance of the way; and therefore no action will lie for such injuries as for a tort, but the damage must be regarded as a matter contemplated in the location of the road, and compensation sought for by the owner of the property in the way pointed out by statute. *Flagg v. Worcester*, 13 Gray, 601.

The statute conferring upon the owner of a house which is injured by the ploughing of a ditch in the road, the right to have damages assessed to him by selectmen, and paid by the town, does not take away his common-law remedy against the highway surveyor, but is cumulative thereto. *Adams v. Richardson*, 43 N. H. 212.

The construction of a ditch by a municipal corporation for the draining of surface water accumulating in its streets will be enjoined at the suit of an owner of land upon which such water will be thereby directly turned, where it will result in permanent injury thereto. *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50.

When neither the flow of water upon an adjoining owner's land is increased, nor its force increased, by the fact that it is conducted near to it by a tile drain, the lower owner is not entitled to an injunction. *Collins v. Keokuk*, 91 Iowa, 293, 59 N. W. 202.

Equity will not enjoin highway commissioners from removing a culvert in the public highway, and filling up the space with dirt, on the ground that such culvert was necessary to convey the surface water collecting on the owner's premises in its natural course of drainage, where it does not appear with sufficient certainty that its removal would result in an injury to such landowner,—it not being clearly established that the water naturally flows in that direction. *Barnard v. Highway Comrs.* 172 Ill. 391, 50 N. E. 120, Affirming 71 Ill. App. 187.

The supreme court will not grant a mandamus to compel county officials to comply with the decree of a district court, enjoining them from discharging drainage water through ditches on complainant's land, in the absence of anything to show that the duty will not be enforced by the district court in due course of law. *State ex rel. Happner v. Fillmore County*, 32 Neb. 870, 49 N. W. 769.

One whose estate, abutting on a highway, is injured by having surface water ponded in front of his premises as the result of an unauthorized change of the grade of such highway, caused or

done by the town council or surveyor of highways, is not entitled to a writ of mandamus to have the former grade restored; as in such a case it is doubtful as to whether the relator has the right to have the street restored to its former grade; and as the surveyor of highways is merely a ministerial officer, who has no power to change the grade of the street, or to incur indebtedness for the purpose of changing the grade; and as, in such a case, the relator has an adequate legal remedy. *Sweet v. Conley*, 20 R. I. 381, 39 Atl. 326.

Neither a mandate, nor an injunction, will lie on behalf of a landowner against the superintendent of roads or the board of commissioners, who had, under a law providing for the construction of free gravel roads, appropriated a highway for that purpose, and constructed the road in such a manner as to cut through a natural bridge along the owner's land, whereby it was flooded by the waters of a stream, in the absence of allegations that the proceedings under which the road was constructed were not regular and valid, and that full damages had not been duly assessed in his favor, under a provision in the law for the assessing of such damages and affording landowners the opportunity to present claims. *State ex rel. Robinson v. Hanna*, 97 Ind. 469.

b. Who may sue.

A right of action for damages to land from the cutting of a ditch by a municipal corporation in the exercise of its legitimate governmental powers accrues to the person owning the land at the time of such cutting, and does not pass to his vendee on a subsequent sale of the land. *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

Damage resulting from a diversion of surface water from a highway into an alley can only be recovered by the owner of the land to which the right of an alley is appurtenant, and the owner of that land cannot extend the right to other land afterwards purchased. *Kensington v. Wood*, 10 Pa. 98, 49 Am. Dec. 582.

For a permanent injury to a lot by a gully made by water flowing on the lot from a street by reason of improper grading, which gully was made prior to a sale of the premises, and which now carries off the water, the cause of action accrues to the former owner, and does not devolve upon the purchaser. *Ortwin v. Baltimore*, 16 Md. 387.

A landowner cannot recover for injury therefrom from flooding, caused by changes in the grade of a street by a municipal corporation, made prior to his purchase. Work of this character is of a permanent nature, and a right of action for such damages is in the party who owned the land when the work was done, and does not pass to his grantee. *Elgin v. Welch*, 16 Ill. App. 488.

A municipal corporation is not liable to a subsequent purchaser of land for permanent injuries thereto from overflow and washing caused by the negligent manner in which the city devised the plan and executed the work of regrading an alley and constructing a gutter therein, and a connecting culvert across a highway, since the improvement is of such a character that it cannot be abated, and an action therefore accrued to the owner at the time the work was done. *Stein v. Lafayette*, 6 Ind. App. 414, 38 N. E. 912.

A purchaser of land along which a ditch had

been previously constructed by a municipal corporation for drainage purposes is entitled to recover damages, in case of overflow, only for the special injury he suffers by reason of the failure of the municipality to exercise reasonable care, skill, and diligence in keeping the ditch in proper condition. *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

Where the change in the grade of a street injures an abutting lot by casting surface water thereon, and the lot is held by a tenant for life, and another is entitled to the remainder in fee, and both of such persons interested in the lot are engaged in a mercantile business as partners, using a storeroom upon the lot, which storeroom is permanently injured by the surface water, such persons cannot recover in the same action for damage done to the life estate, the remainder, and the joint mercantile business by raising the grade of the street and causing the surface water to flow on the lot. *Yeager v. Fairmont*, 43 W. Va. 259, 27 S. E. 234.

A town may sue in its corporate name to restrain the county authorities of the town and other towns from discharging surface water upon certain low lands within its limit, to the injury of highways and bridges, under a statute authorizing a town to sue and be sued in its corporate name. *Merritt Twp. v. Harp* (Mich.) 9 Det. L. N. 302, 91 N. W. 156.

A municipality is entitled to the same relief with regard to the unlawful obstruction of surface water that an individual would be. *Franklin v. Durgee*, 71 N. H. 186, 58 L. R. A. 112, 51 Atl. 911.

c. Liability.

There can be no recovery by a landowner for the negligent maintenance of a ditch by a county upon or near a public highway, as a result of which surface water is diverted and land overflowed, in the absence of an express statute imposing liability therefor. *Stocker v. Nemaha County* (Neb.) 93 N. W. 721.

A county is not liable for an injury caused by the flooding of adjacent lands in the erection by its agents of a county jail, in the absence of express or implied statutory provisions imposing liability for the torts of its officers or agents. *Downing v. Mason County*, 87 Ky. 208, 8 S. W. 264.

Where officers of a municipality, without authority from it, grade a street, and thereby interfere with the drainage of adjoining land, they are trespassers, and will be subjected to nominal damages, even though the work is beneficial to the property. *Clay v. Board*, 85 Mo. App. 237.

Commissioners of highways are individually liable if they cast surface water from the highway onto the land of an adjoining proprietor. *Tearney v. Smith*, 86 Ill. 391.

A municipal corporation is not liable for damages from the negligence of its supervisors in establishing a drain, nor for the improvement of a highway, but for some private purpose, as the drainage of private lands. *Oftelle v. Hammond*, 78 Minn. 275, 80 N. W. 1123.

A ditch constructed by the town marshal, and accepted and paid for by the town, will be held to have been done under the authority of the town, so as to render it liable for injuries resulting from its wrongful construction. *Thorn-town v. Fugate*, 21 Ind. App. 537, 52 N. E. 763.

A municipality is not liable for the flooding

of lands by an insufficient ditch constructed along the highway by its agents without proper authority. *Atcheson v. Portage La Prairie Rural Municipality*, 10 Manitoba L. R. 39.

A municipal corporation is not liable for damages to property by the backing of surface water because of the damming of a well-defined channel through which such water was wont to flow, due to the grading of a street to a greater height than the official grade called for by the contract, although such increase of grade was made under the erroneous grade lines and levels furnished by the city engineer and surveyor, which the contractor followed, where neither contemplated nor called for by the supervisors; since the surveyor and state superintendent, deriving their powers as to the subject-matter from express provisions of law, and not from the order or direction of the board of supervisors, are the servants of the law, and not of the supervisors. *Slevers v. San Francisco*, 115 Cal. 648, 47 Pac. 687.

A city is not rendered liable to one sustaining personal injuries because of the neglect of an independent contractor, in grading a street, to remove surface water and sewage, by its failure to include in the contract for the improvement a provision that the contractor care for and remove all surface water, drainage, and sewage interfered with or impeded by reason of the grading of the street. *White v. New York*, 15 App. Div. 440, 44 N. Y. Supp. 454.

A municipal corporation is not responsible for the acts of its street commissioner in turning water from the street onto the property of adjoining proprietors. *Judge v. Meriden*, 38 Conn. 90.

But *Judge v. Meriden* is explained in *Mootry v. Danbury*, 45 Conn. 550, 29 Am. Rep. 703, in a way to relieve it, in part, of its apparent conflict with the course of authorities elsewhere.

d. Damages.

In an action against a municipal corporation for injury to private property from the flowage of surface water thereon caused by the negligent construction of a sewer, only the damages naturally and proximately resulting from the flooding of the land, the amount of which has been established in dollars and cents, should be taken into account. *Magarity v. Wilmington*, 5 Houst. (Del.) 530.

In an action against a municipal corporation for consequential damages resulting to a citizen by the undermining of the wall to his house by water, due to the negligence of the city in executing the work of grading a street and sidewalk, only such actual damages as are the natural and proximate result of the negligence, and which have been reduced to dollars and cents, can be recovered. *Benson v. Wilmington*, 9 Houst. (Del.) 359, 32 Atl. 1047.

Damages to the extent only of the actual injury, where the acts complained of were done without malice and by color of authority, are recoverable for digging trenches, or removing earth from and causing a flow of water over land, in repairing an adjoining highway. *Berry v. Vreeland*, 21 N. J. L. 183.

Prospective damages cannot be recovered against a municipality for an overflow of adjoining land caused by the insufficient character of its gutters, where the defect can be easily remedied, thereby rendering the injury temporary. *Carson v. Springfield*, 53 Mo. App. 289.

In an action for injury to an owner's land

from overflow caused by the negligence of a municipal corporation in so grading and paving a public street as to obstruct the flow of surface water therefrom, the jury are the proper judges to ascertain and declare from the evidence as presented what damages, if any, the landowner has sustained, and the extent and amount thereof; and their verdict will not be set aside as excessive merely because none of the witnesses had expressed an opinion estimating the damages at as large a sum as the jury awarded. *Princeton v. Gleske*, 93 Ind. 102.

It is for the jury to say, as best they can from the evidence, how much of the whole amount of damage to land from flooding was caused by the construction by a municipal corporation of a concrete sidewalk, as distinguished from that done by drainage in its natural course; and, in an action against the municipal corporation for such damages, it is not proper to include any portion due to other causes for which it is not liable. *Elgin v. Welch*, 16 Ill. App. 488.

In an action for injuries to an owner's land from overflow caused by the negligent manner in which a municipal corporation graded and completed a permanent improvement of a public street, all damages, past and prospective, may be recovered, and for fresh damages resulting from the same cause a second action will not lie. *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821.

The measure of damages for the act of a city in turning drains for surface water into a ditch which had been washed out in a public highway, and removing an obstruction therein in such a manner that the ditch was washed wider, and undermined property of an abutting owner, is the injury which was caused by its negligence or wrongful acts, and not the difference in the value of the property before the acts were committed and at any time during a series of years afterwards. *Podhalsky v. Cedar Rapids*, 106 Iowa, 543, 78 N. W. 847.

The owner of premises is entitled to recover damages for injuries to her property and health from a continuing nuisance created by the filling of streets and raising of catch-basins, so as to render useless drains already established and paid for, causing to flow back upon such premises water which would otherwise have been carried off. *Toledo v. Lewis*, 17 Ohio C. C. 588.

In an action against a municipal corporation for damages to a lot from change of grade of a street, the measure of damages is the difference between the market value of the lot immediately before and immediately after the change of grade. *McCray v. Fairmount*, 46 W. Va. 442, 33 S. E. 245.

The measure of damages to the owner of lands from the failure of a village to plan for an extension to the full width of a highway, on completion of its improvement, of a culvert previously placed therein on a partial improvement thereof, thus shutting off the natural drainage of adjoining lands so as to flood them, is the difference and diminution in value of such lands in the condition they were in before such improvement, and their fair value as they will be when the improvement is completed. *Martin v. Bond Hill*, 7 Ohio C. C. 271.

The owner of a building damaged by the flowing of water in the basement thereof, caused by the raising of the grade of the street in front by the city without providing a proper sewer is not entitled to recover damages for the incon-

venience to tenants occupying such building, or injury to their personal property, but is limited in his recovery to the injury to the building or premises, or loss sustained by him in consequence of the flowage of the water. *Dixon v. Baker*, 85 Ill. 518, 10 Am. Rep. 591.

In an action for injury to an owner's property caused by overflow from a ditch constructed by a municipal corporation in a street, he is entitled to recover only such a sum as will put his premises in as good condition as before the flooding, together with compensation for any loss of use during the time it was rendered unfit for occupation, in the absence of proof that the damage done was permanent or irreparable. *Keithsburg v. Simpson*, 70 Ill. App. 467.

In an action for injury to an owner's lot by reason of an increase in the flow of water over the same by the change of the grade in a street by a municipal corporation, such owner cannot recover damages for breach of a contract by virtue of which a municipal corporation constructed a drain so as to carry off the increased flow, but which drain for some reason failed in times of heavy rain to perform that service; but he can recover only such damages as have accrued to him by reason of the increase in the flow of water over and above that which flowed before the change of the grade was made. *Bloomington v. Burke*, 12 Ill. App. 814.

A municipal corporation is not liable for injury to the arm of an individual by scalding in hot water which he was using while picking chickens in a building that collapsed by reason of the flooding of the cellar with water, caused by a failure of the city to provide sufficient catch-basins and sewers to carry off the surface water. The collapse of the building under such circumstances was not such a result as could have reasonably been anticipated or foreseen, and the injury cannot be regarded as the proximate or natural result of such negligence. *Peoria v. Adams*, 72 Ill. App. 862.

In an action against a city for negligently allowing a lot to be flooded by surface water, evidence as to costs of repairs to houses thereon must be confined to repairs of defects directly caused by the water, and evidence of injuries and depredations of trespassers is irrelevant. *Macon v. Dannenberg*, 113 Ga. 1111, 39 S. E. 446.

In an action for damages to land from the overflowing thereof by rain water, due partly to the grading of the street and partly to the unskillful and negligent construction of a sewer, the increased value of the land from the grading of the street may be set off against the damages occasioned by such grade, but cannot be set off against the damages occasioned by the sewer. *Atlanta v. Word*, 78 Ga. 276.

In an action against a city to recover damages for injury to an owner's property by an overflow of water caused by the making of a fill by the city, the amount of the appreciation in value of such property by reason of the improvement cannot be deducted from the damages suffered by reason of such overflow. *Covington v. Ulrich*, 14 Ky. L. Rep. 302.

In an action by a property owner against a city for negligently grading its streets and raising them above the level of the plaintiff's property, and thereby closing up the natural outlet of surface water, and also for negligently constructing a sewer and closing up the manhole so as to let the water accumulate upon his property, the city cannot offset the benefits accruing 65 L. R. A.

to the property owners by the construction of the streets and sewers, where it does not appear that such benefits were special to the property in question, and not general. *Dallas v. Cooper* (Tex. Civ. App.) 34 S. W. 321.

In a suit for damage done to a town lot by ditching adjacent to it, it was held competent for the defendant to prove that the lot had been benefited by the ditching. Where land is taken absolutely, the benefit to the land adjoining cannot be offset against the value of the land taken. But where the land is not taken absolutely, but is only damaged, the benefit resulting to one portion of the land by the act complained of may be offset against the injury resulting from the same act to another portion of the land. *Allen v. Paris*, 1 Tex. App. Civ. Cas. (White & W.) § 885, p. 508.

A landowner cannot recover for injury to his land from flooding on the ground that township officers neglected to clean out a highway ditch through which his surface water naturally flowed, but opened another ditch, causing an increased flow on his premises, where the evidence fails to show that he was injured thereby. *Chittick v. Lake*, 43 Ill. App. 632.

e. Limitation.

The California statute of limitations applicable to trespass on real estate governs in case of the overflowing of lands by the stopping up of a highway of a natural water course carrying off surface water. *Conniff v. San Francisco*, 87 Cal. 45, 7 Pac. 41.

The statute of limitations begins to run in favor of a city at the time of the construction by it of a pavement in the nature of a permanent improvement, which changed the grade, resulting in the discharge of surface water upon adjacent property. *Hay v. Lexington*, 24 Ky. L. Rep. 1495, 71 S. W. 867.

Where a recovery against a city is sought for damages occasioned to plaintiff's property as the result of water and sewage being forced upon the property, during rains, by means of embankments negligently constructed by the city, the cause of action against the city accrued at the time when the property was damaged by being flooded, and not at the time of the erection of the embankments, within the meaning of the charter of the city, which provides that no suit for damages of any kind shall be sustained against the city, unless such suit is instituted within three months next after the accrual of the cause of action. *Dallas v. Young* (Tex. Civ. App.) 28 S. W. 1086.

A person whose property is damaged by the unlawful discharge of surface water thereon from the streets of a city is not barred by the statute of limitations, because he has not brought his action within the period of limitation after the first damage was done, from recovering for damages occurring within such period. *Kansas City v. Frohwerk*, 10 Kan. App. 120, 62 Pac. 432.

The statute of limitations does not begin to run upon a right of action for damages at the time of the completion of improving a street, whereby the natural flow of the surface water was changed so as to flow upon private property to its damage, as such injury is a continuing one, the city at all times having the legal right, and being under the legal duty, to terminate the cause of injury. *Ibid*.

A cause of action against a city for damages caused by the collection of large quantities of

surface waters in the streets, caused by paving and grading and throwing them on private property does not, where the improvement itself is lawful and wholly on city property, accrue as soon as the work is done, but only after water has been carried and discharged on such private property. *Id.* 10 Kan. App. 116, 62 Pac. 252.

An action for injury to land from overflow caused by the over taxing of a main drain constructed by a municipal corporation as an outlet for surface waters, by the subsequent construction of lateral drains and the grade of streets, is not barred by the statute of limitation, where it does not appear that the lateral drains and other improvements were constructed six years prior to the commencement of the action, although a longer time has elapsed since the construction of the main ditch. *Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. 844.

XI. Abandonment of drain.

A municipal corporation may abandon a surface-water drain which it has once established. *Atchison v. Chailiss*, 9 Kan. 603. (It is suggested that liability would depend on whether the owner of premises would be left in a worse condition than if no drain had been constructed.)

Municipal corporations have full power and discretion in grading or filling up their streets, and need make no provision for carrying off the surface water of adjoining lands, or against its

backflow upon such lands; and when it has made such provision by a sewer or a drain, it may discontinue or abandon the same if such owners are left in no worse condition than they would have been in if the sewer or drain had never been made. *Waters v. Bay View*, 61 Wis. 642, 21 N. W. 811.

A city is not liable for failure to provide means for carrying off surface water collecting on private property; and when it has done so by the gutters and sewers of a street, and subsequent changes in the grade of such street have rendered such means useless, the city is not liable for failure to provide new means for the same purpose. *Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322.

Where the city accepted annexed territory and its roads in the condition in which they were at the time of the annexation, including the means provided for carrying off the surface water collecting on the street, which, although not natural water courses, had at least the weight of long-continued sanction of local officials in deciding what was necessary to preserve the highways; and where the city destroys these means, and diverts the natural course of the water collecting on the street by crossings or ditches, thereby throwing it on the land of a private owner, if, in the opinion of the jury, it was carelessly or negligently done, the city is liable. *Rohrer v. Harrisburg*, 20 Pa. Super. Ct. 543.

H. P. F.

SOUTH CAROLINA SUPREME COURT.

S. P. MATTHEWS, Admr., etc., of J. E. Partlow, Deceased, *Respt.*,

v.

SEABOARD AIR LINE RAILWAY *et al.*,
Appts.

(.....S. C.....)

1. The public use, for the prescriptive period, of a path along a railroad right of way, with the knowledge, acquiescence, and consent of the railway company, gives the public no prescriptive right to travel there, where the statutes limit the use to which a railroad company can devote its right of way to the purposes for which it was condemned, and allow the condemnation of rights of way across the railroad right of way only when it can be done without hindrance to the use for which the property was acquired by the railroad company.
2. A railroad company which permits the public to use its right of way for travel on foot at a particular place so continuously and frequently as to result in a well-beaten and clearly defined path, plain and open, is bound to use ordinary care not to maintain pitfalls or unsafe conditions which may result in injury to one attempt-

ing to use the path relying on the safety suggested by the implied invitation arising from the visible conditions.

3. One, unacquainted with the place, who attempts to use a path along a railroad right of way in reliance on the invitation implied from its well-worn condition, may hold the company liable in case, without negligence on his part, he falls into an unguarded and unmarked cut at right angles with the path, and is injured.
4. The jury must decide, upon all the circumstances of the case, whether or not one is negligent who, without acquaintance with the place attempts to use a well-worn path along a railroad right of way, and falls into an unguarded cut across the path, and is injured.
5. Where a railroad company, in crossing the tracks of another company at a place where the public has been accustomed to use a footpath along the right of way, makes a deep cut which renders the path dangerous, both companies may be sued jointly in case no precaution is taken by either to warn persons attempting to use the path of the danger, so that a person falls into the cut to his injury.

(November 27, 1903.)

NOTE.—For another case in this series as to effect of public use of footpath along railroad right of way, see *Pennsylvania R. Co. v. Ham-mill*, 24 L. R. A. 531.

As to implied license to use railroad track as pathway, see *Anderson v. Chicago, St. P. M. & 65 L. R. A.*

O. R. Co. 23 L. R. A. 203; *Ward v. Southern P. Co.* 23 L. R. A. 715; and *Thomas v. Chicago, M. & St. P. R. Co.* 39 L. R. A. 399.

As to effect of long use of well-defined path across railroad, see *Chenery v. Fitchburg R. Co.* 22 L. R. A. 575.

A PPEAL by the defendant railroad companies from a judgment of the Common Pleas Circuit Court for Greenwood County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of his intestate. *Affirmed.*

The facts are stated in the opinion.

Mr. F. Barron Grier, for appellant Charleston & Western Carolina Railway Company:

The allegations of the complaint do not show that this defendant owed any duty to the deceased.

A plaintiff must state in his complaint all of the facts showing his right, and an invasion of this right by the defendant.

Oliver v. Columbia, N. & L. R. Co. 55 S. C. 541, 33 S. E. 584; *Chalmers v. Glenn*, 18 S. C. 469; *Dorn v. Georgia, C. & N. R. Co.* 58 S. C. 367, 36 S. E. 654; *Tompkins v. Augusta & K. R. Co.* 33 S. C. 216, 11 S. E. 692; 16 Am. & Eng. Enc. Law, p. 411.

The road cannot dispose of its right of way or any part thereof for any purpose.

Central R. Co. v. Brinson, 70 Ga. 207; *East Alabama R. Co. v. Doe ex dem. Vischer*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869.

Therefore the public cannot acquire by prescription any such right.

19 Am. & Eng. Enc. Law, p. 24; *Boggero v. Southern R. Co.* 64 S. C. 104, 41 S. E. 819; *Bailey v. Gray*, 53 S. C. 514, 31 S. E. 354.

One is under no duty to a mere trespasser to keep his premises safe, though the latter is an infant.

16 Am. & Eng. Enc. Law, p. 413; *Smalley v. Southern R. Co.* 57 S. C. 253, 35 S. E. 489; 3 Elliott, Railroads, § 1253; *Jones v. Charleston & W. C. R. Co.* 61 S. C. 556, 39 S. E. 758.

The position occupied by deceased was that of a bare licensee.

Sweeney v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; 3 Elliott, Railroads, § 1250; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783.

The owner of premises is under no legal duty to keep them free from pit falls or obstructions for the accommodation of those who go upon or over them for their own convenience or pleasure, even when this is done with his permission.

Wood, Railroads, 1462; *Little Schuylkill Nav. R. & Coal Co. v. Norton*, 24 Pa. 465, 64 Am. Dec. 672; 19 Am. & Eng. Enc. Law, pp. 935-937; *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 114; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 373, 87 Am. Dec. 644; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Philadelphia & R. R. Co. v.* 65 L. R. A.

Hummell, 44 Pa. 375, 84 Am. Dec. 457; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 54 L. R. A. 314, 39 S. E. 82; *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L. R. A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; *Ryan v. Towar*, 128 Mich. 463, 55 L. R. A. 310, 92 Am. St. Rep. 481, 87 N. W. 644; *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 339.

One who so enters must take the premises as he finds them, and cannot hold the company liable unless injured by the active negligence of the company.

Jones v. Charleston & W. C. R. Co. 61 S. C. 556, 39 S. E. 758; *Pomponio v. New York, N. H. & H. R. Co.* 66 Conn. 528, 32 L. R. A. 533, 50 Am. St. Rep. 124, 34 Atl. 491; *Byrne v. New York C. & H. R. R. Co.* 104 N. Y. 362, 58 Am. Rep. 512, 10 N. E. 539; *Dorn v. Georgia, C. & N. R. Co.* 58 S. C. 364, 36 S. E. 654; *Cobb v. Cater*, 59 S. C. 462, 38 S. E. 114; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 60; *Omaha & R. Valley R. Co. v. Martin*, 14 Neb. 295, 15 N. W. 696; *Pittsburgh, Ft. W. & O. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751.

The cause of action is not a joint one.

Pom. Rem. & Rem. Rights, 2d ed. § 308; *Howard v. Union Traction Co.* 195 Pa. 391, 45 Atl. 1076.

Mr. S. J. Simpson, also, for appellant Charleston & Western Carolina Railway Company.

Mr. T. P. Cothran, for appellant Southern Railroad:

The Georgia, Carolina, & Northern Railway made the cut and established the "pitfall," if it was such, and is alone liable if any liability exists.

The right to use the track or right of way of a railway company, longitudinally, as a footpath, cannot be acquired by prescription.

Thompson v. Louisville & N. R. Co. 110 Ky. 973, 63 S. W. 42; 19 Am. & Eng. Enc. Law, p. 24; *Barker v. Richardson*, 4 Barn. & Ald. 579; *Bloodgood v. Mohawk & H. River R. Co.* 18 Wend. 9, 31 Am. Dec. 313; *Talcott v. Pine Grove Twp.* 1 Flipp. 129, Fed. Cas. No. 13,735; *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287; *Averill v. Southern R. Co.* 75 Fed. 737; *Central R. Co. v. Brinson*, 70 Ga. 207; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 101 Tenn. 62, 41 L. R. A. 406, 46 S. W. 571; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 76 Miss. 731, 45 L. R. A. 223, 26 So. 370; *Sapp v. Northern C. R. Co.* 51 Md. 115; *Ft. Worth & R. G. R. Co. v. Jennings*, 8 L. R. A. 180, note, 76 Tex. 373, 13 S. W. 270; *Anderson v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 195, 23 L. R. A. 207, 58 N. W. 79; *Jones, Easements*, p. 232, §§ 2, 81; *Orena v. Santa Barbara*, 91 Cal. 631, 28 Pac. 268; *Hoadley v. San Francisco*,

50 Cal. 265; *Visalia v. Jacob*, 65 Cal. 435, 52 Am. Rep. 303, 4 Pac. 433; *People v. Pope*, 53 Cal. 450; *San Francisco v. Bradbury*, 92 Cal. 414, 28 Pac. 803; *Archer v. Salinas City*, 93 Cal. 51, 16 L. R. A. 145, 28 Pac. 839; *Southern P. Co. v. Hyatt*, 132 Cal. 240, 54 L. R. A. 522, 64 Pac. 272; *Thompson v. Louisville & N. R. Co.* 110 Ky. 973, 63 S. W. 42.

The same principles applicable to the acquisition of title by prescription prevent the acquisition by license of the right to use the railroad track or right of way as a foot-path.

Haltiwanger v. Columbia, N. & L. R. Co. 64 S. C. 7, 41 S. E. 810; 3 Elliott, Railroads, § 1250; *Izlar v. Manchester & A. R. Co.* 57 S. C. 332, 35 S. E. 583.

The intestate was a trespasser, and the rule declared in the *Haltiwanger Case* applies. If the intestate was a licensee, the Southern Railway owed to him, under the circumstances, no duty of guarding that cut.

Pittsburgh, Ft. W. & C. R. Co. v. Birmingham, 29 Ohio St. 364, 23 Am. Rep. 751; *Izlar v. Manchester & A. R. Co.* 57 S. C. 339, 35 S. E. 583; *Hounsell v. Smyth*, 7 C. B. N. S. 731; *McKone v. Michigan C. R. Co.* 51 Mich. 601, 47 Am. Rep. 596, 17 N. W. 74; *Murphy v. Brooklyn*, 118 N. Y. 575, 23 N. E. 887; *Newdell v. Young*, 80 Hun, 364, 30 N. Y. Supp. 84; *Union Stock Yards & Transit Co. v. Rourke*, 10 Ill. App. 474; *Lingenfelter v. Baltimore & O. S. R. Co.* 154 Ind. 49, 55 N. E. 1021; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Chapman v. Rothwell*, El. Bl. & El. 168; *McCann v. Thilemann*, 36 Misc. 145, 72 N. Y. Supp. 1076; *Foster v. Portland Gold Min. Co.* 52 C. C. A. 393, 114 Fed. 613; *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 14 L. R. A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Freer v. Cameron*, 4 Rich. L. 228, 55 Am. Dec. 663; *Cusick v. Adams*, 115 N. Y. 55, 12 Am. St. Rep. 772, 21 N. E. 673; *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L. R. A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; 2 Thomp. Neg. § 1705.

Mr. J. L. Glenn, for appellant Seaboard & Roanoke Railroad Company:

A prescriptive right cannot be acquired as against a railroad company by the use of its track.

Boggero v. Southern R. Co. 64 S. C. 104, 41 S. E. 819.

The unorganized public cannot prescribe or get a prescriptive right.

22 Am. & Eng. Enc. Law, 2d ed. p. 1189; *Hankinson v. Charlotte, C. & A. R. Co.* 41 S. C. 1, 19 S. E. 206.

Plaintiff's intestate, having no prescriptive right to the use of the Columbia & 65 L. R. A.

Greenville roadbed as a pathway, was evidently using the same as a trespasser, or at best as a licensee. He must use it at his peril; and none of the companies were under any obligation to him, except to refrain from doing him any wilful or wanton injury.

Smalley v. Southern R. Co. 57 S. C. 243, 35 S. E. 489; *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 14 L. R. A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; *Reardon v. Thompson*, 149 Mass. 268, 21 N. E. 369; *Lingenfelter v. Baltimore & O. S. W. R. Co.* 154 Ind. 49, 55 N. E. 1021; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 372, 87 Am. Dec. 644; *Lary v. Cleveland, C. C. & I. R. Co.* 78 Ind. 323, 41 Am. Rep. 572; *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 So. 618; *Omaha & R. Valley R. Co. v. Martin*, 14 Neb. 295, 15 N. W. 696.

The action cannot be maintained against the defendants jointly.

15 Enc. Pl. & Pr. p. 740; *Langhorne v. Richmond R. Co.* 91 Va. 369, 22 S. E. 159; *Troubridge v. Forepaugh*, 14 Minn. 133, Gil. 100; *Howard v. Union Traction Co.* 195 Pa. 396, 45 Atl. 1076.

Messrs. **Graydon & Giles** and **William N. Graydon** for respondent.

Woods, J., delivered the opinion of the court:

The plaintiff, as administrator of John E. Partlow, instituted this suit for damages, alleging his intestate was killed by falling into a railroad cut in the town of Greenwood, and that the accident was due to the joint negligence of the defendants. The defendants demurred on the ground that the complaint fails to state facts sufficient to constitute a cause of action. The demurrer of the town of Greenwood was sustained, and the plaintiff did not appeal. The separate demurrers of the three railroad companies were overruled, and they have all appealed.

The appeal involves no question concerning the incorporation, sales, and leases of the several railroads, which are set out in the complaint, and no reference need be made to them. The following statement contains all the allegations of the complaint necessary to the discussion of the questions involved:

The Columbia & Greenville Railroad was built in 1852 from Columbia to Greenville, and is owned and operated by defendant Southern Railway Company. The Charleston & Western Carolina Railroad was built in 1882 from Augusta, Georgia, to Spartanburg. The Georgia, Carolina, & Northern Railroad, known as part of the Seaboard system, was built in 1890, and at Greenwood passes under the Southern Railway and the

Charleston & Western Carolina, at right angles, through a cut about 30 feet deep and 18 feet wide. The Southern Railway and the Charleston & Western Carolina Railway, for about 200 yards above the crossing toward Greenville and about 500 yards below the crossing toward Columbia, run parallel to each other and about 10 or 12 feet apart. The sides of the cut for a distance of about 60 feet are held secure by granite walls, and the crossing is made by iron girders resting on the sides of these walls. The walls are entirely within the limits of the rights of way of the two roads by which they are crossed. The Southern Railway has a side track running across the cut parallel with its main line, on the side opposite to the track of the Charleston & Western Carolina Railway, and has always maintained a bridge across the cut between its main line and side track. Negligence is charged against all the defendants in that they allowed the cut to remain open and unprotected, and failed to keep a light burning at the cut, or to give any notice or warning of its danger, although it was in the corporate limits of the town, within 200 yards of the public square, and crossed one of the main thoroughfares; the defendants, well knowing the danger of leaving it thus unprotected, their attention having been called to it, several persons having fallen into it, and at least one having been killed by the fall.

It is further alleged "that at least twenty years before the building of the said Georgia, Carolina, & Northern Railroad there was a well-beaten path—a regular traveled place—over which the public had acquired a prescriptive right to travel, and used by the public at their will and pleasure, along the space now between the track of the said Columbia & Greenville Railroad and the Charleston & Western Carolina Railroad, both above and below the said cut, which path or traveled way the public have continued to use up to the present time." Negligence is charged against the Georgia, Carolina, & Northern Railway Company in not building a bridge across the cut it had made, and thus leaving it open and exposed, and in a dangerous condition. After the cut was made, the path was deflected from its original course, about 6 feet from the cut, across the main track of the Southern Railway, and then led over the cut on the bridge built by the Southern Railway between its side track and main line. It is alleged the defendants all well knew the public were using the path as a passageway or sidewalk for pedestrians, with a right to do so; but none of them gave any notice or warning to the public not to so use it, but, on the contrary, such 65 L. R. A.

use was "with the knowledge, acquiescence, and consent of them all." The complaint then gives the following account of the accident: "That on the night of March 13, 1899, John E. Partlow, who was a citizen of Greenwood county, but not a resident of the town of Greenwood, and not acquainted with the cut and its surroundings, left the home of his daughter, Mrs. Bessie P. Andrews, in said town, to go down to the public square of said town on some matter of business or pleasure, walked along the said path, and on account of said cut being open and unprotected, his ignorance of its presence, and his being unable to see it in the darkness of the night, fell into the same, without fault or negligence on his part, and was so bruised and hurt by the said fall that he died from his injuries on the 2d day of April, A. D. 1899."

Responsibility is thus charged on the defendants, as a conclusion from the allegation above set forth: "That the direct and proximate cause of the death of the said John E. Partlow was the gross and concurring negligence of the said defendants in constructing said cut, and in allowing it to remain open and unprotected in the manner aforesaid, although they each and all well knew the danger of allowing it so to remain, and although it was the duty of each and all of them to cover or guard the same."

Since the accident, the town of Greenwood has bridged over the cut with strong and heavy timbers, and erected a fence at each end of the bridge; and the Southern Railway Company has erected a fence as a guard on the outside of the upper or northern granite wall, between its main track and the track of the Charleston & Western Carolina Railway Company, where the town had previously had a fence, which had fallen into decay.

In the foregoing synopsis of the complaint no reference is made to allegations concerning the duty and neglect of the town of Greenwood, for when its demurrer was sustained without appeal its alleged liability was eliminated from consideration.

The first question made by the demurrers is whether the plaintiff's intestate was using a way over which the public had by prescription a right to travel. There are some authorities which hold a railroad company may release or convey a portion of its right of way, and hence that individuals may acquire a private right of way, or the public a highway, over the company's right of way by continuous, open, and adverse use for twenty years. *Gay v. Boston & A. R. Co.* 141 Mass. 407, 6 N. E. 236; *Turner v. Fitchburg R. Co.* 145 Mass. 433, 14 N. E. 627; *Blumenthal v. State*, 21 Ind. App. 665, 51 N. E. 496; *Pittsburgh, C. C. & St. L. R. Co.* 19

v. *Crown Point*, 150 Ind. 536, 50 N. E. 741; *People v. El River & E. R. Co.* 98 Cal. 865, 33 Pac. 728; 22 Am. & Eng. Enc. Law, p. 1220; Elliott, Railroads, § 425. The subject is referred to in *Boggero v. Southern R. Co.* 64 S. C. 104, 41 S. E. 819; *Jones v. Charleston & W. C. R. Co.* 61 S. C. 560, 39 S. E. 758; *Haltwanger v. Columbia, N. & L. R. Co.* 64 S. C. 7, 41 S. E. 810; *Hankinson v. Charlotte, C. & A. R. Co.* 41 S. C. 1, 19 S. E. 206, and *Ringstaff v. Lancaster & O. R. Co.* 64 S. C. 546, 43 S. E. 22; but the question here made was not decided or involved in any of these cases. The doctrine above stated, under our statutes and the general principles of law, should be received, we think, with an important limitation. Railroad companies are allowed to acquire rights of way by condemnation because of the interest the public has in the construction and operation of their roads as highways, and hence a right of way so acquired is burdened with duties to the public. Therefore it may be stated as a general proposition, while the railroad company may deal with the right of way so acquired as its own in the conduct of its business as a carrier, it cannot dispose of it or use it so as to destroy or impair its ability to serve the public. 5 Thomp. Corp. §§ 58, 78, 6137; *Thomas v. West Jersey R. Co.* 101 U. S. 87, 25 L. ed. 950; *Southern P. Co. v. Hyatt*, 132 Cal. 240, 54 L. R. A. 522, 64 Pac. 272; *Collett v. Vanderburgh County*, 119 Ind. 27, 4 L. R. A. 321, 21 N. E. 329; *Northern P. R. Co. v. Spokane*, 12 C. C. A. 246, 29 U. S. App. 81, 64 Fed. 506. Our statute under which the right of way is acquired provides that nothing therein contained "shall be construed to confer upon such person or corporation any right in or power over the lands so condemned, other than such as may be within the particular purpose for which such lands were condemned." Civil Code 1902, § 2194. Nevertheless, it is absolutely necessary that there should be many crossings for the use of those passing from one side of railroads to the other for business and social purposes, and it is sometimes essential that a public road or another railroad should run parallel with a railroad already constructed within the limits of its right of way. In recognition of this public necessity the law allows condemnation of a way for such purpose over lands already acquired for a railroad right of way, "provided, that in the construction of such other highway there be no hindrance to the use and enjoyment of the highway for which such lands or right of way were previously procured." Civil Code 1902, § 2195.

When conditions arise that would justify the condemnation of a way over a railroad

right of way, the railroad company no doubt could, without violating its duty to the public, waive condemnation, and allow the easement over its own right of way, subject to the condition indicated by the statute that the new highway should be so constructed as not to interfere with its own use to such an extent as to impair its ability to perform its public duties. Prescription can only arise from presumption of a grant or dedication. Under our own statute the railroad company has no power over a right of way acquired by condemnation except to use it for railroad purposes, and it therefore cannot grant it to another for other uses. The statute further forbids any portion of the right of way being taken under the state's right of eminent domain for another public highway, except with the provision that such other highway shall be so constructed as not to interfere with the first public purpose for which the land was set apart. The public may, no doubt, acquire a right to use a particular way over lands set apart for a railroad right of way by use clearly shown to be adverse for twenty years, in the sense that after that lapse of time the railroad authorities cannot arbitrarily forbid the use of such way for any reason not connected with the operation of the railroad; but, since the company cannot grant its right of way so as to defeat the purpose for which it was acquired, and it cannot be condemned for another highway so as to hinder these uses, it cannot be presumed that there ever was any grant or dedication to a public use inconsistent with the purpose for which the property was acquired by state authority. The use made of the right of way by others, with or without the consent or acquiescence of the company, must be regarded subject to the right to use the property for the conduct of the railroad's business as a carrier for the public.

Besides, the width of the strip of land necessary for railroad purposes is fixed under the authority of the state, and this fact creates a strong presumption that the whole of it should be preserved as necessary for the purpose for which it is set apart, except when burdened with condemnation for another highway; and the mere use for purposes of travel of a portion of the right of way, however long and notorious, should be regarded not adverse, but subject to yield to the end the state has in view in exercising its power of eminent domain in setting it apart and fixing its limits. The case under consideration affords a striking example, not only of the reasonableness, but of the necessity, of this rule. Two of the great railroad systems have acquired rights of way and are running their main lines through the town of Greenwood 10 or 12

feet apart. If the people of that vicinity are held by the use here alleged to have acquired a right, not subject to railroad purposes, to the space not actually occupied by the railroad tracks, it would inevitably interfere not only with the construction of side tracks or double tracks, which the development of the country may render essential to the public convenience and welfare, but also with the present operation of trains. The rule founded on legal principles and demanded by public necessity is thus stated in Jones, Easements, § 281: "A prescriptive right to a passageway along the track or right of way of a railroad cannot be acquired by the public or by individuals while the railroad company has constantly used a single track over such right of way. The construction and operation of one track upon its location is an assertion of right to the entire width of its right of way. The presence of a track constantly in use is a defiant badge of ownership, and the only practical assertion of title that can be made. If the public has used paths by the side of the railroad track for any length of time, the use must be considered as permissive, and not adverse. An injunction will be issued in behalf of the railroad company to restrain any interference with the laying of a second track over such part of its way as has been used by the public as a footway for more than twenty-one years." *Pennsylvania R. Co. v. Freeport*, 138 Pa. 91, 20 Atl. 940.

The complaint alleges this narrow strip had been used by the public for more than twenty years before the accident occurred, but it does not allege it was not used by the railroads for the purposes for which a right of way is acquired, or that it was not necessary for those purposes, or that the foot travel over it was inconsistent with railroad uses, or in any way hostile or adverse. The bald statement that "the public had acquired a prescriptive right to travel" on this strip is a mere legal conclusion, which, so far from being supported by the allegation of fact, is negated by the statement that the public use was "with the knowledge, acquiescence, and consent" of the defendants. *Bailey v. Gray*, 53 S. C. 514, 31 S. E. 354. Under the allegations of the complaint, we conclude there was no public right of passage acquired by prescription between the tracks of the Southern Railway and the Charleston & Western Carolina Railway.

It should be observed, the conclusion that the public cannot acquire a way on a railroad right of way by prescription which is founded on the presumption of a deed does not imply that title to portions of the right of way may not be acquired by adverse possession which is founded on possession hostile to the true owner. Neither adverse pos-

session nor the doctrine of equitable estoppel, referred to in *Crocker v. Collins*, 37 S. C. 333, 34 Am. St. Rep. 752, 15 S. E. 951, is involved in this case. While a railroad company cannot lose its right of way by alienation or prescription, because of the public's interest in its holding it for public purposes, it may impose upon itself as a private corporation duties and obligations to the public or to individuals by inviting the use of the right of way, or indicating its willingness that it should be used by the public or particular individuals. In such circumstances the duty devolves on the railroad company to exercise ordinary care to avoid injury to those so using the right of way. This rule is not peculiar to railroads, but is of general application. The invitation need not be expressed in words, but may be implied in a number of ways; such, for instance, as the actual construction or repairing by the railroad company of a road or a bridge along the right of way, which would not be suggestive of any other use except travel on foot or in the ordinary vehicles of the country. The allegation here is that the defendants acquiesced and consented for many years to the use by the public of a "well-beaten path, a regular traveled place," along the right of way of the Southern and the Charleston & Western Carolina railroads, and at right angles to the track of the Georgia, Carolina, & Northern Railroad. "Acquiescence and consent" convey the meaning, not only of knowledge and recognition on the part of the defendants of the alleged use of the right of way, but actual concurrence in such use. The complaint does not allege that the acquiescence and consent on which plaintiff's intestate would have been authorized by law to rely in undertaking to travel the path was evidenced only by the fact that there was "a well-beaten path, a regular traveled place," but, assuming this to be plaintiff's position, the complaint still states a cause of action. It is true that a railroad track is itself a danger signal to pedestrians. All persons in possession of reason must be held to know that, so far from a railroad company being able to construct its road with regard to the safety of those who walk on it, it must have numerous dangerous cattle guards, cuts, and trestles, and that no adequate speed of trains could be maintained if those in charge of them had to have concern for persons who take the risk, unbidden, of walking on the track or right of way. Hence, ordinarily, those who walk along or across railroads, however general the practice may be, are trespassers, taking upon themselves all the risks; and the railroad company owes them no duty except not to harm them wilfully or wantonly. *Jones v. Charleston &*

W. C. R. Co. 61 S. C. 560, 39 S. E. 758; *Smalley v. Southern R. Co.* 57 S. C. 243, 35 S. E. 489. But where a railroad company allows the public to use its right of way for a long time at a particular place in a large town so continuously and frequently that it becomes a well-beaten or clearly defined path, plain and open, a reasonable man may well infer that he will not encounter unguarded cuts and the other dangers of the ordinary path along the track. In such a case the owner of the property knows and acquiesces in the use, and by his acquiescence those wishing to go in that direction are lured into a sense of safety in following the course obviously taken by those who have preceded them. If the owners, or those in control of the property, fail to observe ordinary care in avoiding injury to persons who travel the path, relying on the safety suggested by the implied invitation, they must be held responsible.

A contrary view is taken in some cases of very high authority. *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 14 L. R. A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; *Illinois C. R. Co. v. Arnola*, 78 Miss. 787, 84 Am. St. Rep. 645, 29 So. 768; *Devoe v. New York, O. & W. R. Co.* 63 N. J. L. 276, 43 Atl. 899; *Griswold v. Boston & M. R. Co.* 183 Mass. 434, 67 N. E. 354; *Omaha & R. Valley R. Co. v. Martin*, 14 Neb. 295, 15 N. W. 696; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; *Lingenfelter v. Baltimore & O. S. W. R. Co.* 154 Ind. 49, 55 N. E. 1021; 3 Elliott, Railroads, § 1154. The general rule, in which all the courts agree, however, is that the owner of property is held to ordinary care to avoid injury to one who enters his premises by invitation, express or implied; but the variance is as to what facts imply an invitation. In the cases above mentioned it is held that acquiescence in the use of the right of way for a long time, indicated by a plain, well-defined road or path at a particular point, manifestly differing from the ordinary path along the track, does not imply invitation or suggestion to the public to use the path, except where the path is used as an approach to the company's place of business by those having occasion to transact business with the company.

The rule as we have stated it, which is contrary to the doctrine laid down in the above cases, seems to require nothing more than ordinary good conduct on the part of the owner in the use of his property, to the end that injury to his neighbor may be avoided; and we think it is supported by the current of judicial opinion. *Jones v. Charleston & W. C. R. Co.* 61 S. C. 560, 39 S. E. 758; *Hansen v. Southern P. Co.* 105 Cal. 379, 38 Pac. 957; *Taylor v. Delaware* 65 L. R. A.

& *H. Canal Co.* 113 Pa. 162, 57 Am. Rep. 446, 8 Atl. 43; *Burton v. Western & A. R. Co.* 98 Ga. 783, 25 S. E. 736; *Atchison, T. & S. F. R. Co. v. Potter*, 64 Kan. 13, 56 L. R. A. 575, 67 Pac. 534; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 406; *Barry v. New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645, 25 N. E. 378; *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Lepniok v. Gaddis*, 72 Miss. 200, 48 Am. St. Rep. 547, 16 So. 213, and note, 26 L. R. A. 688; 23 Am. & Eng. Enc. Law, p. 732. The English cases are to the same effect. It is, of course, always a question for the jury to determine whether the way was so plain and so constantly used, with the acquiescence and consent of the owner, as to imply an invitation to the public to enter.

It is noteworthy that while in the case of *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 14 L. R. A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133, the supreme judicial court of Massachusetts seemed to take very advanced ground against the doctrine that invitation may be implied from such conditions as are above stated, yet in the case of *Chenery v. Fitchburg R. Co.* 160 Mass. 211, 22 L. R. A. 575, 35 N. E. 554, it holds, while long use by the public of a well-defined path across a railroad track does not, as a matter of law, import a license, still it presents a question of fact for the jury as to whether a license is to be implied, which would subject the railroad to liability for negligence.

The New York court of appeals and the courts of some other states hold that, where injury results from mere passive omission of the railroad company to guard or give notice of a dangerous place on its right of way, where the public has been accustomed to use it in the manner indicated above, no liability will be incurred for resulting accident, but that the company will be liable for injury resulting from its active negligence at such place; as, for instance, in running its trains without looking out for the safety of travelers, or digging a pit, or placing explosives, without adequate notice, at a place where it has acquiesced in the general and frequent use by the public of its railroad track. *Barry v. New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Byrne v. New York C. & H. R. R. Co.* 104 N. Y. 362, 58 Am. Rep. 512, 10 N. E. 539; *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350. This distinction may

fairly be supported on the ground that the people at large may well be held to have notice of the dangers already existing along the path they are accustomed to travel, and the owner may properly assume that they enter the premises in full contemplation of the danger, and of their own volition assume the risk; but they do not assume the risk of dangers brought upon them unexpectedly by the owner of the property. The distinction should not apply to that portion of the public who are not familiar with the dangers of the way, but enter it with sufficient reason to infer it has been used by the public with safety. Applying this view to the allegations of the complaint in this case will, we think, make its reasonableness obvious. Those who walked in the path here described entered, not a public highway, but the property of the railroad companies as licensees; and, even if they did so in pursuance of an invitation, express or implied, but knew of the existence of the cut and its dangerous condition, they accepted the invitation in full view of the danger, and for their own convenience voluntarily assumed it. In such case, it seems clear the railroad companies would not be responsible for resulting injuries. But, if the jury should find the path is of the kind to invite entrance and suggest safety, one who enters, relying upon this invitation, in ignorance of danger, and falls into a deep, unguarded cut, at right angles to the path, may hold the railroad companies responsible, in the absence of contributory negligence, if they had reason to expect such persons to enter. The allegation here is that the plaintiff's intestate did not know of the cut or surroundings, and could not see it on account of darkness. We venture to suggest that if this distinction between those who know the danger and those who do not is borne in mind it will reconcile in some measure the apparent conflict of authority on this subject.

Before leaving this branch of the case, it may be well to observe there is an obvious difference between a case like this, where there are allegations of such apparent use by the public as to suggest safety and invite entrance, and the turntable and other cases of that nature, such as *Bridger v. Asheville & S. R. Co.* 25 S. C. 24; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 54 L. R. A. 314, 39 S. E. 82, and *Ryan v. Towar*, 128 Mich. 463, 65 L. R. A. 310, 92 Am. St. Rep. 481, 87 N. W. 644, where there is no indication of invitation, or even willingness, that the person injured should enter, the entry being merely a trespass to gratify curiosity, or to attain some other end peculiar to the particular individual.

The appellants insist, however, that the 65 L. R. A.

attempt of plaintiff's intestate to use a path between two railroad tracks, with which he was unacquainted, in the darkness of night, was itself such carelessness on his part as to warrant the court in dismissing the complaint on the ground of contributory negligence. Whether there was contributory negligence by Partlow in this respect, which was the proximate cause of his death, depends on the character of the path, and possibly on many other circumstances, which are for the consideration of the jury. The case of *Jarrell v. Charleston & W. C. R. Co.* 58 S. C. 491, 36 S. E. 910, therefore does not apply, for the reason that we cannot say, as a matter of law, that no other conclusion could be drawn than that plaintiff's intestate was guilty of contributory negligence, which was the proximate cause of his death. No detailed discussion of this point is attempted, because the case is to be heard by a jury.

Having reached the conclusion that the complaint states a cause of action, the remaining question is whether the defendants can be held jointly liable. It will be observed there is no allegation that any one of the three companies had improperly constructed its road. The charge is not that the cut which made the danger and into which Partlow fell was improperly constructed and located, but that, owing to the kind of path that led to it over the right of way of the Southern Railway and the Charleston & Western Carolina Railway, these defendants, after the cut was made, owed the duty to Partlow, entering it as one of the public, either to properly notify the public not to use the path, or to guard or warn by obstructions or lights. The wrong, if any, was in inviting Partlow into a place of danger, known to them, but not to him, without warning or safeguard; and it was of no consequence that the danger was not created by these companies, but by the rightful action of another railroad, in making the cut. If, under such circumstances, he was injured without fault on his part, they should be held liable. On the other hand, the lessees of the Georgia, Carolina, & Northern Railway cannot avoid liability on the ground that it had no part in allowing the use of the path, and had never in any way consented to such an approach to its cut. It is alleged the Georgia, Carolina, & Northern Railway Company knew of the existence and nature of the path when it made the cut, which was dangerous to pedestrians because of its being across the path at right angles. It will hardly be disputed that one who rightfully makes a ditch or cut, dangerous to travelers, across a well-defined way, with knowledge that it has for a long time been used as a public way, and gives

no warning and places no safeguard, will be liable to those who, without fault of their own, are injured thereby. If there was any duty to safeguard the cut, it seems clear that it was a duty which developed upon each of the defendants. From this conclusion it results that the defendants were properly sued jointly. "If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tort feorsors may be held. But when each of two or more persons owes to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the neglect of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort feorsors are subject to a like liability." *Matthews v. Delaware, L. & W. R. Co.* 56 N. J. L. 34, 22 L. R. A. 262, 27 Atl. 919. See also *Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683. The allegations of this complaint would bring the case even within the Pennsylvania rule, which is much stricter as to joint liability than that above stated. *Klauder v. McGrath*, 35 Pa. 128, 78 Am. Dec. 329. The cases of *Langhorne v. Richmond R. Co.* 91 Va. 369, 22 S. E. 159, and *Howard v. Union Traction Co.* 195 Pa. 391, 45 Atl. 1076, on which appellants rely, may be readily distinguished from this case.

It is quite obvious the allegations of this complaint are very different from those which were held insufficient in *Dorn v. Georgia, C. & N. R. Co.* 58 S. C. 364, 36 S. E. 654.

The exceptions are overruled, and the judgment of the Circuit Court is affirmed.

Gary, A. J., concurs in the result.

COMPUTING SCALES COMPANY, *Respt.*, v.

J. W. LONG, *Appt.*

(66 S. C. 379.)

1. A pleading cannot be stricken out for indefiniteness.
2. Misrepresentation as to the quality of scales sold is not shown by evidence that other scales sold by the same vendor, but not shown to be of the same pattern as those in controversy, had rusted, and that they did not compute certain fractions of a cent accurately, without showing the cir-

cumstances, or that the vendor made any representations on these points; or by showing that, although the scales were represented to be dust proof, the seller had advised putting paper over them to keep the dust out, without showing that it was necessary, and not a mere matter of precaution.

3. A purchaser of machinery cannot rescind the contract merely because the patents under which it is manufactured are in dispute.

4. Interest will be allowed from maturity of the debt, in case of failure to pay a certain sum of money at a fixed time.

(June 18, 1903.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Lexington County in plaintiff's favor in an action brought to recover the purchase price of certain scales alleged to have been sold and delivered. *Affirmed.*

The facts are stated in the opinion.

Mr. E. S. Asbill for appellant.

Mr. Joseph A. McCullough for respondent.

Woods, J., delivered the opinion of the court:

The plaintiff, through its traveling salesman, Hardy, sold by written contract to defendant, on March 4, 1897, computing scales for the price of \$40, payable ten days after shipment. The defendant duly received the scales, but, after keeping them in his store for some days unopened, reshipped them to plaintiff's address, and refused to pay the purchase money. The plaintiff then commenced this action for the contract price. By a consent order the cause was referred to a referee, who sustained the defenses involved in this appeal. The circuit judge, at the hearing, reversed the findings of the referee, and upon his decree judgment has been entered for the plaintiff for the full amount claimed.

The grounds of appeal to this court involve only two paragraphs of the answer, and these will be considered separately. The first of them is as follows:

"That the computing scales offered to the public by the plaintiff's agent, P. D. Hardy, during March, 1897, at Lexington, South Carolina, were fraudulently represented by false claims and flagrant misrepresentations by the said P. D. Hardy, and that the said computing scales had acquired a false value by fraudulent misrepresentations in advertisements, and that the said scales are not as represented by the plaintiff and its agent, P. D. Hardy."

The plaintiff moved before the referee and the circuit judge to strike out this defense as too indefinite and uncertain. Neither referee nor circuit judge made any ruling on this motion, but the plaintiff, after due

NOTE.—As to implied warranty of title generally on sale of personal property, see *Hodges v. Wilkinson*, 17 L. R. A. 545, and *Jarrett v. Goodnow*, 32 L. R. A. 321.
65 L. R. A.

notice to the defendant, asks this court to hold that the motion should have been granted. A pleading cannot be stricken out for indefiniteness. The remedy is a motion to make more definite and certain. Code Civ. Proc. § 181. The plaintiff having made no motion of that kind, evidence of any misrepresentation whatever to defendant tending to defeat the recovery was properly admitted and considered. To sustain this defense the defendant testified that Hardy, the selling agent, had represented the scales to be dustproof, and afterward, when the scales were sent, told him to keep paper over them as a protection from dust. The witness Gunter testified that scales sold by plaintiff to other parties had rusted, that they would not compute certain fractions of a cent, and that mistakes could be made in using them. In the sale of machinery the court must assume that representations as to its fitness are based on the supposition that it will be used with some degree of care and intelligence. There is no evidence here of the conditions under which the scales rusted, or how the mistakes were made, nor whether the use of the paper to keep out dust was a necessity, or only suggested as an extra precaution; and it does not appear that the selling agent represented the scales would compute all fractions. Aside from all this, the scales sold to the defendant were never unpacked, no testimony was offered that those spoken of by defendant's witnesses were of the same pattern, and the court cannot assume this as a fact. It is significant that the defendant, in his letter to plaintiff giving notice of the return of the scales and of his refusal to pay for them, makes no complaint of the quality of the scales, but places his refusal on the sole ground that suits were pending involving the patent rights. In his testimony he again says he returned them because he had been notified of such suits. The defendant has entirely failed to sustain his allegation of misrepresentation as to the quality of the scales.

The other defense involved in this appeal is thus stated in defendant's answer:

"That the plaintiff is not the undisputed owner of the patent rights to the said scales and fixtures thereof mentioned in plaintiff's complaint, and that the defendant could not use the said scales without subjecting himself to suits for infringements."

If the defendant had alleged and proved that the plaintiff had sold him scales in infringement of the patent of a third party without giving notice of such infringement, he could have rescinded the sale without waiting for suit and judgment against himself for using the scales in violation of the patent rights of another. It is true, as a 65 L. R. A.

general proposition, that a purchaser cannot rescind for failure of warranty until there has been eviction or other actual damage suffered. *Bethune v. McDonald*, 35 S. C. 93, 14 S. E. 674; *Childs v. Alexander*, 22 S. C. 185; *Lessly v. Bowie*, 27 S. C. 200, 3 S. E. 199. These cases all involved express warranty in the sale of real estate, but in the sale of personal property there is an implied warranty of title, and the same rule applies. *Ware v. Weathnall*, 2 M'Cord, L. 413; *Rodrigues v. Habersham*, 1 Speers, L. 318; Benjamin, Sales, § 961. If, however, the vendor at the time of the sale knew of a valid outstanding title or encumbrance, and failed to give notice to the vendee, the element of fraud is introduced, and the vendee may rescind without waiting for actual loss to come to him. This doctrine is stated by Chancellor Harper in *Whitworth v. Stuckey*, 1 Rich. Eq. 410, and is founded upon the plainest principles of justice. But mere dispute about the title, or the contingency of future loss, does not warrant a rescission; and, where the buyer returns the goods, and refuses to pay the purchase money, it is incumbent on him to show that there is a valid adverse claim, from which loss to him would inevitably occur. 14 Am. & Eng. Enc. Law, p. 142; Benjamin, Sales, § 849, note. This rule is applied to the defense set up by a vendee that the use of the article purchased would involve him in litigation for infringement of an outstanding patent in *Consumers' Gas Co. v. American Electric Constr. Co.* 1 C. C. A. 663, 3 U. S. App. 111, 50 Fed. 778, and *The Electron*, 21 C. C. A. 12, 45 U. S. App. 16, 74 Fed. 689. The application of the rule may sometimes result in hardship, but to adopt any other would make it possible for a purchaser to escape from his contract upon any claim coming to his notice, however baseless or absurd it might be. The utmost that can be claimed for the defendant here is that he alleged the patent rights to the scales sold were in dispute. The evidence does not connect the scales sold to defendant with any disputed patent. The letter of Hoyt Scales Company, competing dealers, which the defendant says in his letter of May 1, 1897, caused him to return the scales, refers to them as an imitation of Troemner scales; but there is no evidence whatever that the Troemner scales are patented. The testimony of Koehne is that the scales sold defendant are not provided with weights of the design involved in the Culmer patent suit, and this is undisputed, for there is no proof whatever that the scales referred to by plaintiff in the letter to Fox, Marsh, & Co. were of the same pattern as those sold to defendant. The testimony of Ozias, the manager of the plaintiff company,

to the effect that the scales were not like the Phelps patent, which was in litigation between the Hoyt company and the plaintiff, is also undisputed. There is, therefore, an entire absence of proof that the scales involved in this suit fall under any disputed patent; but, even if the right to make and sell them had been in dispute, this would be no defense.

Upon the question of interest it is only necessary to say there was an express written contract to pay a certain sum of money at a fixed time, and this sum should bear interest from maturity.

We are unable to find grounds upon which any of the exceptions can be sustained.

The judgment of this court is that *the judgment of the Circuit Court be affirmed.*

TENNESSEE SUPREME COURT.

KNOXVILLE TRACTION COMPANY,
Appt.,
v.

John E. McMILLAN *et al.*

(.....Tenn.....)

A street car company cannot be made responsible for the payment of a privilege tax imposed upon persons leasing the right to use the cars for advertising purposes, under a constitutional provision that no one shall be deprived of his property without due process of law.

(November 20, 1903.)

A PPEAL by complainant from a decree of the Chancery Court for Knox County dismissing a bill filed to recover money which had been exacted in payment of a tax which complainant claimed it was under no obligation to pay. *Reversed.*

The facts are stated in the opinion.

Messrs. S. G. Shields and R. E. L. Mountcastle, for appellant:

A privilege tax is a debt against any person who carries on a business charged therewith, and may be sued for accordingly.

State v. Nashville Sav. Bank, 16 Lea, 111.

If this privilege tax is a debt, it can only be a debt owed by the party who does the business, the doing of which is made a privilege, and, therefore, is a debt solely and alone as a privilege against the advertising company. The legislature has no power to say that such debt can be collected from the traction company.

First Nat. Bank v. Chehalis County, 166 U. S. 446, 41 L. ed. 1073, 17 Sup. Ct. Rep. 629; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 239, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; *Hagan v. Hardie*, 8 Heisk. 812; *Columbia v. Beasley*, 1 Humph. 240, 34 Am. Dec. 646; *Nashville v. Althrop*, 5 Coldw. 558; *Murphy v. State*, 3 Head, 248; *Adams v. Somerville*, 2 Head, 366.

Messrs. Charles T. Cates, Jr., Attorney General, and Reuben L. Cates for appellees.

NOTE.—The above case appears to be one of first impression, and to which there do not seem to be any very close analogies.

65 L. R. A.

Shields, J., delivered the opinion of the court:

This suit involves the constitutionality of the provision of chapter 257, p. 599, of the Acts of 1903, the general revenue law enacted by the present general assembly, making street and commercial railroad companies liable for the privilege tax imposed upon advertising companies conducting the business of advertising in the cars and stations of such companies.

The portions of the statute in question, and necessary to show the connection, are these:

"That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege; and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk, as provided by law for the collection of revenue.

All persons, companies, or corporations owning, controlling, or conducting the business of advertising in street cars in counties of 60,000 inhabitants or over, each, per annum \$100 00

All persons, companies, or corporations owning, controlling, or conducting the business of advertising in dummy cars or railroad cars in counties of 50,000 inhabitants or over, each, per annum. 50 00

All persons, companies, or corporations owning, controlling, or conducting the business of advertising in railroad depots in each county in which business is done, each, per annum 10 00

"Provided that the street car company or railroad company who leases or sells such advertising privileges shall be liable for the payment of the above privileges."

The complainant, a street railway company, owning and controlling a street railway in Knox county, leased the exclusive privilege of advertising in its cars to the Consolidated Railway Advertising Company for a term of years, for a fixed rental, to be

paid at stated intervals; and the latter company has been, and is now, exercising this privilege, and liable for the tax.

The defendant, John E. McMillan, clerk of the county court of Knox county, demanded of complainant payment of the privilege tax due from the Consolidated Railway Advertising Company, and, upon complainant's refusing payment, issued a distress warrant against complainant therefor, which was about to be levied upon its property, when it paid the tax under protest, and now brings this suit to recover the same; insisting that the provision of the statute making it liable for said tax deprives it of its property without due process of law, and consequently contravenes article 1, § 8, of the Constitution of Tennessee, providing that no man shall be taken or imprisoned or dispossessed of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land, and also the 14th Amendment of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law, and is therefore void.

These contentions are sound, and must be sustained.

The traction company and the advertising company are distinct and independent corporations, owing each other no duty or obligation, and having no interest in common. The former is engaged solely in operating a street railway, and the latter in the advertising business. The tax is imposed upon the business of advertising in street cars,—a privilege exercised by the advertising company, and not by the traction company. It is not a liability of the traction company, but one of the advertising company. The only relation of the two companies is that the former is the creditor of the latter for the rent due it for the use of its cars for advertising purposes. The statute arbitrarily imposes upon the traction company liability for this debt of the advertising company, and requires it to pay it with its own means. This is a deprivation of property without a hearing or due process of law, clearly within the prohibition of the constitutional provisions relied upon. This is too obvious for argument, and the property of one citizen can no more be taken to pay a tax or public debt due from another than the private debt of such other person.

The cases of *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 239, 33 L. ed. 895, 10 Sup. Ct. Rep. 533, and *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629, in which statutes requiring corporations to pay taxes due from bondholders and shareholders are held valid, are cited and relied upon to sustain this statute. They are not in point. These statutes apply to corporations having assets of their bondholders and shareholders, in the way of interest and dividends, in their hands, which they can apply to the payment of the taxes, and it is upon this ground that they are sustained.

This is made clear in the case of *Stapleton v. Thaggard*, 33 C. C. A. 353, 62 U. S. App. 638, 91 Fed. 93-95, where a recovery against the receiver of an insolvent bank on account of the taxes assessed against the shareholders was denied because the receiver did not have funds due them in his hands.

It is there said: "As we construe the cases, from *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701, to *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629, the bank is made to pay the taxes assessed by the state against its shareholders, when the state statutes lay such duty upon the bank, upon the theory that the shares are valuable, and that the bank has assets in its hands belonging to the shareholders from which it can recoup. Where a bank is insolvent and has passed into the hands of a receiver, the shares are generally worse than worthless, and the receiver has no assets belonging to the shareholders which can be applied to the payment of taxes assessed on shares. In such case, we are of opinion that the tax assessed against the shares of the bank cannot be collected from the receiver, or from assets in his hands."

The complainant is not the debtor of the advertising company, and at no time, in due course of business, will have any of its assets in its hands or under its control, which it can apply to the payment of the tax imposed upon it. If required to pay this tax, it must do so out of its own property, without any provision for its reimbursement.

The provision of the statute requiring these companies to pay the tax imposed upon advertising companies is therefore clearly unconstitutional and void, and complainant is entitled to recover from the defendant the taxes which it has been unlawfully required to pay.

The provision of the statute requiring these companies to pay the tax imposed upon advertising companies is therefore clearly unconstitutional and void, and complainant is entitled to recover from the defendant the taxes which it has been unlawfully required to pay.

The decree of the chancellor dismissing complainant's bill will be reversed, and a decree here rendered in accordance with this opinion.

The cases of *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 239, 33 L. ed. 895, 10 Sup. Ct. Rep. 533, and *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629, in which statutes requiring corporations to pay taxes due from bondholders and shareholders are held valid, are cited and relied upon to sustain this statute. They are not in point. These statutes apply to corporations having assets of their bondholders and shareholders, in the way of interest and dividends, in their hands, which they can apply to the payment of the taxes, and it is upon this ground that they are sustained.

NASHVILLE, CHATTANOOGA & ST.
LOUIS RAILWAY COMPANY, *Plff. in*
Err.,

v.

I. H. HEIKENS.

(.....Tenn.....)

1. Failure to give a requested instruction is not reversible error, where the instructions given were calculated to impart to the jury fully as clear an idea of the matter involved as would have been done by the use of the language in the one requested.
2. Failure to instruct the jury upon a particular branch of the case is not reversible error, where the complaining party presented no request for such instruction.
3. The owner of property may recover for the injury to his interests by the negligent destruction of it by fire, whether he is in possession or not.
4. The lease of a building, without anything to indicate that it is to be separate from the subjacent land, will pass both building and land; and the destruction of the building will not terminate the liability of the lessee, but he will continue liable for the rent until the expiration of the term.
5. The owner of a building negligently destroyed by fire while in possession of a tenant cannot recover from the one responsible for the loss the whole value of it, but from such value must be deducted the value of the leasehold.

(March 26, 1904.)

ERROR to the Circuit Court for Franklin County to review a judgment in favor of plaintiff in an action brought to recover the value of property destroyed by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Lynch & Lynch for plaintiff in error.

Messrs. Frank L. Lynch and Murray & Murray for defendant in error.

Neil, J., delivered the opinion of the court:

This action was brought in the circuit court of Franklin county against the plaintiff in error to recover damages for the burning of a mill. The jury rendered a verdict in favor of the defendant in error

NOTE.—For a case in this series holding that where a tort upon realty affects both the estate of a tenant and that of a reversioner each may sue separately and recover damages for the injury done to his estate, and that neither can recover damages for the entire injury to both estates, see *Jordon v. Benwood*, 36 L. R. A. 519.

As to liability of tenant for rent after destruction of premises, see, in this series, *Porter v. Tull*, 22 L. R. A. 613, and *note*; *Taylor v. Hart*, 30 L. R. A. 716; *Walt v. O'Neil*, 34 L. R. A. 550; *Wattles v. South Omaha Ice & Coal Co.* 36 L. R. A. 424; and *Arbenz v. Exley*, 61 L. R. A. 957.
65 L. R. A.

for \$5,000, and thereupon the plaintiff in error appealed, and has assigned errors as follows:

"First. There is no evidence in the record to support the verdict.

"Second. The court erred in declining to charge the jury, as requested by the defendant, as follows: 'The plaintiff, to be entitled to recover in this case, must not only prove that the fire might have proceeded from the defendant's locomotive, but must show by reasonably affirmative evidence that said fire did originate from sparks emitted or thrown from defendant's engine.'

"Third. The court erred in not defining to the jury in some way, or instructing them as to the character of, circumstantial evidence necessary to establish a fact. As applied to this case, he should have told the jury that the circumstances shown in the evidence must be such as to make it at least probable, and not merely possible, that the mill was ignited by sparks emitted from defendant's engine.

"Fourth. Because the defendant did not have the benefit of the testimony of J. A. Haley, its engineer on engine No. 118, which witness should have shown conclusively that said engine, spark arrester, etc., were in perfect condition, and were properly handled by him on the day of the fire. This testimony was lost to defendant through no fault of its attorneys, and a new trial should have been granted on the showing made by the affidavits of J. J. Lynch and J. A. Haley.

"Fifth. The court erred in charging the jury as to the measure of damages as follows: 'If you find from the evidence in the case that the plaintiff would be entitled to recover, the amount of his recovery will be the value of the mill, engine, and boiler, and whatever equipment was contained in the mill at the time it was destroyed by fire.' It being shown that by the proof that the mill was encumbered by a lease to Hubert Cherry, who was in possession and who owned the contents of the mill at the time of the fire.

"Sixth. The court erred in declining to charge the jury, as requested by defendant, as follows: 'The plaintiff alleges in his declaration that I. H. Heikens was the owner and in possession of the mill that was burned, and before the plaintiff can recover this fact must be established by the proof. If the proof in this case established the fact that I. H. Heikens was not in possession of the property at the time of the fire, but had leased same to another, then the plaintiff cannot recover.'"

Upon a careful examination of the testimony, we are of opinion that the first assignment of error must be overruled.

The second assignment is also overruled, because its substance appears in the charge of the circuit judge in language even stronger than that contained in the request.

The circuit judge, in substance, told the jury that, before the railroad company could be held liable, the plaintiff below must show that the building was burned by sparks from the engine, or that the fire was set out by the engine of the plaintiff in error.

The court said to the jury: "The burden is on the plaintiff in this case to prove that his mill and fixtures were consumed by fire, and that this fire originated from a spark from one of the defendant's engines." The court also said that, after the plaintiff below has proved that he owned the mill, and that it was consumed by fire, "and that the fire was communicated to the mill by one of the defendant's engines, then the burden of proof would be shifted to the defendant company," etc. Again, the court said: "The plaintiff, in order to make out a prima facie case, must prove by a preponderance or greater weight of the testimony that the fire was caused by a spark from one of the defendant's engines." The same thought is expressed in different language in other parts of the charge. Again, the court told the jury that the plaintiff would be entitled to recover, "provided that the facts and circumstances were such as to make you believe that the fire was communicated by an engine, and that the engine was not properly equipped, or was out of repair, as I have explained to you."

We are of opinion, from these instructions, that the jury got quite as clear an idea of the matter involved in the request contained in the second assignment of error as would have been imparted by a statement of the principle in the language there set out.

The third assignment of error must also be overruled. It is true the circuit judge did not give any instruction concerning circumstantial evidence, but, there being no request presented by plaintiff in error for an instruction upon that subject, the circuit judge could not be put in error for a failure to charge upon it.

The fourth assignment is overruled. We do not think that the affidavits referred to are sufficient, when taken in connection with the fact that the company knew that No. 118 had passed the building that day, and knew that very hour when it did pass. Taking all the circumstances together which should be considered in connection with the affidavits, we are of opinion that the company has not acquitted itself of negligence in respect of the absence of engineer Haley. 65 L. R. A.

We shall pass the fifth assignment of error for the present.

The sixth assignment of error, we are of opinion, should be overruled. It was an immaterial allegation that the plaintiff below was in possession of the mill. Whether in possession or not, he could sue for an injury to his interest.

Now we come to the fifth assignment of error.

Before considering the legal question involved, it should be said that the testimony shows that the mill, prior to the fire, had been rented for the term of one year to one Hubert Cherry, who was in possession of it.

The substance of the assignment is that, inasmuch as there had been a lease of the mill for one year, which had not expired, there were two interests in the property,—one that of the lessee, the other the interest of the reversioner, the owner in fee of the property; that each had a right to sue for an injury to his interest, but that neither had a right to sue for an injury to the interest of the other; and that, in a suit by the reversioner for an injury to his interest, the circuit judge could not lawfully ignore the existence of the leasehold estate, and instruct the jury to allow to the reversioner damages for the injuries inflicted upon the whole interest of the property.

It is insisted, in behalf of defendant in error, that when the property was destroyed by fire the leasehold estate ceased, and nothing was left but the reversion. To sustain this proposition the following authorities are cited: *Winton v. Cornish*, 5 Ohio, 477; *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 220; *Graves v. Berdan*, 26 N. Y. 498; *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Ainsworth v. Ritt*, 38 Cal. 89; *Shawmut Nat. Bank v. Boston*, 118 Mass. 125; *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 443; *Harrington v. Watson*, 11 Or. 143, 50 Am. Rep. 465, 3 Pac. 173; *Porter v. Tull*, 6 Wash. 408, 22 L. R. A. 613, 36 Am. St. Rep. 172, 33 Pac. 965; *Kerr v. Merchants' Exch. Co.* 3 Edw. Ch. 316; *Chesebrough v. Pingree*, 72 Mich. 438, 1 L. R. A. 529, 40 N. W. 747; *Wattles v. South Omaha Ice & Coal Co.* 50 Neb. 251, 36 L. R. A. 424, 61 Am. St. Rep. 554, 69 N. W. 785; *Wait v. O'Neil*, 34 L. R. A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408.

In all the foregoing authorities except the three last cited it appeared that the property rented was a room or apartment in a building, or a cellar, or some part of the building, as distinguished from the whole building. In this class of cases the authorities are practically uniform that the destruction of the building brings the interest of the lessee to an end. The reason given is

that the lease of such a portion of a building does not carry with it any interest in the land. The whole subject is discussed luminously and with great learning in the case of *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654. No different doctrine is taught in volume 2, *Taylor's Landlord & Tenant*, § 520, referred to by counsel.

The current of authority is almost without exception that, where a building is rented without any language indicating that only the building itself is leased, as distinguished from the subjacent land, both the building and the land pass under the lease, and a destruction of the building will not end the lease, but that the lease will continue to the end of the term, and the lessee is liable for the rent up to the expiration of such term. *Banks v. White*, 1 Sneed, 613; *Hibbard v. Newman*, 2 Baxt. 285; *McNairy v. Hicks*, 3 Baxt. 378. And see *Hicks v. Parham*, 3 Hayw. 225, 9 Am. Dec. 745. The same doctrine is recognized in *Wait v. O'Neil*, 34 L. R. A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408, cited by defendants in error. In the case of *Wattles v. South Omaha Ice & Coal Co.* 50 Neb. 251, 36 L. R. A. 424, 61 Am. St. Rep. 554, 69 N. W. 785, cited by defendants in error, it is admitted that the foregoing is practically the universal doctrine under the common law; but that case declines to follow it. The note to *McMillan v. Solomon*, 94 Am. Dec. 654, recognizes that such is almost the universal doctrine. Indeed, the current of authority is so strong that it is useless to cite authorities upon the subject. Of course, if the property itself is destroyed, as in the case of a landing (*Wait v. O'Neil*, 34 L. R. A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408), the tenancy would cease. The subject of the lease in that case was a landing on the Mississippi river. The landing was washed away by a change in the current of the river, and the court held that the tenancy thereupon ceased. In *Chesebrough v. Pingree*, 72 Mich. 438, 1 L. R. A. 529, 40 N. W. 747, the question involved in the case was to some extent discussed, but the case went off upon another ground.

Assuming it to be settled, then, that in the present case the two interests referred to still existed, we pass to the next proposition,—that the reversioner and the tenant each had a right of action for the injury to which he was subjected by the fire.

The recognized doctrine is that a tenant, in the absence of a covenant to the contrary, is liable to the landlord for waste, by whomsoever committed. "If the law were not so," said Lord Mansfield in *Atter-* 65 L. R. A.

sol v. Stevens, 1 Taunt. 202, "there would be no protection to the lessor where he lives at a distance from his estate. This is not the case of a sack full of earth stolen by night, but many hands and carts must be employed, and the tenant must necessarily know it. When the lessor comes to see his estate, and finds the soil gone, it is impossible that he should know who took it. Suppose, on a covenant not to take brick earth, the lessor sues, finding a quantity gone. Is it an answer to say: 'I did not take it; a stranger—a beggar—took it; resort to him?' The law authorizes the tenant to use force in order to resist the taking, and, if that force is resisted by force, the law will not presume that the law is so feeble as not instantly to repel it and prevail." In view of this principle, it seems to have been held in *Austin v. Hudson River R. Co.* 25 N. Y. 334, that the tenant could sue for the whole injury done to the premises, and that the recourse of the landlord would be upon him. The more reasonable view, however, seems to have been adopted in *Wood v. Griffin*, 46 N. H. 231, that, while the tenant could sue to recover damages for injury to his own interest, he could not recover for injury done to the reversioner, unless it should appear that he had paid the landlord or reversioner such damages. See also *California Dry Dock Co. v. Armstrong*, 8 Sawy. 523, 17 Fed. 216.

The weight of authority seems to be that each may sue to recover for the injury done to his estate in the premises which may be the subject of the controversy. In *Sherman v. Fall River Iron Works Co.* 2 Allen, 524, 79 Am. Dec. 799, it was held that a lessee might maintain an action for a nuisance to the real estate which he occupied, which was injurious to his possessory interest; while the landlord must bring an action for an injury to the reversion. In *Getz v. Philadelphia & R. R. Co.* 105 Pa. 547, the supreme court of Pennsylvania held that lessees of property from year to year were entitled to recover damages to their leasehold interest when the property was damaged or taken by a railroad company. In *Crowell v. New Orleans & N. E. R. Co.* 61 Miss. 631, it appeared that the owner of realty gave the defendant railway company a right of way across land in possession of the tenant. The tenant sued the railroad company for trespassing. The supreme court of Mississippi held that, inasmuch as the owner of the land had leased it to the tenant for a year, the latter was the owner of the term, and it was thereafter not within the power of the landlord to confer upon

the railroad company the right to construct its road on the land during the term; that the landlord could confer no right which he himself could not exercise over the premises; that he himself would have been a trespasser if he had done the acts complained of,—that is, had built the roadbed of a railroad track across the land; and that the company, acting under his authority only, was not protected by it from a recovery by the tenant for the injury inflicted. In *Sutherland on Damages* it is said: "The same act may be injurious to several persons having different interests,—to the person having a limited estate in possession, and the person or persons having the fee subject to that possessory title. The owner of the reversionary or expectant estate has no claim for damages where the wrong affects only its present enjoyment, and when it affects the value of the whole estate in possession and in expectancy, he has no claim for damages except for the injury to the inheritance." Vol. 4, 3d ed. § 1033. In *Attersol v. Stevens*, 1 Taunt. 202, it was said, per Chambre, J. (p. 194); "Where different persons have distinct rights in the subject of a trespass, the compensation must be to each in proportion to the injury he has received. One of them cannot claim that part of the compensation which belongs to the other, nor can the satisfaction made to one be a bar to an action brought by the other. It can hardly be necessary to cite cases upon this point." In our own case of *Colcough v. Nashville & N. W. R. Co.* it appeared that the defendant railway company had appropriated certain lands for its right of way, which were leased for a term of years to the plaintiff. The charter provided that, when property should be taken by the company for railroad purposes, the "owner" should be compensated. The defendant insisted that only the owner of the fee could recover, but the court held that the lessee or the owner of any interest might recover for the loss or damage to his particular estate. Speaking to this matter, the court said: "It would seem that in such cases the persons vested with the several interests which constitute the entire estate might join in a proceeding under the statute to obtain compensation, or, as they have several interests, proceed separately. In either mode of proceeding, however, the compensation for the entire damage must be apportioned according to their respective interests." 2 Head, 171. In *Jordan v. Benwood* the supreme court of West Virginia had a case under examination wherein it appeared there was a life estate and a remainder interest. The suit 65 L. R. A.

was brought by the remainder-man for injury to the property. It did not appear that any deduction had been made in the damages for the amount of injury suffered by the holder of the life estate. The court announced the following doctrine, *viz.*: That, if there be a tenant for years or life in actual possession, he can sue for any trespass affecting his immediate residential interest, and the reversioner or remainder-man, if the act does a permanent injury to the inheritance, may sue as to that, but that they are separate claims; that, where the injury is of a permanent nature, deteriorating the market value of the property, so that, if the remainder-man or reversioner were to sell, it would bring less money in the market, there is damage to the reversion or remainder, for which the reversioner or remainder-man may sue; that, where the same act affects both the limited estate and the remaining fee, the damages are apportionable between the tenant of the particular estate and the owner of the fee; that the particular tenant recovers for damage only to present enjoyment covering the entire term, if it affect the entire term, and the remainder-man or reversioner only for damage to the remainder or reversion. "This discrimination of right between the two is plain in the law books," continues the court, "and must be carried out in practice. How? The books do not just say. But they say, as reason says, that the damage to the reversion or remainder is the amount that estate is diminished in value. . . . But that is only the market value of the remainder after the end of the particular estate, and it is difficult to get at that, unless we ask the market value of the property before and after the injury, regardless of the two estates, and then seek the value of the estate for years or life on the basis of the annual rental value multiplied by the number of years remaining of the term of years, or by the number based on the expectation of life of the life tenant." 42 W. Va. 312, 36 L. R. A. 519, 57 Am. St. Rep. 859, 26 S. E. 266.

Applying these principles, it is clear that the circuit judge committed error in instructing the jury that they should allow to the defendant in error the whole value of the mill and equipment, making no account of the value of the leasehold interest. This value should have been proved, and the jury should have been instructed by the court to deduct it from the total valuation of the mill.

For this error the judgment of the court below must be reversed, and the cause remanded for a new trial.

TEXAS SUPREME COURT.

GREENWALL THEATRICAL CIRCUIT
COMPANY, *Piff. in Err.*,
v.

E. MARKOWITZ.

(.....Tex.....)

One who sues for breach, before the time for performance arrived, of a contract to employ him as manager of an opera house for a compensation, to consist in part of a share of the net profits, is not entitled to recover as damages a share of the amount for which his employer disposed of the lease subsequent to the time when such employment should have begun.

(April 11, 1904.)

ERROR to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment increasing the amount of plaintiff's recovery in the District Court of Galveston County in an action brought to recover damages for breach of a contract to employ him as manager of an opera house. *Reversed.*

The plaintiff recovered \$1,000 at the trial in the district court. Upon appeal to the court of civil appeals the court, in an opinion by Gill, J., held that the principle upon which the damages were assessed was erroneous.

The material portions of the opinion of the appellate court were as follows:

The appellant contended in the lower court, and contends here, that the sale of the lease furnished a certain measure of appellant's damage; and that, because the very act by which the breach was irrevocably accomplished furnished such a certain measure, the court should have instructed the jury that, in case they found for appellant on the issue of liability, they should return a verdict for appellant for \$7,500 less the amount of the \$3,000 Kempner note, with interest to the date of the breach.

The appellee contends that the judgment should not be disturbed, because no liability was in fact shown, and, in support of this position, urges: (1) That the contract with appellant was void, because it amounted to a subleasing of the premises without the landlord's consent. (2) Because the contract was one of partnership, and, it appearing, from the allegations in plaintiff's petition, that appellee is a corporation, it was bad on general demurrer, since a corporation has no power to enter into part-

nership either with another corporation or with an individual. (3) Because Kempner, being an accommodation indorser, had the right to recall his indorsement, and, having recalled it before appellee had changed its position by reason thereof, the contract was unenforceable for want of consideration.

We are thus brought to the question of the measure of damages. We have already stated the position of appellant. In opposition to this, appellee propounds two further propositions: (1) That the petition in this respect is bad, on general demurrer, because the damages prayed for are too speculative and remote to be recoverable. (2) Because the sale of the lease and the sum it brought bear no such relation to the breach of the contract as to furnish the plaintiff a measure of damage for its breach.

The petition sets up the facts, and asks for damages; so, after all, the question must turn upon the inquiry whether, from the facts, the court can ascertain the damage suffered by appellant without going into the field of pure speculation. "Damages which are the natural and probable result of a breach of contract, and which may be reasonably anticipated therefrom, but which are so speculative and so dependent upon numerous and changing contingencies that their amount is not susceptible of proof, with any reasonable degree of certainty, may not be recovered." *Central Trust Co. v. Clark*, 34 C. C. A. 354, 92 Fed. 296; *Fraser v. Echo Min. & Smelting Co.* 9 Tex. Civ. App. 211, 28 S. W. 714.

The rule stated is one of general application, and is well established; but another, equally well established and to which all others yield, is that, whenever in a given case damages are shown to have been suffered by the actionable fault of another, and, by reason of the facts, the court finds that the damages actually suffered can be safely ascertained, the court will make the inquiry and award the damages; and this whether they include loss of profits or any other element, however difficult or uncertain of proof they may ordinarily be.

This is but another way of saying that every damage suit must be determined upon its own facts, and such a reasonable and safe measure of damages applied as the facts may furnish. This rule is most frequently applied in actions sounding in tort, but is equally applicable to breaches of contract where the damages prayed for are unquestionably within the contemplation of the parties and the question is one of certainty of proof. Compensation is the basic

NOTE.—For loss of profits as an element of damages for breach of contract, see, in this series, *Wells v. National Life Asso.* 53 L. R. A. 33, and note.
65 L. R. A.

principle, but, owing to the ever recurring differences in the facts of cases, it is difficult, if not impossible, to lay down a general rule as to the measure of damages. *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; 8 Am. & Eng. Enc. Law, p. 628.

No rule of universal application has been formulated. The requirement of certainty of proof of the loss claimed and the exclusion, ordinarily, of future profits as an element of recovery is but the old rule, in a new form, that the plaintiff must make out his case with reasonable certainty.

Some cases are such, in their circumstances, as to afford an obvious rule by which a just and adequate compensation can be readily measured, and when this is the case the rule should be unhesitatingly applied. *Gilbert v. Kennedy*, 22 Mich. 117; *Warren v. Cole*, 15 Mich. 274; *Allison v. Chandler*, 11 Mich. 548.

This course is infinitely safer and better than to substitute therefor some abstract generality, which may prove inapplicable in some important particular. Such is the case before us. In this case the actual breach was accomplished by the sale of the lease. Appellee had not bound itself to accord to appellant any management or control, so a denial of that privilege was not a breach, but was in accord with the terms of the instrument. The mere verbal repudiation of his rights on the part of the appellee was not a breach, for it might, nevertheless, have proceeded with the enterprise and settled justly with appellant on the days named for a division of the profits. The return of the note to Kempner was not a breach, for that was a matter in which the appellant had no concern. The appellee might have donated the note to a charity, or disposed of it in any other way, and appellant would not have been heard to complain. The note was not partnership assets, but the individual property of appellee. The breach, then, consisted in the sale of the lease, for thereby the continuance of the business was rendered impossible. The case has this peculiar feature. The life of the lease and the term of the partnership were identical. The partnership business actively began at the inception of the lease. The building was leased for no other purpose than an opera house. The right to so use the house was valuable only to the extent to which the house could be profitably used for theatrical purposes. One purchasing the lease must necessarily be controlled by probable future profits in estimating its value. The sum of \$15,000, paid by Kyle to appellee for the lease, was what the appellee actually realized from the venture, and less than what Kyle, perhaps, hoped to realize from the operation of the

house; for it is manifest, from his purchase of the bookings of theatrical and opera companies, that he intended to continue the business. The bookings up to that time, having been made pursuant to partnership purposes, were a part of the partnership acquisitions and capital. Thus stated, it is plain that if, at the end of one month's operation, the partnership had been terminated by mutual consent, the sale value of the lease would have been an accurate basis of settlement. For a like reason, the court will seize hold of that fact in the case as it stands as furnishing a measure of the minimum profits, at least; for surely, having thus wrongfully breached the contract of partnership, the appellee will not be heard to say the profits would have been less than the business actually brought at the sale. Such a rule would permit a partner who owned a lease, without which the partnership could not proceed, to sell his lease at a handsome profit, pocket the profits, and mock his wronged partner with the doctrine that his damages consisted of lost profits, which the law would not allow because incapable of certain ascertainment. The court will, rather, accept the joint judgment of the purchaser and the seller at the accomplished sale, that the present value of the future profits is \$15,000, and award appellant such an interest as the contract authorizes.

A petition for rehearing was filed in the court of civil appeals, and the court, in response thereto, made the following additional observations upon the question of measure of damages:

"Appellee earnestly presents the proposition as we found on the original hearing, that, as the contract in question was not breached by the verbal repudiation on the part of appellee prior to October 1st, it follows, inevitably, from the facts that appellant has forfeited his rights by non-payment of his note and the half of the annual rent. It is evident that we have been misunderstood. We did no more in that connection than apply the familiar doctrine that, when a party who has contracted with another to do certain things repudiates the contract in advance of the date fixed for performance, the other may accept the repudiation as a breach, and sue at once, or he may await the event, and accept performance if the first party repents and tenders it. We thought, also, and are still of the same opinion, that appellee, having stated in advance that he would not perform, cannot now be heard to complain that appellant did not tender the amount of the note and his share of the year's rent. The law did not require of appellant a futile

act; and he, having been advised that appellee would accept nothing and accord nothing, might, until otherwise advised by appellee of its repentance, assume that the state of mind continued to endure, and that any tender would be refused. We think we were right, then, in saying the act by which the breach was irrevocably accomplished was the sale of the lease."

Further facts appear in the opinion.

Messrs. Kleberg & Neethe, for plaintiff in error:

The court of civil appeals having held that the mere verbal repudiation by appellee, before the contract was performable, of the rights of appellant, and the return of the \$3,000 note to Kempner, its indorser, did not constitute a breach of the contract between the parties, the said court erred in holding that the sale of the lease by appellee to Kyle on the 16th day of November, 1901, constituted such a breach of said contract of which appellant could complain, and for which he was entitled to recover damages, because by its very terms said contract was rendered null and void, and had ceased to have any existence as early as October 1, 1901, a month and a half prior to said sale, by the failure of appellant to pay appellee the sum of \$1,000, as he had agreed to do, being one half of the yearly rent of the Beaumont opera house.

Kilgore v. Northwest Texas Baptist Educational Asso. 90 Tex. 139, 37 S. W. 598; *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. Rep. 850; *Smoot's Case*, 15 Wall. 36, 21 L. ed. 107; *Frost v. Knight*, L. R. 7 Exch. 111, 41 L. J. Exch. N. S. 78, 26 L. T. N. S. 77, 20 Week. Rep. 471; *Benjamin, Sales*, § 568.

The court of civil appeals erred in holding that the sale of the lease and the sum it brought bear such relation to the breach of the contract as to furnish the plaintiff a measure of damage for its breach.

Houston & T. C. R. Co. v. Hill, 63 Tex. 381, 51 Am. Rep. 642; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Hadley v. Basendale*, 9 Exch. 341, 2 C. L. Rep. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302; *Calvit v. McFadden*, 13 Tex. 327; *Williams v. Barton*, 13 La. 404; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; *Central Trust Co. v. Olark*, 34 C. C. A. 354, 92 Fed. 293; *Peace River Phosphate Co. v. Graffin*, 58 Fed. 552; *Fraser v. Echo Min. & Smelting Co.* 9 Tex. Civ. App. 210; *Equitable Mortg. Co. v. Weddington*, 2 Tex. Civ. App. 373, 21 S. W. 576; *Ball v. Britton*, 58 Tex. 57; *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756; 1 Sutherland, Damages, 119.

The allegations in the petition of the damages sought to be recovered are vague 65 L. R. A.

and uncertain, and the damages as alleged are too remote, contingent, speculative, and uncertain to form the basis of a recovery.

Central Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 295; *Houston & T. C. R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642; *Coosam Min. Co. v. Carolina Min. Co.* 75 Fed. 860; *Fraser v. Echo Min. & Smelting Co.* 9 Tex. Civ. App. 211, 28 S. W. 714.

Messrs. James B. Stubbs and Charles J. Stubbs, for defendant in error:

As the lease of the opera house and the engagement of dramatic companies were the principal, in fact the only, assets of the Greenwall company, any use or disposition of such assets by either copartner was for the benefit of the firm; and if, instead of conducting the business for five years, appellee chose to place upon it an estimate of its present value or earning capacity, and dispose of it at that figure, the resultant gains belong to the firm as much as those that might have been realized from day to day by giving performances in the leased building during the entire term.

22 Am. & Eng. Enc. Law, 2d ed. pp. 115-117, and notes; *Henson v. Byrne*, (Tex. Civ. App.) 41 S. W. 497; *Mitchell v. Read*, 84 N. Y. 556; *Moody v. Matthews*, 7 Ves. Jr. 185; *Brincefield v. Allen*, 25 Tex. Civ. App. 258, 60 S. W. 1011; *Cullinan v. Standard Light & P. Co.* (Tex. Civ. App.) 65 S. W. 689; *Dilley v. Ratcliff*, 29 Tex. Civ. App. 545, 69 S. W. 237; *Zimmerman v. Huber*, 29 Ala. 379; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 205, 35 L. ed. 150, 11 Sup. Ct. Rep. 500; *Kimberly v. Arms*, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; *Story*, Partn. 174-178; *Story*, Agency, 211; *Karrick v. Hannaman*, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135; *Brigham v. Dana*, 29 Vt. 1; *Wells v. National Life Asso.* 53 L. R. A. 81, 39 C. C. A. 476, 99 Fed. 229; *Reiter v. Morton*, 96 Pa. 243; 1 Lindley, Partn. 307; *Nevins v. Thomas*, 80 Tex. 597, 16 S. W. 332; *Johnson's Appeal*, 115 Pa. 129, 2 Am. St. Rep. 539, 8 Atl. 36; *Lacy v. Hall*, 37 Pa. 360; *McMahon v. McOlerman*, 10 W. Va. 419.

Plaintiff having a right to the value of his contract, we find that value fixed by the acts of his copartner, which he is willing to accept.

Nat. Union Bank v. National Mechanics' Bank, 80 Md. 371, 27 L. R. A. 483, 45 Am. St. Rep. 350, 30 Atl. 913; *Chamberlin v. Chamberlin*, 12 Jones & S. 116; *Collyer*, Partn. 160.

The doctrine that a trustee cannot obtain an advantage over his *cestui que trust* applies to the case of a partnership, and, upon this ground, it is held that a partner cannot obtain the renewal of a partnership lease for his own purposes, to commence

after the expiration of the original lease, or, indeed, after the termination of the partnership.

Mitchell v. Read, 61 Barb. 310; *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 299, 11 Revised Rep. 77; *Clegg v. Edmondson*, 8 DeG. M. & G. 787, 26 L. J. Ch. N. S. 673, 3 Jur. N. S. 299; *Clements v. Hall*, 2 DeG. & J. 173, 27 L. J. Ch. N. S. 349, 4 Jur. N. S. 494, 6 Week. Rep. 358; *Clegg v. Fishwick*, 1 Macn. & G. 294, 1 Hall & T. 396, 19 L. J. Ch. N. S. 49, 13 Jur. 993; *Leach v. Leach*, 18 Pick. 68; *Johnson's Appeal*, 115 Pa. 129, 2 Am. St. Rep. 539, 8 Atl. 36; 1 Bates, Partn. 303; *Karrick v. Hannaman*, 168 U. S. 336, 42 L. ed. 490, 18 Sup. Ct. Rep. 135; *Ambler v. Whipple*, 20 Wall. 546, 22 L. ed. 403; *Pearce v. Ham*, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. Rep. 676; *Miller v. O'Boyle*, 89 Fed. 140; *Williamson v. Monroe*, 101 Fed. 322; 2 Story, Partn. § 174; 2 Kent, Com. 51; *Spears v. Willis*, 151 N. Y. 452, 45 N. E. 849; *Pomeroy v. Benton*, 57 Mo. 544; *Dimond v. Henderson*, 47 Wis. 176, 2 N. W. 73; *Stoughton v. Lynch*, 1 Johns. Ch. 467; *Snyder v. Lunsford*, 9 W. Va. 223; *Settembre v. Putnam*, 30 Cal. 490.

Williams, J., delivered the opinion of the court:

This action was brought by Markowitz against the Greenwall Theatrical Circuit Company on the 23d day of January, 1902, to recover damages for breach of a written contract attached to the petition. This contract was executed between the parties July 16, 1901, and by it defendant, in consideration of the payment of \$3,000 in cash (called "bonus"), agreed to give to plaintiff the position of business manager of the Kyle opera house in Beaumont during the term of defendant's lease thereof from its owner, Kyle, for five years, to begin October 1, 1901, and to pay plaintiff for his services \$20 per week during the theatrical season, and one half of the net profits, payable at the end of each theatrical season, about May 1st each year. But defendant reserved the right, if it should "feel that the interests of all concerned are not thoroughly taken care of," to remove plaintiff from the position of business manager, and replace him by another, in which event plaintiff should receive only the half of the net profits. The losses of the business were to be borne equally by the parties. Plaintiff bound himself to act as business manager, and give the business his personal attention in the best possible manner, and, in addition to the \$3,000 bonus, agreed to pay on the 1st day of October each year \$1,000, the half of the yearly rent of the opera house; and the contract expressly stipulated that his fail-

ure to meet this payment when due "makes this contract null and void." The petition, after stating the terms of the contract, contained the following allegations and prayer: "That said defendant, although plaintiff has in all things kept and performed the obligations of his said contract, a substantial copy of which, marked 'A,' is hereto annexed, and made a part hereof as fully as if incorporated herein regardless of its obligations, violated and repudiated said contract on or about September 10, 1901, and refused to carry it out in any particular; wherefore and whereby a cause of action accrued to this plaintiff to recover damages for the breach of said agreement by defendant. Plaintiff also shows that defendant, without the knowledge or consent of plaintiff, and in disregard of his rights, sold and disposed of the lease of said opera house, and other rights and assets, for the sum of \$15,000, which said lease was, by defendant or its representative, transferred to W. W. Kyle, at Beaumont, Texas, in or about the month of November, 1901. Plaintiff shows that said lease and the business of said opera house are, and would in all probability continue to be, profitable during the full period of said lease, and would be worth the sum of not less than \$15,000 per year net, to which plaintiff, by virtue of said contract, was or would be entitled to one half, and, under any circumstances, would be entitled to one half of the value of said lease, which value he alleges to be not less than \$30,000. Premises considered, plaintiff sues and prays due process to defendant, and, upon hearing, judgment for his said damages, present and prospective, but, in the alternative, for one half the value of said lease, and for interest, costs of suit, and general relief."

The evidence shows the following state of facts: In lieu of the cash payment required by the contract, the note of plaintiff for the amount, indorsed by I. H. Kempner, was accepted by defendant. At the time of the execution of this contract defendant held the agreement of W. W. Kyle to build the opera house, and to lease it to defendant for five years, beginning October 1, 1901, at a rental of \$2,000 per annum. Shortly after the contract between plaintiff and defendant was concluded, Kyle raised objection to the proposed connection of plaintiff with the theater, and conversations and correspondence ensued between plaintiff, defendant, and Kempner concerning an adjustment. Finally, on September 10, 1901, Greenwall, the president of defendant company, asserted to plaintiff that the contract was invalid, that plaintiff had no contract; and, upon the latter insist-

ing upon the validity of the agreement, declared to him that, if he insisted upon the contract, he had a lawsuit. After this Kempner, under the impression that the contract was at an end by mutual consent, without plaintiff's knowledge, demanded of defendant the return of the note for \$3,000, and it was returned to him. Plaintiff continued to insist upon the observance of the contract and his rights under it, and upon learning of the return of the note, protested against it. Kempner thereupon explained to defendant the error under which he had acted, and offered to return the note, but the latter continued to ignore the contract with plaintiff, and to treat it as ended. Plaintiff, while insisting, as we understand his attitude, and as it is defined by the court of civil appeals, upon the maintenance of the contract, did not pay, or offer to pay, the \$1,000 due on the 1st day of October. He was able and willing to do so, but did not signify this to the defendant before or at the time the money became due otherwise than by insisting upon the preservation of the contract; and he claims that he was relieved of the necessity of performing this undertaking by defendant's previous repudiation of its obligations. The theater was not quite completed by the 1st of October, but defendant accepted it, and conducted the business in it until November 16th, and then, on account of differences with Kyle and other reasons, sold out the lease, with the contracts made with dramatic and opera companies for performances, to Kyle, the latter paying \$15,000, returning \$2,000 paid by defendant in advance for rent for the first year, and agreeing to pay appellee \$200 per annum for services in securing companies during the term of the lease.

Upon the trial in the district court the plaintiff claimed the right to recover one half of the net proceeds of the sale of the lease, less proper deductions; but the trial judge instructed the jury that they had "nothing to do with the amount received by defendant from Kyle for the termination of the lease," and defined the measure of damages as one half of the profits that would have been derived from the business, had it been carried on, after deducting the \$3,000 bonus and \$5,000 rent which plaintiff would have had to pay. Upon appeal the court of civil appeals was of the opinion that this was error, holding that plaintiff, upon the facts stated, was entitled to the recovery claimed by him, and accordingly rendered judgment in his favor. The defendant now assigns this as error, and we must hold that its position is well founded. The contract was one of which performance was to commence in future. 65 L. R. A.

The petition distinctly alleged a breach of this contract and the accrual to plaintiff of a cause of action for damages through defendant's repudiation on September 10th, before the time for performance had come. The allegation of the subsequent sale of the lease was only the assertion of a claim for damages because of the breach alleged, and not of a cause of action first accruing from such sale. Before the time when defendant was bound to perform, it could not, by its renunciation of its obligation, put an end to the contract; but by its action it left the plaintiff at liberty, if he saw fit, to take it at its word, and treat its conduct as a breach, and the contract as thereby terminated, and hold the defendant responsible for the damages resulting. This is plainly the cause of action pleaded. The allegation of such a repudiation and the assertion of a cause of action growing out of it leave no doubt, upon the pleading, of plaintiff's election to treat this act of the defendant as a breach of the contract. He must be held, in his recovery, to that position, and his damages cannot be measured by rules which might be applicable had he based his conduct and his suit upon a different theory inconsistent with that upon which he sues. The following statement of the principles governing such cases, in *Frost v. Knight*, L. R. 7 Exch. 112, 41 L. J. Exch. N. S. 78, 26 L. T. N. S. 77, 20 Week. Rep. 471, has commanded the acceptance of most of the text writers and courts in England and America: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour*, 2 El. & Bl. 678, 22 L. J. Q. B. N. S. 455, 17 Jur. 972, 1 Week. Rep. 469; *Danube & B. Sea Co. v. Xenos*, 13 C. B. N. S. 825, 31 L. J. C. P. N. S. 284, 8 Jur. N. S. 439, 10 Week. Rep. 320, on the one hand, and *Avery v. Bowden*, 5 El. & Bl. 714; *Reid v. Hoskins*, 6 El. & Bl. 953, 26 L. J. Q. B. N. S. 5, 3 Jur. N. S. 238, 5 Week. Rep. 45, and *Barrick v. Buba*, 2 C. B. N. S. 563, 26 L. J. C. P. N. S. 280, 5 Week. Rep. 665, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudi-

ation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party, as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." When the promisee adopts the latter course, treating the contract as broken, and himself as discharged from his obligations under it, he resolves his right into a mere cause of action for damages. He is no longer concerned with the disposition which the promisor may make of the subject-matter of the contract. *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548; *Johnstone v. Milling*, L. R. 16 Q. B. Div. 467, 55 L. J. Q. B. N. S. 162, 54 L. T. N. S. 629, 34 Week. Rep. 238, 50 J. P. 694; *Roper v. Johnson*, L. R. 8 C. P. 167, 42 L. J. C. P. N. S. 65, 28 L. T. N. S. 296, 21 Week. Rep. 384; *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780; *Anson*, Contr. 368 *et seq.*, and authorities cited; Cyc. Law & Proc. 635-637, and authorities cited. In *Johnstone v. Milling*, L. R. 16 Q. B. Div. 467, 55 L. J. Q. B. N. S. 162, 54 L. T. N. S. 629, 34 Week. Rep. 238, 50 J. P. 694, the rule was thus stated: "When one party assumes to renounce the contract,—that is, by anticipation, refuses to perform it,—he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it; but, by wrongfully making such a renunciation of the contract, he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as, in effect, to declare that he, too, treats the contract as at an end except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation." The necessary consequence of both parties treating the contract as terminated by the renunciation of September 10th, as averred in the 65 L. R. A.

petition, was to prevent the accrual of any specific interest plaintiff might, by a different course, have acquired and preserved in the lease, the business to be conducted under it, and the proceeds of the sale of same. Had he sued upon the theory that he had kept alive the contract and acquired and preserved a right in the subject-matter until the sale took place, a different question would be presented. It is upon that view that plaintiff now attempts to sustain the judgment of the court of civil appeals. If such a case is made by the evidence,—which need not be considered,—it is not only not supported by, but is irreconcilable with, the case made by the pleading; for it is very clear from the authorities that a contract cannot be thus treated, for one purpose, as subsisting, and, for another purpose, as at an end. Upon such a repudiation of an executory agreement by one party, the other may make his choice between the two courses open to him, but can neither confuse them together nor take both. *Johnstone v. Milling*, L. R. 16 Q. B. Div. 467, 55 L. J. Q. B. N. S. 162, 54 L. T. N. S. 629, 34 Week. Rep. 238, 50 J. P. 694. It would seem to follow, necessarily, that the cause of action which plaintiff set up in his pleading entitled him, if sustained by the evidence, to recover only for the loss which he sustained from the breach alleged, which was the profit he would have made from the business. At any rate, he has no cause to complain that he was allowed to recover according to that standard. The disposition of the lease, which the termination of the contract left the defendant free to make as it saw fit, in no manner altered that cause of action. Whether or not the evidence showing, as it did, a continued insistence upon the contract on plaintiff's part after the attempt of defendant to recede from it, justified a recovery upon the theory of the petition, we are not called upon to consider. If it did not, the plaintiff cannot, upon that ground, complain, and the defendant neither appealed nor sought a reversal in the court of civil appeals.

It follows from what we have said that the measure of damages applied by the Court of Civil Appeals was inappropriate to plaintiff's action as he made it by his pleading, and *the judgment of that court will be reversed*, and the judgment of the District Court will be affirmed.

Rehearing denied.

UTAH SUPREME COURT.

Sol BLOCK *et al.*, *Respts.*,
v.

Samuel L. SCHWARTZ.

John MANN, Intervener, *Appt.*

(.....Utah.....)

1. An act cannot be declared void because its general operation is unjust and unfair to individuals, unless it trenches upon some provision of the Constitution.
2. The liberty guaranteed by the Constitution includes the right of a citizen to use his God-given powers, employ his faculties, exercise his judgment in the affairs of life, and be free in the enjoyment and disposal of his acquisitions, subject, only, to such restrictions as are imposed by the law of the land for the public welfare.
3. A statute prohibiting, under penalty, a solvent merchant from disposing of his stock of goods in bulk without notifying his creditors, and which is applicable, also, to persons acting in a fiduciary capacity and under judicial process, when merchants who are not indebted have that privilege, unconstitutionally deprives him of his liberty and property.
4. The police power will not justify an act prohibiting solvent merchants from disposing of their stocks in bulk without giving notice to their creditors.

(March 22, 1904.)

APPEAL by intervener from a judgment of the District Court for Salt Lake County reversing a judgment of a justice of the peace in his favor, in an action brought to recover possession of certain merchandise which was claimed by intervener under a contract for sale. *Reversed.*

The facts are stated in the opinion.

Messrs. Zane & Stringfellow, for appellant:

This statute provides for a most unwarranted search into a man's private business affairs for which there is no justification or excuse.

Clinton v. Phillips, 58 Ill. 102, 11 Am. Rep. 52.

The constitutional rights of the citizen to life, liberty, and property are wholly unlimited and unrestricted, except by considerations of the public good; and no abridgment or deprivation of the rights by the legislature will be upheld or enforced, except as a regulation of police power operating to the benefit of all individuals of the community equally.

People v. Gillson, 109 N. Y. 389, 4 Am. St.

NOTE.—For another case in this series as to constitutionality of statute regulating purchase of stock of goods in bulk, see *McDaniels v. J. J. Connelly Shoe Co.* 60 L. R. A. 947. 65 L. R. A.

Rep. 465, 17 N. E. 343; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *Butchers' Union, S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

The law will not allow rights of property to be invaded under the pretense of prescribing a police regulation; the state cannot be permitted to encroach upon the just right secured by the Constitution against abridgment.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Com. v. Alger*, 7 Cush. 53; *Austin v. Murray*, 16 Pick. 121; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 465; *Coe v. Schultz*, 47 Barb. 64; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Rockwell v. Nearing*, 35 N. Y. 302; *Re Townsend*, 39 N. Y. 171; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *People v. Equitable Trust Co.* 96 N. Y. 387; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer, and so to contend would be to say that one's property may be taken without due process of law.

State v. Julow, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Wynehamer v. People*, 13 N. Y. 378; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285.

The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic.

State v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Civil Rights Cases*, 109 U. S. 23, 27 L. ed. 843, 3 Sup. Ct. Rep. 18; *People v. Gillson*, 109 N. Y. 398, 4 Am. St. Rep. 465, 17 N. E. 343; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 755, 28 L. ed. 590, 4 Sup. Ct. Rep. 652;

Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511; *Pick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631.

Mr. W. R. Hutchinson, for respondents:

The legislature may, under its police powers, place such reasonable restrictions on the right of an owner in relation to his property as it finds necessary to protect the interests of the public, or to prevent fraud among individuals.

Com. v. Tewksbury, 11 Met. 55.

The law in question was passed to prevent merchants dealing in goods, wares, and merchandise from defrauding their creditors. This being its object and purpose, it is a subject of legislation.

McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L. R. A. 947, 94 Am. St. Rep. 889, 71 Pac. 37.

When a law is uniform so far as it operates, its constitutionality is not affected by the number of persons within the scope of its operation.

Redford v. Spokane Street R. Co. 15 Wash. 419, 46 Pac. 650; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147.

The act is not in restraint of trade.

State v. Garver, 23 Ohio C. C. 140.

The act is not in violation of the 14th Amendment of the United States Constitution.

Genest v. Las Vegas Masonic Bldg. Asso. (N. M.) 67 Pac. 743; *Com. v. Keary*, 198 Pa. 500, 48 Atl. 472.

Laws are not local or special when they are general and uniform upon all in like situation.

People ex rel. Meyer v. Hazelwood, 116 Ill. 319, 6 N. E. 480.

This law is now in force in the states of Utah, Colorado, Maryland, Minnesota, Washington, Tennessee, and Idaho, and has been productive of great good to debtor and creditor.

Hart v. Roney, 93 Md. 432, 49 Atl. 661.

In no sense can a search into one's private effects be instituted under the provisions of the law.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50.

Bartch, J., delivered the opinion of the court:

This action was originally brought in a justice's court on April 2, 1902, to recover \$277.47 for merchandise sold and delivered to the defendant, Schwartz. On the same day, at the instance of the plaintiffs, the 65 L. R. A.

goods were attached while in the possession of the intervener, John Mann, to whom Schwartz had previously, on March 29, 1902, sold and delivered the same for the sum of \$550, which was its fair value, the purchase having been made in good faith. After the writ of attachment was levied upon the goods the purchaser filed his complaint in intervention, claiming to own all the property included in the levy, and praying that the attachment be dissolved, and the goods restored to his possession, and for damages and costs. Neither the seller nor the purchaser made an inventory of the merchandise before sale, as required by the act approved March 14, 1901, p. 67, chap. 67, Sess. Laws Utah, nor did they in other respects comply with the requirements of that act. The cause was first tried in the justice's court, where judgment was rendered in favor of the intervener, and then appealed to and tried in the district court, where the sale was held fraudulent and void under the statute referred to, and judgment rendered in favor of the plaintiffs. The appeal to this court presents simply the question of the constitutionality of the law relating to the sale of merchandise in bulk, found in that enactment.

The appellant contends that the act is unconstitutional and void, and that, therefore, he cannot be punished for a violation of its provisions. He insists that it is repugnant to and in conflict with both Federal and state Constitutions, in that it abridges and interferes with the inherent and inalienable rights which are guaranteed to every subject by both Constitutions. The respondents contend that the act is not in conflict with the supreme law, but is the result of a proper exercise, by the legislature, of the police power of the state. In determining the question thus presented, it behooves us to be mindful of the fact that the enactment in controversy has, in the judgment of both the legislative and executive branches of the state government, been declared a valid exercise of legislative power. Courts will always approach such a judgment with that consideration and respect which are due to the co-ordinate branches of the government, and if, upon an examination and comparison of the enactment with the constitutional provisions which it is claimed to violate, there is a well-grounded doubt of its validity, such doubt must be resolved in favor of its constitutionality. If, however, notwithstanding the enactment was passed with all due deliberation and formalities, it be found to contravene constitutional provisions, or to constitute an infringement upon the rights of individuals guaranteed by the Constitution, then the courts have the conceded power to declare void the enactment, as being a

violation of the supreme law of the land. But, although such power is lodged in the courts, they will not declare void a legislative enactment unless there is a substantial conflict between it and the Constitution; and so high a regard do the courts entertain for the judgment of the makers of the law that, in determining the validity of an enactment, every presumption will be indulged in favor of its constitutionality. The question of the validity of a legislative act can alone be determined by reference to the constitutional inhibitions and restraints. Whenever, as to any subject within the jurisdiction of the state, the Constitutions of the state and of the United States are silent, the legislature may speak; and when it does speak its enactment will not be declared void simply because, in the opinion of the court, it is unwise, or opposed to justice and equity. The sole question in such case is whether the act violates the supreme law of the state or of the United States. If it does, it is the plain duty of the courts to declare its invalidity. The question under consideration must be determined in the light of these principles, which have been frequently asserted by the courts.

Section 1 of the act in controversy reads: "A sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or a sale of an entire stock of merchandise in bulk, is fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall, at least five days before the sale, make a full and detailed inventory, showing the quantity, and, so far as possible, with the exercise of reasonable diligence, the cost price, to the seller of each article to be included in the sale; and unless such purchaser shall, at least five days before the sale, in good faith, make full and explicit inquiry of the seller as to the names and places of residence or places of business of each and all of the creditors of the seller, and the amount owing each creditor; and unless the purchaser shall, at least five days before the sale, in good faith, notify, or cause to be notified, personally or by registered mail, each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge, of said proposed sale, and of the cost price of the merchandise to be sold, and of the price proposed to be paid therefor by the purchaser." Section 2 makes the violation of the provisions of the 1st section a misdemeanor, and prescribes a penalty therefor. Under the provisions of this act a sale of any portion or all of a stock of merchandise, made out of the ordinary course of trade, by any merchant who

has creditors, without a detailed inventory made at least five days before the sale, showing the cost price of each article, and notice of the proposed sale, the cost price, and selling price, given at least five days before the sale to each creditor, is not only fraudulent and void, but also renders both the seller and purchaser guilty of a misdemeanor, and subjects them to the penalty provided in the act for that crime. Not only this, but the merchant, though ever so solvent and able to pay his debts, must, in order to effect a sale of the whole or any portion of his stock out of the usual course of trade, expose the secrets of his business to every person who may seek to buy and to whom he may desire to sell, as well as to every creditor. The making of inventories and giving notices as required by the act, it can readily be seen, would, in many instances, almost absolutely prohibit the consummation of such sales. Such would doubtless be the practical operation of the act in its application to large department stores, where the creditors are numerous, and the stock of merchandise immense. The lapse of time necessarily incident to a compliance with the provisions of the act would have a strong tendency to prevent advantageous sales by the class of merchants affected. In many instances it would, doubtless, require many days, or even months, to complete such an inventory and give such notices; and in active business communities purchasers are not likely to look with much favor on such delays. In this age of competition it is quite apparent that this would place such a merchant at a great disadvantage in his struggles to provide for his family,—in competing with his neighbor who has no creditors. These same disadvantages would likewise follow the purchaser of the merchandise in his endeavor to again dispose of the goods, if he should happen to be a debtor.

The act appears to be unreasonably restrictive, and is liable to subject individuals to punishment for acts wholly innocent. It seems calculated to inflict upon the seller the loss of an advantageous sale, and cause the purchaser to refrain from making what might to him be an advantageous purchase, because of the risk of delay. It is favorable to one class of merchants and unfavorable to another, and thus places competitors in the same line of business upon different planes. In its operation, as to one class of merchants, it brands as criminals persons perfectly solvent, and abundantly able to discharge their debts and obligations, for making bargains according to customs and usages which have prevailed in the commercial world from time immemorial, while as to the other class the same bargains would be lawful. It holds out advantages to one

and denies them to another, both pursuing the same business for a livelihood. As to the debtor class, it prevents a free exchange of lawful commodities, and thus operates in restraint of trade. Undoubtedly, the legislature has power to legislate as to the general rights of debtors to dispose of their property, and in enacting such legislation the legislature has the right to consider the debtor's right of disposal of his property by contract or otherwise in connection with the general right of creditors to have afforded an opportunity to collect their claims; but such legislation must not transcend constitutional limitations, or invade the guaranteed rights and liberties of individuals. If within such limitations, such legislation will be upheld, although it be deemed unwise, or, in its operation, unfair and unjust. So the act in question, as we have seen, would evidently, in its general operation, result unjustly and unfairly; yet, if it does not trench upon constitutional law, it cannot be held void.

The appellant, however, claims that the enactment interferes with and abridges his inalienable rights, as well as those of others in like situation, subjects of this commonwealth; and for his and their protection against the consequences which naturally flow from such an enactment he appeals to § 1, art. 14, of Amendments to the Constitution of the United States, which, on this subject, provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." For like reasons he appeals to § 1, art. 1, of the Constitution of this state, which, *inter alia*, provides: "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess, and protect property; . . . to assemble peaceably, protest against wrongs, and petition for redress of grievances;" and also to § 7 of article 1, which provides: "No person shall be deprived of life, liberty, or property, without due process of law." These constitutional provisions constitute the supreme law of the commonwealth upon this subject. To that law the executive, the legislative, and the judicial departments of the government alike must bow obedience, as well as every subject. It forbids the abridgment by the state of the privileges and immunities of all citizens. Under its mandate no person can be deprived of life, liberty, or property without due process of law, and every person is entitled to the equal protection of the laws, and may acquire proper-

ty, possess, and protect it, as well as defend his life and liberty. These are inherent and inalienable rights of citizens, and are constitutional guaranties. An enactment, therefore, which deprives a person arbitrarily of his property, or of some part of his personal liberty, is just as much inhibited by the supreme law as one which would deprive him of life. And "liberty," in the sense in which the law of the land here employed, is not restricted to mere freedom from imprisonment, but it embraces the right of a person to use his God-given powers, employ his faculties, exercise his judgment in the affairs of life, and to be free in the enjoyment and disposal of his acquisitions, subject only to such restraints as are imposed by the law of the land for the public welfare. The word "liberty," as thus employed in the Constitutions and understood in the United States, is a term of comprehensive scope. It embraces, not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights, including the right in each subject to purchase, hold, and sell or dispose of property in the same way that his neighbor may; and of such liberties no one can be deprived except by due process of law.

Property has some essential attributes without which we could not conceive it to be property. Among these are use, enjoyment, susceptibility of purchase, sale, and of contracts in relation thereto. The taking away of any one of the essential attributes may violate the constitutional guaranty that no person shall be deprived of his property without due process of law as clearly as in case of a physical taking without due process of law. An enactment, therefore, like the one in controversy, which deprives an owner of his liberty to sell his property, or contract in relation thereto, in the same manner as others engaged in the same business might lawfully do, invades his rights guaranteed by the Constitution, and cannot be upheld; and to prevent the free exchange and sale or disposal of property according to the immemorial usages of trade is to deprive it of one of its main attributes. "The third absolute right, inherent in every Englishman," says Sir William Blackstone in his classification of fundamental rights, "is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 Bl. Com. 138. The right thus referred to and defined by the illustrious commentator is absolute and inherent in every American, subject of the United States, by virtue of the supreme law of the land. Therefore,

"when a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended especially to shield private rights from the exercise of arbitrary power." *Wynehamer v. People*, 13 N. Y. 378, 398. Judge Cooley, in his work on Constitutional Limitations, 8th ed. p. 484, speaking of doubtful or questionable legislation, says: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and, if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness.'" In *Third Nat. Bank v. Divine Grocery Co.* 97 Tenn. 603, 34 L. R. A. 445, 37 S. W. 390, it was said: "To take from property its chief element of value, and to deny to the citizen the right to use and transfer it in any proper and legitimate method, is as much depriving him of his property as if the property itself were taken." In *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48, it was said: "Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision." In *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285, it was said: "The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor,—which is, as we have seen, property,—is protected by the Constitution. If the legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may

prevent the prosecution of all trades, and regulate all contracts." So, in *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350, it was observed: "Liberty, we have seen, includes the right to acquire property, and that means and includes the right to make and enforce contracts. We do not say that such rights cannot be regulated by general law, but we do say that the legislature cannot single out one class of persons who are competent to contract, and deprive them of rights in that respect which are accorded to other persons. The constitutional declaration that no person shall be deprived of life, liberty, or property without due process of law was designed to protect and preserve their existing rights against arbitrary legislation as well as against arbitrary executive and judicial acts. The sections of our statute in question deprive a class of persons of the right to make and enforce ordinary contracts, and they introduce a system of state paternalism which is at war with the fundamental principles of our government, and, as we have before said, are not due process of law." *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343, is a case where the legislature had passed an act prohibiting the sale or disposal of any article of food, or any offer or attempt to do so, upon any representation or inducement that anything else would be delivered as a gift, prize, premium, or reward to the purchasers, and provided that any person violating any of its provisions should be deemed guilty of a misdemeanor. Mr. Justice Peckham, holding the enactment unconstitutional and void, in the course of his opinion said: "It cannot be truthfully maintained that this legislation does not seriously infringe upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner, or that it does not to some extent at least, deprive a person of his property by curtailing his power of sale; and, unless this infringement and deprivation are reasonably necessary for the common welfare, or may be said to fairly tend in that direction or to that result, the legislation is invalid, as plainly violative of the constitutional provision under discussion." Again, he said: "Nor can this act stand as a valid exercise of legislative power to enact what shall amount to a crime. The power of the legislature to so declare is exceedingly large, and it is difficult to define its exact limit. But that there is a limit even to that power, under our Constitution, we entertain no doubt, and we think that limit has been reached and passed in the act under review. The power has been unlawfully exercised in this instance for the same reasons that we have already stated,—because it violates the consti-

tutional provision which secures to each person in this state his liberty and property except as he shall be deprived of one or both by due process of law." In *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652, Mr. Justice Field, speaking of constitutional rights, said: "Among these inalienable rights as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Clinton v. Phillips*, 58 Ill. 102, 11 Am. Rep. 52; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1084.

Nor can the act be sustained, in its present form, as a proper exercise of the police power of the state. That power, though somewhat shrouded in mystery as to its limits, which are not easy to prescribe with precision, has stood sponsor for multitudes of legislative enactments; but such enactments were, nevertheless, always bound to be within constitutional limits. The power, however broad and comprehensive, is not paramount to the Constitution, but is always bounded by its provisions. If, therefore, an act of the legislature is repugnant to a provision of the Constitution, it cannot be held valid as a proper exercise of the police power. Likewise, if a right of property or of person be protected by the Constitution, it cannot be destroyed by any exercise of the police power either by the legislature or the executive power of the state.

Neither the legislative nor the executive can, under the guise of police regulation or otherwise, arbitrarily or unjustly, without good cause, restrict or infringe upon the 65 L. R. A.

property rights or the liberty of any subject within the protection of the supreme law; and whenever the legislature undertakes to determine what is a proper exercise of police power, its determination is a subject for judicial scrutiny. The power may be exercised to promote the safety, health, comfort, and welfare of society; and, to sustain legislation as a proper exercise of the police power, it must have reference to some such end. By virtue of that power the use of property is regulated by enforcing the maxim, *Sic utere tuo ut alienum non lœdas*. The enactment in controversy does not appear to have reference to either of the objects here indicated. It can hardly be said that a law which prevents a person, though indebted, who is abundantly able to pay his debts, from selling his property in the same way his neighbors do, and in accordance with a time-honored custom or usage, either promotes the safety, health, comfort, or welfare of the community or the state. If the act referred generally to insolvent debtors it would present a different question; but it relates simply to debtors and purchasers of debtors of a particular and specified business, whether solvent or insolvent; so that the merchant who is worth a fortune over and above his indebtedness, and who is able to respond instantly to his creditors, who may be only such because of convenience in trade and business transactions, nevertheless finds himself, under the provisions of the act, deprived of the liberty to sell his goods, or to contract in relation thereto in the same manner that others engaged in the same business may lawfully do. Not only this, but by making a sale which would be perfectly lawful if made by his neighbor both he and his purchaser become criminals, and amenable to the penalty provided in the act.

Looking again at the provisions of the enactment, it will be observed that it aims at but one kind of business,—the mercantile,—and impliedly and arbitrarily divides those engaged therein into two classes. The merchants of the one class, being unaffected in their property rights, may make sales and contracts in relation thereto as they see fit; while the same kind of sales and contracts, if made in the same manner by the merchants of the other class, are not only declared void, but will render both the sellers and purchasers liable to criminal prosecution. The enactment, as we have seen, not only places the debtor class in the mercantile business at a great disadvantage in competing with others in the same line of business, but its provisions are exceedingly strict and oppressive. Nor do its provisions apply generally to all debtors within

the commonwealth. They apply only to merchants, who are debtors, while farmers, miners, manufacturers, traders, and other dealers, though debtors, may sell and dispose of their property when and as they please so long as they act in good faith. If the act is designed to prevent fraud, why not make it general? Looking alone at the debtor class, there appears to be such a discrimination as is difficult to reconcile with justice and fair dealing. Nor do we perceive any justification for restraining a merchant who is in debt, but solvent, from selling his merchandise, in whole or in part, as he may deem most advantageous, in order to prevent one who is insolvent from exercising the same privilege.

There is another feature which must be deemed quite material in determining the validity or invalidity of this legislation. Under the terms of the act "a sale of any portion of a stock of merchandise," or "a sale of an entire stock" in bulk, made otherwise than as in the act provided, "is fraudulent and void as against creditors," and renders both the seller and buyer liable to criminal prosecution. Now, it will be noticed that nowhere in its provisions is there an exemption of any sale by administrators, executors, trustees, assignees for the benefit of creditors, trustees in bankruptcy, or public officers acting under judicial process. There being no such exemption, it would seem that such sales of merchandise owned by debtors, made by persons acting in a fiduciary capacity or under judicial process, must also be made in accordance with the provisions of the act, in order that the seller and purchaser may avoid the penalties provided. It is evident that such a law would not only deprive property of one of its chief attributes, but would greatly hamper the administration of estates and retard the enforcing of judicial process. Nor is this law necessary for the public weal. Broad and extensive as the public power of a state is, it cannot be assumed that it warrants such legislation as this. It is true, there are extreme cases where the exercise of that power is justified by the maxim, *Salus populi suprema lex est*, and so, in some cases of great emergency and overruling necessity, the taking or destruction of property, even without compensation and without due process of law, may be justified; but such is not this case. The police power can never avail to declare an act valid when the Constitution says it is invalid. "The limit to the exercise of the police power can only be this: The regulation must have reference to the comfort, the safety, or the welfare of society; it must not be in conflict with the provisions of the Constitution." Potter's Dwarrr. Stat. p. 458. 65 L. R. A.

Speaking of the regulation of the conduct of corporations whose charters are inviolable, by the legislature, under the police power, Judge Cooley says: "The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society. They must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise." Const. Lim. 6th ed. p. 710. In *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694, Mr. Justice Colt said: "To a great extent the legislature is the proper judge of the necessity for the exercise of this restraining power. It is not easy to prescribe its limit. The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or the protection against a threatened nuisance; and, when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen." In *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, Mr. Justice Earl says: "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and, while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act, and see whether it really relates to and is convenient and appropriate to promote the public health." Again, referring to the same subject, he says: "Such legislation may invade one class of rights to-day and another to-morrow, and, if it can be sanctioned under the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the

people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one." In the *Slaughter-House Cases*, 16 Wall. 36, 87, 21 L. ed. 394, Mr. Justice Field, referring to the police power of the state, said: "All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions or fundamental principles they cannot be successfully assailed in a judicial tribunal."

But, under the pretense of prescribing a police regulation, the state cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgment." So, in *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, Mr. Justice Brown said: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." *Tiedeman*, Pol. Power, §§ 85, 194; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *Austin v. Murray*, 16 Pick. 121; *Com. v. Alger*, 7 Cush. 53, 85; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; *Coe v. Schultz*, 47 Barb. 64; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The respondents cite and rely upon several cases from the states of Massachusetts, Maryland, Tennessee, and Washington, where enactments upon the same subject were enforced. While enactments of similar character have been upheld in those states, an examination shows that they all differ materially in important features from the one here under consideration. The law in Massachusetts exempts all sales from its

provisions made by officers acting in a fiduciary capacity or under judicial process; and, while it declares a sale made in violation of its provisions fraudulent and void as against creditors, it does not subject the seller and buyer acting in disobedience of the law to criminal prosecution. Mass. Stat. 1903, chap. 415, p. 389. Notwithstanding this, however, it seems apparent from the opinion in *Squire v. Tellier* (Mass.) 69 N. E. 312, that the supreme court of that state regarded their statute as going to the very limit of constitutional authority, when it said: "Although the requirements of the act are very strict, we cannot say that the determination of the legislature, as between the interests of owners of stocks of merchandise and their creditors, was so far wrong as to render the statute unconstitutional." We apprehend, from a perusal of that opinion, that if there, as here, the determination of the legislature had gone to the length of applying the provisions of the act to persons acting in a fiduciary or official capacity and under judicial process, and provided criminal punishment for the persons affected if they disobeyed such provisions, the court would have hesitated before pronouncing the act constitutional.

Under the act of the state of Maryland, a sale made in disobedience of the statutory provisions is not absolutely fraudulent and void, as under our enactment, but is simply "presumed to be fraudulent and void as against the creditors of the seller." Md. Laws 1900, chap. 579, p. 907. In the case cited from that state the question of the constitutionality of the act was neither presented nor decided. *Hart v. Roney*, 93 Md. 432, 49 Atl. 661.

So, under the act of Tennessee, a sale made in disobedience of the provisions thereof is only "presumed to be fraudulent and void as against creditors of the seller." Tenn. Acts 1901, chap. 133, p. 234. The supreme court of Tennessee held the act valid, Mr. Justice Wilkes dissenting. *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50.

It will be noticed that in none of the acts thus far referred to, except in our own, is disobedience of the provisions thereof by the seller and buyer made a criminal offense. The supreme court of Missouri, in *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781, determining the validity of an act somewhat similar in character to the one here under consideration, said: "If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may. If he disobeys it, then he is punished for the performance of an act wholly innocent, un-

less, indeed, the doing of such act guaranteed by the organic law, the exercise of a right of which the legislature is forbidden to deprive him, can, by that body, be conclusively pronounced criminal. We deny the power of the legislature to do this,—to brand as an offense that which the Constitution designates and declares to be a right, and therefore an innocent, act; and, consequently, we hold that the statute which professes to exert such a power is nothing more nor less than a 'legislative judgment,' and an attempt to deprive all who are included within its terms of a constitutional right without due process of law."

The provisions of the act of the state of Washington (Sess. Laws 1901, chap. 109, p. 222) are so materially different from those of our enactment that the case of *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L. R. A. 947, 94 Am. St. Rep. 889, 71 Pac. 37, cited by respondents as sustaining the statute of that state, cannot be regarded as authority herein. Nor, for the reasons given, can any one of the cases, from the several states referred to, be relied upon as controlling authority in this case.

While it is within the province of the

legislature to prevent fraudulent sales as a protection to creditors, still, when it attempts to do this,—to remove one evil,—it must not so restrict individual rights, and disturb industrial pursuits and usages, as to cause a score of wrongs.

We are of the opinion that the enactment in controversy abridges some of the inalienable rights of persons guaranteed by the Constitution; that it is not a proper exercise of the police power of the state; that it deprives property of one of its chief attributes, and some persons of the liberty to dispose of property as others may; that it punishes criminally one person for the doing of an act which another person in the same line of business may lawfully do; that it deprives the persons to whom it applies of a right of property without due process of law; and that, therefore, it is null and void.

The judgment must be reversed, with costs, and remanded, with directions to the court below to proceed in accordance herewith. It is so ordered.

Baskin, Ch. J., and McCarty, J., concur.

TEXAS SUPREME COURT.

George KENNEY, *Appt.*,
v.

STATE of Texas.

(.....Tex. Crim. App.)

1. Statements of one who claims to be the victim of rape are not inadmissible in evidence as part of the *res gesta* because not precisely coincident in point of time with the outrage, if they were made only a few moments afterwards, and they are in fact

proximate to the event and apparently spontaneous.

2. That a child is too young to be a competent witness because of inability to comprehend the obligation of an oath does not preclude the admission in evidence of its declarations as part of the *res gesta*.
3. Complete penetration is not necessary to sustain a conviction for rape.

(*Davidson, P. J., dissents.*)

(December 2, 1903.)

NOTE.—*Admissibility of declarations of infant too young to be sworn as a witness at the trial.*

- I. The general rule, 316.
- II. *Res gesta* as an exception to the general rule, 318.

This note does not include decisions concerning the competency of children as witnesses, as dependent on age. On this point, see note to *State v. Michael*, 19 L. R. A. 605.

I. The general rule.

It was formerly thought in England that where rape was charged to have been committed on an infant of such tender years that she could not be sworn as a witness, yet that she ought to be heard without oath to give the court information. The reasons given by Lord Hale for this procedure were, first, the nature of the offense, which is for the most part secret, 65 L. R. A.

so that often no other testimony can be had of the fact itself; and second, because, if the child complains presently of the wrong done her to her mother or other relations, their evidence on oath may be taken; and there is much more reason for the court to hear the relation of the child herself than to receive it at secondhand from those that swear they heard her say so, for such a relation may be falsified, or otherwise represented at the secondhand than when it was first delivered. 1 Hale, P. C. 634; 1 East, P. C. 441; 4 Bl. Com. 214.

But both these ideas were rejected in *King v. Brasier*, 1 Leach, C. L. 199, 1 East, P. C. 443. There the defendant was tried for assaulting an infant five years old with intent to ravish her. The case on the part of the prosecution was proved by the mother and another woman, to whom the child, immediately on her coming home, told all the circumstances of the injury done to her, and described the prisoner. Mr. Justice Buller was of opinion that, as the

APPEAL by defendant from a judgment of the District Court for Anderson County convicting him of rape. *Affirmed.* The facts are stated in the opinion. **Messrs. S. A. McMeans and N. B. Morris** for appellant.

Mr. Howard Martin for the State.

Henderson, J., delivered the opinion of the court:

Appellant was convicted of rape, and his punishment assessed at death; hence this appeal.

Appellant assigns as error the action of the court permitting Mrs. Hawkins, the mother of the alleged injured party, to testify to the declarations of the child concerning the alleged injury. It was shown

that the child was three and a half years old, and not of sufficient intelligence to testify as a witness in the case. The bill does not disclose at what particular time the alleged rape occurred, with reference to the statement or declarations of the child. It states: "That said child was only absent from the presence of the mother, Mrs. Hawkins, about twenty-five or thirty minutes. That said Adele came into the room where she was, calling to her, and telling her that she was hurt, and wanted witness 'to go out yonder and kill that old, mean negro, because he hurt her.' Witness asked what negro, and the child said, 'George.' Witness asked the child where he hurt her, and the child placed its hands over its privates and said, 'He hurt me down here.'"

child was incapable of taking an oath, what she said respecting the attempt was receivable in evidence; and the prisoner was convicted. But he reserved the case for the opinion of the judges, who unanimously agreed that no hearsay evidence can be given of the declarations of a child without capacity to be sworn; nor can such child be examined in court without oath. Parke, B., who, in *Reg. v. Guttridge*, 9 Car. & P. 471, rejected evidence of complaints made by an adult prosecutrix recently after the alleged assault, where she was not at the trial to testify, stated: "At the time of *Brasier's Case* it seems to have been considered that, as the child was incompetent to take an oath what she said was receivable in evidence. The law was not so well settled then as it is now."

So, a statement made by a child six years of age and incompetent to be sworn, shortly after being assaulted, is inadmissible; nor can the person to whom she complained state whether the child mentioned any person's name to her. *Reg. v. Nicholas*, 2 Car. & K. 246, 2 Cox, C. C. 139. *Pollock, C. B.*, said in this case: "It is certainly a very odd reason for receiving the evidence of what a child has said, that that child is not capable of taking an oath."

On an indictment for rape on a child five years old, where the child was not admitted as a witness, but an account of what she had told her mother about three weeks after the transaction was given in evidence by the mother; and the jury convicted the prisoner, principally, as was supposed, on that evidence,—the judges, in a case reserved for their opinion, thought the evidence clearly inadmissible; and the prisoner was accordingly pardoned. 1 *Phillips, Ev. 11*, Citing *Rex v. Tucker*, 1808, MS.

These cases establish the rule that the declarations of an infant not competent to be sworn as a witness are inadmissible. The American cases follow this rule.

In a suit to remove a father from the tutorship of his minor children on the ground of misconduct, declarations of the minors, who were themselves incompetent as witnesses, made to third persons, to the effect that their father had driven them from home and refused to support them, are hearsay and inadmissible. *Edwards v. Morrow*, 12 La. Ann. 887.

Statements made to her parents by a child in her fourth year and too young to testify, immediately after an assault with intent to

rape has been made upon her, which charge defendant with the act, and give some of its details, are inadmissible. *Smith v. State*, 41 Tex. 352.

So, where the prosecutrix in a trial for rape is a child but six years of age, and, although sworn, is withdrawn before she has testified to any fact in the case, the child's mother cannot testify to statements made by the child, as to occurrences with regard to which the child has not testified. *People v. Graham*, 21 Cal. 261.

Statements made by a child six years of age to her parents, but not in the presence of the accused, soon after an assault with intent to commit rape has been perpetrated upon her, are inadmissible, where she is not allowed to testify for want of sufficient understanding. *Weldon v. State*, 32 Ind. 81.

In *State v. Tom*, 8 Or. 177, where the prosecutrix, a child of five years, was held not to possess sufficient intelligence to receive just impressions of the facts, or to relate them truly, it was held error to admit statements made by her to her parents as to the facts constituting the alleged rape.

And in *Holst v. State*, 23 Tex. App. 1, 59 Am. Rep. 770, 3 S. W. 757, the rule is recognized that, if the injured female is incompetent to testify from want of age or failure to understand the nature of an oath, proof of her declarations is inadmissible.

But the rule seems to be otherwise in *Kentucky, Philpot v. Com.* 5 Ky. L. Rep. 862, holding that, upon the trial of a party on the charge of rape, the declarations of the female, made immediately after the commission of the alleged offense are admissible to prove that the offense was committed, although the female is incompetent to testify on account of immature age, idiocy, or other mental defect.

The proposition that the declarations of one incompetent to testify on account of immature age are inadmissible finds support in cases excluding proof of statements made by persons of weak understanding and intimating that the rule is the same as when the incapacity arises from tender years.

Thus, upon the trial of an indictment for rape, the declarations of the injured female, made immediately after the alleged offense, are not admissible evidence for the prosecution to prove the commission of the offense; and the rule is the same though it appear that she is incompetent to testify on account of immature

That she then asked the child how he hurt her. To which the child replied: 'He took me up in his arms and carried me into the house, stating that he wanted to get a tick off of me. When he got me in there, he laid me on the bed, raised up my clothes, and took out of his pants a big, old, black thing, and rubbed it all over me down here,'—placing her hands over her privates." Appellant objected to this testimony on the ground that the same was hearsay, and did not appear to be *res gestæ*, and for the further reason that the child making the statements was not a competent witness, and they were not such statements as could bind defendant. The court overruled said objections and admitted the testimony, and defendant excepted. A bill of this character, to be complete, in order to make time an element to reject the testimony, should show that, as to the actual rape, the time of the declaration was so far removed or remote therefrom as to exclude the idea that it was *res gestæ*. Here the child was absent from the presence of the mother

twenty-five or thirty minutes, but it is not shown that the rape alleged was committed immediately after the child left its mother. For aught that appears, the assault complained of had just been committed, and the child released by appellant, when she appeared before her mother and made said declarations. So that, so far as the time is concerned, while it was not exactly contemporaneous with the main fact (*i. e.*, the outrage), yet it was so proximate to that event, and at least the first portion of the declaration apparently so spontaneous, as to make it come within the rule of *res gestæ*, as laid down by this court. We are aware that our authorities on this subject show we have made a departure from the common law, and from the rule adopted in a number of states, which requires the declaration to be exactly contemporaneous with the main fact in order to authorize its introduction as *res gestæ*. As was said by this court in *Lewis v. State*, 29 Tex. App. 201, 25 Am. St. Rep. 720, 15 S. W. 642, which has been followed: "In order

age, idiocy, or other mental defect. Such declarations are only competent where the party injured has testified as a witness, and then only upon the question of her credibility. In this case the prosecuting witness was about thirty years of age and of imbecile understanding. *People v. McGee*, 1 Denio, 19.

Declarations made by a female, incompetent to testify by reason of imbecility, shortly after the alleged assault upon her, are inadmissible to prove the commission of the crime charged. Such statements are admissible only to corroborate her testimony, and are inadmissible if she is not a witness. That she is incompetent to testify is immaterial. *State v. Meyers*, 46 Neb. 152, 37 L. R. A. 423, 64 N. W. 697; *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608.

The general rule, however, seems not to exclude declarations against interest. Such declarations, made by an infant plaintiff less than seven years of age and excluded from testifying, are admissible against him. *Atchison, T. & S. F. R. Co. v. Potter*, 60 Kan. 808, 72 Am. St. Rep. 385, 58 Pac. 471.

And an infant's declarations may be received to show the belief and motive of a party to whom they were addressed. Thus, an answer made by a child of four to an inquiry by defendant as to the whereabouts of a person is admissible to show the probable belief of the defendant at the time of his actions after receiving the reply; and the fact that the child was too young to testify is immaterial. *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770.

II. *Res gestæ* as an exception to the general rule.

When the statements made by the child form part of the *res gestæ* their admissibility is urged on the ground that they derive their force from the circumstances under which they were uttered, and do not rest on the credit of the maker; that *res gestæ* evidence is not the witness speaking, but the transaction voicing itself.

65 L. R. A.

Exclamations of an infant, too young to be sworn, made contemporaneously with the main transaction, are doubtless admissible as part of the *res gestæ*, if the child possesses sufficient intelligence to render his statements reliable. Whether the observations come within this rule depends upon the scope given to the term *res gestæ* by the decisions and statutes of the particular state.

In a prosecution for indecent assault upon a girl five years of age, testimony that the child "hollered," more than once, "You hurt me; stop that!" was received. It does not appear that the evidence was objected to. *People v. Colletta*, 65 App. Div. 570, 72 N. Y. Supp. 903, Affirmed without opinion in 169 N. Y. 609, 62 N. E. 1099.

But the exclamations or observations of a child but three and one-half years old, made when he witnessed a homicide, cannot, on the trial held two years later, at which time he was found by the court not to have sufficient comprehension and intelligence to be competent as a witness, be detailed by one who heard them when made, even though they may have been part of the *res gestæ*; since such a child would hardly have been possessed of sufficient discrimination or intelligence to comprehend passing events with anything like such accuracy as to render his exclamations or observations at all reliable. *Adams v. State*, 34 Fla. 186, 15 So. 905.

The declarations of a child, incompetent to testify for failure to understand the nature and obligation of an oath, made immediately after an assault with intent to rape has been perpetrated upon her, are admissible as part of the *res gestæ*. *Croomes v. State*, 40 Tex. Crim. Rep. 672, 51 S. W. 924, 53 S. W. 883.

The mother of an outraged child about seven years of age may testify that the child, immediately after the commission of the crime, complained to her of the injury, and denounced defendant as her assailant. This decision is based on Ga. Code, § 3773, making declarations

to constitute declarations a part of the *res gestæ*, it is not necessary that they were precisely coincident in point of time with the principal fact. If they sprang out of the principal fact, tend to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and are admissible in evidence." In that case the statements received in evidence as *res gestæ* were made from a half hour to an hour after the principal transaction. In *Fulcher's Case*, 28 Tex. App. 465, 13 S. W. 750, a declaration was admitted which was made fifteen minutes after the shooting. And see *Stagner v. State*, 9 Tex. App. 440; *Lindsey v. State*, 35 Tex. Crim. Rep. 164, 32 S. W. 768; *Ingram v. State* (Tex. Crim. App.) 43 S. W. 518; *Craig v. State*, 30 Tex. App. 619, 18 S. W. 297; *Freeman v. State*, 40 Tex. Crim. Rep. 545, 46 S. W. 641, 51 S. W. 230. Under these authorities, as stated above, the evidence complained of comes within the rule of *res gestæ*.

However, appellant asserts another proposition, which is of vital importance in the consideration of the admissibility of this testimony. He insists that the declarant was a child only three and a half years old, and, thus being incompetent to give evidence as a witness, the declarations of said child could not be introduced as evidence against appellant. This exact question was before this court in *Croomes v. State*, 40 Tex. Crim. Rep. 672, 51 S. W. 924, 53 S. W. 882; and it was there held that, wherever the testimony of an infant is a part of the *res gestæ*, it is introduceable, notwithstanding the fact that the witness was incompetent to take an oath. But it is urged that this case is not supported by the authorities cited, and that it is in direct conflict with *Smith v. State*, 41 Tex. 352. An examination of that case discloses that the child was in her fourth year at the time of the offense, but at the time of the trial was in her seventh year. She was held by the court below to be too young to testify; but her parents were permitted to prove

accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, admissible in evidence as part of the *res gestæ*. *McMath v. State*, 55 Ga. 303.

That an injured child made recent complaint may be shown; but the details of her statement, or the name of the person accused by her, are inadmissible.

In a prosecution for rape upon a child of the age of seven years, whose testimony has been stricken out, the child's mother may state, as against an objection that the testimony is hearsay,—no part of the *res gestæ*,—whether the child complained, while the injury was recent, of the assault committed upon her. But the details of the complaint, or her statements connecting the defendant with the assault are inadmissible. *People v. Barney*, 114 Cal. 554, 47 Pac. 41.

So, in a prosecution for assault with intent to commit felony upon a child six years old, the mother of the prosecutrix may properly testify that the child made immediate complaint after the assault, and also complained of pain in her abdomen. Here the mother testified only to the fact of the complaint, and of what complaint was made. Neither the conversation, nor the name of the person complained of, was stated. *Territory v. Godfrey*, 6 Dak. 46, 50 N. W. 481.

That an outraged child six years of age, and too young to be sworn, made recent complaint to her mother of the injury inflicted upon her, may be testified to by the latter; but any narrative of the child as to the conduct of the defendant is inadmissible. The court says: "The fact of her complaining after the criminal act was accomplished, and after the defendant had fled, is, perhaps, not admissible as a part of the '*res gestæ* of the crime,' as that expression is usually understood and applied; but it may be treated rather as tending to show her physical condition at the time of the utterance of the 65 L. R. A.

complaint, just as groans or other evidences of pain and suffering are received in evidence to illustrate the condition when that condition is the subject of inquiry." *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202.

So, the declarations of an outraged child four years of age, voluntarily made in the presence of the defendant, when she reached home, disclosing his criminal acts, are competent for the reason, if for no other, that they directed attention to the condition of her body, which tended to show the commission of the crime. *State v. Jerome*, 82 Iowa, 749, 48 N. W. 722.

But in a prosecution for assault with intent to rape, testimony by the mother of the child assaulted, as to what the latter's three-year-old brother stated to the mother the next day about the transaction, is incompetent. *People v. Beech*, 129 Mich. 622, 89 N. W. 363.

Statements made to his father by a boy who came home wounded and crying are admissible as part of the *res gestæ* in a prosecution for assault and battery; but statements subsequently made to a third person sent for by the father are inadmissible, as well as the acts and conduct of the boy in pointing out the scene of the assault and the stick claimed to be the one he was struck with. The case does not give the boy's age, nor show whether he testified or not. *Pool v. State* (Tex. Crim. App.) 23 S. W. 891.

In a suit for libel in charging plaintiff with having driven a little girl out into the desert to die, the statements of the child, made when found by third persons, are not admissible as part of the *res gestæ*. In this case the age of the child is not given, nor does it appear that she was sworn. *Fenstermaker v. Tribune Pub. Co.* 12 Utah, 439, 35 L. R. A. 611, 43 Pac. 112.

As to how near the main transaction declarations must be made in order to constitute part of the *res gestæ*, see note to *Ohio & M. R. Co. v. Stein*, 19 L. R. A. 733.

A. W. R.

her statements made to them immediately after the occurrences, charging defendant with the act, and giving some of its details. While it is not stated that the testimony was admitted as *res gestæ*, yet we may concede, from the decision, that the court was prepared to hold that any statement made by such a child, though a part of the *res gestæ*, would not be admissible in evidence if the child could not be sworn, as the court says "that, where a child is unfit to be sworn, it follows as a necessary consequence that any account of the transaction which it may have given to others ought not to be admitted," and then cites a number of authorities in support of the proposition. The authorities cited are common-law authorities, and they appear to support, in general terms, the doctrine announced. And to the same effect, see 1 Best, Ev. §§ 151-158; 1 Russell, Crimes, p. 931; 2 Jones, Ev. § 336; Underhill, Ev. § 414. These authors cite *Reg. v. Nicholas*, 2 Car. & K. 246, 2 Cox, C. C. 136; *Rea v. Williams*, 7 Car. & P. 320; *Rea v. Brasier*, 1 Leach, C. L. 199, 1 East, P. C. 443. Mr. Best says: Through all the decisions, two principles are found working their way: "First, that, if the testimony of an infant of tender years is to be received at all, it ought to be received from the infant itself, and not through a statement presented *obstetricante manu*; second, that the witness is an infant of tender years is no ground for relaxing the rule." However, we do not find in any of the decisions referred to, supporting the doctrine, where the question of *res gestæ* was presented, but the cases seem to be predicated on the proposition that the statement of an infant not competent to be a witness cannot be proved. As was said in *Reg. v. Nicholas*, 2 Car. & K. 246, 2 Cox, C. C. 136: A child's statement, who was not capable of taking an oath, is not receivable on the ground that she was not a competent witness. In that case the child appeared to be six years of age, but the facts show that the testimony offered was a statement made two days after the alleged abuse, which clearly shows the case is not authority upon the question of *res gestæ*. The distinction between *res gestæ* and statements made subsequent to the transaction, and no part thereof, is manifest. The one is introduceable as a part of the transaction itself, while the other is introduceable as a subsequent statement made by the alleged injured party recently thereafter, and is used to corroborate and support the evidence of the alleged injured party. Nowhere is this distinction more clearly drawn than in *Castillo v. State*, 31 Tex. Crim. Rep. 145, 37 Am. St. Rep. 794, 19 S. W. 892. So we take it that the English text-books and cases,

even if they were authority for us upon this question, are not decisive of the issue as here presented, especially as we must bear in mind that in England *res gestæ* is confined to what occurs contemporaneously with the main transaction; that is, exactly coincident therewith. See Wharton, Ev. §§ 262-264; Underhill, Crim. Ev. §§ 95-98. Accordingly the authorities say the statement of an incompetent witness will not be received. We do not believe that any English case can be found where a declaration which was made immediately coincident with the main transaction, and was unquestionably a part of the *res gestæ*, was rejected. On the contrary, we do find in the text (3 Russell, Crimes, p. 248) that it had been considered, allowable on an indictment for an assault on an infant five years old with intent to ravish her, to give evidence of the child having complained of the injury recently thereafter; citing 1 East, P. C. chap. 10, § 5, p. 444.

We are therefore driven to the reason of the rule, and to our own authorities on analogous questions. We are aware that the general doctrine is that dying declarations of a witness who is incompetent as a witness, from infancy or other cause, cannot be proved. And the principle announced by these authorities has been cited in support of the view that *res gestæ* coming from an incompetent witness cannot be shown. But it should not be forgotten that the principle with regard to dying declarations and their admission is predicated on the idea that the declarant makes the statement under the sense of approaching death, and with the recognition of the obligations of an oath. In other words, the solemnity of the situation is considered to be, so far as the declarant is concerned, tantamount to the oath. As was said in *Rea v. Pike*, 3 Car. & P. 598, where the declarant was a child four years old, her declarations as to the cause of her death could not be admitted, because the declarant, although conscious of approaching death, from a lack of intelligence, could not be conscious of a future state. See 10 Am. & Eng. Enc. Law, p. 365. The admission of *res gestæ* evidence is upon another proposition; that is, it is not the witness speaking, as in the case of dying declarations, but it is the transaction voicing itself. As was said in *Yeatman v. Hart*, 6 Humph. 375: "When declarations are admitted as *res gestæ*, it is not upon the ground that the party making them could be a witness, but they are 'verbal acts' connected with the transaction and calculated to illustrate its character." To the same effect, see *Rogers v. Crain*, 30 Tex. 288. Both of those cases authorize the introduction of the declarations of a slave

as a part of the *res gestæ*, though such slave could not be a competent witness. And it has been held in this state that the declarations of a wife, where they were a part of the *res gestæ*, could be used against the husband, although our statute provides that they cannot be witnesses against each other. *Cook v. State*, 22 Tex. App. 511, 3 S. W. 749. And in *Powers v. State*, 23 Tex. App. 42, 5 S. W. 153, it was held that, although the declarant was under arrest at the time the statement was made, and no warning had been given, still, if the declaration was a part of the *res gestæ*, it was admissible, notwithstanding our statute with reference to confessions while under arrest. See *Weathersby v. State*, 29 Tex. App. 278, 15 S. W. 823. And in *Neely v. State* (Tex. Crim. App.) 56 S. W. 625, the doctrine was announced that the declarations of a convict, although he was not competent to testify, could be proved as a part of the *res gestæ*. In *Cook's Case*, 22 Tex. App. 511, 3 S. W. 749, the court announced the doctrine that the rule as to *res gestæ* overrides all other rules known to the law governing the admissibility of testimony. So far as we are advised, all the cases, except the *Smith Case*, 41 Tex. 352, indorse this view. We do not understand the case of *Long v. State*, 10 Tex. App. 186, to contravene this doctrine, because that was an attempt to prove the declaration of a convicted felon as against a third party; that is, appellant was not a party to the transaction. Nor does *Holst v. State*, 23 Tex. App. 1, 59 Am. Rep. 770, 3 S. W. 757, contravene the principle, because that was clearly a case in which an effort was made to prove a statement, no part of the *res gestæ*, made long subsequent to the transaction. The evidence of the witness was admissible to support her statement that she made complaint recently after the transaction, but it was held there that she could not give the details of the transaction under the guise of recent complaint. It does not occur to us that there would be any difficulty in determining a question of this character, if *res gestæ* was confined to the immediate transaction, for who would dispute the proposition that if the child, in the first instance, had been heard by its mother, during the transaction, to scream and cry out, "Oh, George, you are killing me!" that this evidence would be admissible against appellant, as a part of the transaction voicing itself through the instrumentality of the child, although it could not testify to the fact, because it did not understand the nature and obligation of an oath? The difficulty arises from the latitude our decisions have given to *res gestæ*, but we must remember that the principles governing *res gestæ* 65 L. R. A.

must be the same. *Res gestæ* is not a witness. It cannot be summoned as a witness, nor sworn as a witness, nor put under the rule as a witness, nor punished for contempt or perjury as a witness. But it is a fact,—an integral part of the transaction, occurring *dum ferveret opus*,—and, as a fact, it can be testified to by any competent witness who may have heard it, just as such witness may testify as to any other fact which transpires during the transaction, and which is and was a part thereof. We therefore hold, as stated before, that the testimony here presented was *res gestæ* (*Berry v. State*, 44 Tex. Crim. Rep. 395, 72 S. W. 170; *Galveston v. Barbour*, 62 Tex. 175, 50 Am. Rep. 519), and that, being a part and parcel of the transaction, notwithstanding the child was not competent as a witness, the court did not err in permitting the mother of the child to testify as to declarations of the child immediately after the transaction.

Appellant raises another question in connection with the charge of the court; that is, he asked the court to give a charge on the subject of penetration, which the court refused, and he reserved an exception. The contention is that, if the evidence showed any penetration, it was merely an entry of the labia or lips of the female organ; that there was no rupture of the hymen or laceration of the vagina. We understand the testimony to be as contended for here. At the same time, the evidence conclusively showed that the lips of the female organ were penetrated, and that the parts were very much bruised; and, while there was no laceration, there was considerable swelling and difficulty in urinating. In other words, there is no question as to the penetration to this extent, and the court's charge embodied this view. The authorities support the instruction on this subject as given by the court. *Rodgers v. State*, 30 Tex. App. 510, 17 S. W. 1077. And for other authorities see § 1106, White's Anno. Penal Code; *People v. Courier*, 79 Mich. 366, 44 N. W. 571; *Reg. v. Lines*, 1 Car. & K. 393; *Brauer v. State*, 25 Wis. 413.

We have examined the record carefully, and, in our opinion, the proof shows beyond any reasonable doubt that appellant, who was a grown man, committed rape, as defined by our statute, upon Adele Hawkins, then a child only three and one half years old. The penalty inflicted is death. We see no reason to disturb the finding of the jury. There being no error in the record, the judgment is affirmed.

Davidson, P. J., dissenting:

I cannot concur in the views of my

brethren affirming the judgment in this case, inflicting the death penalty on this negro.

Appellant's bill of exceptions recites: "That while the witness Mrs. Hawkins was on the stand the state offered to prove, and did prove, by her, that upon August 21, 1903, between 1:30 and 2 p. m., after eating dinner, and while she was cleaning up the dishes, she missed from her presence or view her little child, Adele, for a period of about twenty-five or thirty minutes. That said Adele came into the room where she was, calling to her, and telling her that she was hurt, and wanted witness 'to go out yonder and kill that old, mean negro, because he hurt her.' Witness asked, 'What negro?' and the child said, 'George.' Witness asked the child where he hurt her, and the child placed its hands over its privates, and said, 'He hurt me down here.' That she then asked the child how he hurt her, to which the child replied: 'He took me up in his arms and carried me into the house, stating that he wanted to get a tick off of me. When he got me in there he laid me on the bed, raised up my clothes, and took out of his pants a big, old, black thing, and rubbed it all over me down here,'—placing her hands over her privates." Objection was urged to this, because it was hearsay, and did not appear to be *res gestæ*, and for the further reason that the child making the statement was not a competent witness, and such statements were not such as could bind defendant. There is no question as to the facts. The child was held incompetent by the court because of her extreme youth, being about three years and eight months of age. My brethren have held that her statements to her mother were admissible against appellant on the ground that they were *res gestæ*. The opinion shows great research and ingenuity in arguing to this result, but, in my judgment, the conclusion, as well as the reasoning, is not sound, as it is in violation of our law, our statutes, our decisions, and our Constitution. This question may be said to be hardly novel. It has been before our supreme court, before this court had an existence, in *Smith v. State*, 41 Tex. 352. That case is argued away from, because it did not use the term *res gestæ*. The court held in that case that the statement of the incompetent witness, a child, made immediately after the occurrence, was inadmissible. That case was followed in *Holst v. State*, 23 Tex. App. 1, 59 Am. Rep. 770, 3 S. W. 757; and under all the authorities, so far as I know, and until the decision in *Croomes v. State*, 40 Tex. Crim. Rep. 672, 51 S. W. 924, 53 S. W. 882, the rule announced in the *Smith Case*, 41 Tex. 352, has been followed. It was so at common law, and, so far as I have

been able to ascertain, in the states of the Federal Union. The rule laid down in the *Croomes Case*, 40 Tex. Crim. Rep. 672, 51 S. W. 924, 53 S. W. 882, is a wide departure from our law, constitutional and statutory, and decisions. 1 Russell, Crimes, p. 931; 3 Russell, Crimes, 612; 1 Philipps, Ev. 5, 6. In this last-cited author, this language is found: "Where a child is unfit to be sworn, it follows as a necessary consequence that any account of the transaction which it may have given to others ought not to be admitted." In 1 Chitty, Crim. Law, 568, this language is found: "For the law admits of no evidence but such as is delivered upon oath, and the original expressions were not only uttered when the speaker was not under that obligation, but are liable to be forgotten, misunderstood, and unconsciously altered by the party who repeats them. Besides, if the original speaker be living, this statement of his words is not the best evidence, which we have seen, the court will require; and the prisoner loses the benefit of cross-examination, which is of such eminent service in discovering the real aspect of the circumstances related." See also *Rex v. Pike*, 3 Car. & P. 598. Underhill on Evidence, § 414, says: "If the complainant is too young to comprehend the nature and responsibility of an oath, her testimony is not admissible, nor her statements made out of court permitted to be proved;" Citing *Reg. v. Nicholas*, 2 Car. & K. 246, 2 Cox. C. C. 136; *Rex v. Williams*, 7 Car. & P. 320. To the same effect are 1 Best, Ev. §§ 151-158; 2 Jones, Ev. § 336; *King v. Brasier*, 1 Leach, C. L. 199, 1 East, P. C. 443. In the work by Mr. Best, it is said: Through all the decisions two principles are found working their way: "First, that if the testimony of an infant of tender years is to be received at all, it ought to be received from the infant itself, and not through a statement presented *obstetricante manu*; second, that a witness being an infant of tender years is no ground for relaxing the rule." See also Best, Ev. § 495; *Adams v. State*, 34 Fla. 186, 15 So. 905; *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608; *Weldon v. State*, 32 Ind. 81; 24 Am. & Eng. Enc. Law, p. 607; 23 Am. & Eng. Enc. Law, p. 877, notes 11, 12, p. 878, notes 1, 2. Bishop, New Crim. Proc. bottom page 438, § 961, sub. 2, reads thus: "Too young.—If, as sometimes in cases of carnal abuse, the girl is too young, or too ignorant of the nature of an oath, to testify in the usual way, she cannot give her evidence otherwise, nor can her declarations be proved. So the evidence is lost." 1 East, P. C. 441; *Brazier's Case*, 1 East, P. C. 443, 1 Leach, C. L. 199; *Rex v. Dannel*, 1 East, P. C. 442;

Rea v. Porcell, 1 Leach, C. L. 110; *Smith v. State*, 41 Tex. 352; *Reg. v. Nicholas*, 2 Car & K. 246, 2 Cox, C. C. 136; *Rea v. Travers*, 1 Strange, 700; *Weldon v. State*, 32 Ind. 81; *Johnson v. State*, 76 Ga. 76. And the same rule is laid down as to insane persons (*Lopez v. State*, 30 Tex. App. 487, 28 Am. St. Rep. 935, 17 S. W. 1058), and convicts (*Long v. State*, 10 Tex. App. 186). And such is our statute (Code Crim. Proc. art. 768).

Referring to our Constitution, we find article 1, § 5, provides: "No person shall be disqualified to give evidence in any of the courts of this state on account of his religious opinions or for want of any religious belief; but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury." Following up this same idea, the legislature enacted, in article 34, Penal Code, that "no person shall, in any case, be convicted of any offense committed before he was of the age of nine years, nor of any offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense." Nor did our legislature rest here, for by the terms of article 768, Code Crim. Proc.: "All persons are competent to testify in criminal actions except the following: (1) Insane persons, who are in an insane condition of mind at the time when they are offered as witnesses, or who were in that condition when the events happened of which they are called to testify. (2) Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they were interrogated, or who do not understand the obligation of an oath. (3) All persons who have been, or may be, convicted of felony in this state," etc.

It would hardly be asserted that a person laboring under the disadvantage of insanity could be a competent witness, or a statement made by an insane person could be used as evidence against an accused. The same statute which prohibits the insane person from testifying is equally prohibitive of children who do not understand the obligations of an oath. So we have our Constitution, Penal Code, and Code of Criminal Procedure all supporting the proposition that persons who are incompetent to testify, or are not the subject of punishment, are prohibited from testifying. It is a strange and remarkable proposition to assert that a witness incapable of testifying may make statements to third parties which can be used as evidence, thus testifying indirectly 65 L. R. A.

to matters which are prohibited directly by the statute. But a distinction is sought to be drawn between this character of testimony and dying declarations, on the theory "that the declarant makes a statement under the sense of approaching death, and with recognition of the obligations of an oath." If in fact that distinction is to be drawn, then the reason for admitting dying declarations is much stronger than for the admission of statements of an incompetent witness, because the incompetent witness is, first, prohibited from testifying; and, second, because the statements are made without any sense of sworn obligation or responsibilities of an oath. So we now have the rule laid down, after careful investigation, that statements of an incompetent witness, made to third parties, can be introduced against an accused, when that witness is by statute prohibited from testifying.

If we go to the common law, we find the authorities do not sustain the majority opinion, and our legislature has expressly enacted, by article 763, Code Crim. Proc.: "The rules of evidence known to the common law of England, both in civil and criminal cases, shall govern in the trial of criminal actions in this state, except where they are in conflict with the provisions of this Code or of some statute of the state." So, if the statute had not spoken upon the subject, we would then be relegated to the common law. Going to that source, we find from the beginning this character of testimony was excluded. See authorities above cited; also *People v. McGee*, 1 Denio, 19. *Brazier's Case* is often cited and relied upon by text writers, as well as courts in enunciating decisions. This case is reported in 1 East, P. C. p. 443. In this decision we find this language: "The last case which has occurred on this doubtful subject is that of William Brazier, who was tried for assaulting Mary Harris, an infant five years old, with intent to ravish her. The case on the part of the prosecution was proved by the mother of the child and another woman who lodged with her, to whom the child, immediately on her coming home, told all the circumstances of the injury done her, and described the prisoner, who was a soldier, as the person who had committed it; but she did not know his name. The next day the prisoner was called from the guard by the sergeant, and shown to the child, who immediately said that was the man. Two other soldiers had been before shown her, of whom she at once denied any knowledge. . . . The child was coming from school when the prisoner attacked her. The school did not break up till four o'clock, and she was at home before five, and had no conversation or communication with the mother

before she told all that had passed. The prisoner was convicted. But Mr. Justice Buller reserved the above statement of facts for the opinion of the judges, whether this evidence ought to have been received, or was sufficient, in point of law, to be left to the jury. On the first day of Easter term, 1779, the judges met on this subject, when all of them, except Gould and Willes, JJ., held that this evidence of the information of the child ought not to have been received, as she herself was not heard on oath; as to which some, particularly Blackstone, Nares, Eyre, and Buller, JJ., thought that, if she appeared on examination to have been capable of distinguishing between good and evil, she might have been sworn. But as to that, others, particularly Gould and Willes, JJ., held that the presumption of law of want of discretion under the age of seven is conclusive, so as not to admit an infant under that age to be sworn on any examination as to her capacity. And as to the information or narration from the child, Gould and Willes, JJ., held that it being recently after the fact, so that it excluded a possibility of practising on her, it was a part of the fact or transaction itself, and therefore admissible; and Buller, J., held the same, if by law the child could not be examined on oath. But as to what happened the next day, Gould, J., thought it not admissible, by reason of the danger of her being influenced in the interval. But on the 29th day of April, all the judges assembled, they unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined on oath, and consequently that evidence of what she had said ought not to have been received, and that a child of whatever age cannot be examined unless sworn." I have copied the most of this decision, because it seems to be a rather central or leading case, under the authorities. So we have this last-cited case, rejecting the evidence as *res gestæ*, and at common law the unqualified rule rejecting this character of testimony. We have our statute, which is plain and explicit. We have our Constitution, which prohibits anyone from testifying, except under the pains and penalties of perjury. We have the statute which prohibits punishment where child is under nine years of age. In this case we have the trial court holding the child incompetent as a witness, her testimony excluded by reason of that fact, and yet her statements made to third parties admitted, and the life of the accused taken in the face of all these prohibitory laws.

The conduct of the negro, if he be the guilty party, is outrageous; but all outrageous conduct, in this state, is not pun-

ished with death; nor does all such conduct constitute rape, nor render competent the testimony or declarations of an incompetent witness. It is a question of law, pure and simple; and I cannot give my assent to setting aside the law as it has existed from the beginning, at common law, and in our own state, since we have had a Code and procedure and a Constitution.

The majority use this language: "It does not occur to us that there would be any difficulty in determining a question of this character, if *res gestæ* was confined to the immediate transaction, for who would dispute the proposition that, if the child, in the first instance, had been heard by its mother, during the transaction, to scream and cry out, 'Oh, George, you are killing me!' that this evidence would be admissible against appellant as a part of the transaction, voicing itself through the instrumentality of the child, although it could not testify to the fact, because it did not understand the nature and obligation of an oath." This quoted exclamation was not used by the child, but, if the evidence was of the character spoken of here, and the child had cried out, "Oh, George, you are killing me!" it would be the declaration of the child to the accused, and anyone who heard this statement could testify to it, though the child could not, because it was the accusation to defendant himself, and would be therefore admissible. It would make no difference who made or heard the accusation. So the exclamation of this child, "Oh, George, you are killing me!" if made to appellant in the presence of its mother, instead of to its mother in the absence of defendant, would have been admissible. If the accusation, "Oh, George you are killing me!" had been made to the defendant in person by the child a week after the transaction, it would have been admissible, because it would be the accusation of the crime itself, made to defendant. But that is begging the question. That is not involved here.

It is said in the majority opinion: "*Res gestæ* is not a witness. It cannot be summoned as a witness, nor sworn as a witness, nor put under the rule as a witness, nor punished for contempt or perjury as a witness. But it is a fact,—an integral part of the transaction, occurring *dum fervet opus*,—and, as a fact, it can be testified to by any competent witness who may have heard it, just as such witness may testify as to any other fact which transpired during the transaction, and which is and was a part thereof." Of course, *res gestæ* is not a witness. It cannot be summoned as a witness, nor sworn as a witness, nor put under the rule, nor punished for contempt

or perjury. But the witness who testifies to the *res gestæ* can be a witness, can be summoned, can be sworn, can be put under the rule, can be punished for contempt or convicted of perjury. A bill of sale is not a witness. It cannot be summoned, nor can it be sworn, nor put under the rule, nor punished for contempt or convicted of perjury. Neither can a deed, nor any other fact, nor any other testimony. But the witness who testifies to the fact may be punished for perjury or for contempt, or put under the rule. It would be a very difficult matter to punish a fact, whether it was *res gestæ* or not, and the court would have more than a very difficult proposition on its hands to punish a deed or bill of sale or a fact. However, the court might punish the witness for perjury or contempt who testifies to the fact. If my brethren be correct, then we have a rule of *res gestæ* which is paramount to the law, superior to the statute, and must dominate all other rules of evidence. *Res gestæ* is simply considered as evidence. It can be nothing more.

This is an extreme case in which to file a dissenting opinion, because of the popular outcry of the age. But I believe it to be a case, therefore, which ought to be closely guarded, and the rules of law held inviolable. It is a negro charged with the crime upon a little white child, which, it is but a common historical fact to state, excites the impulse and outrages the feelings of communities. Cases of similar character, within the recent history of this state, have led so far as to force trial courts, by mob violence, to require defendants to waive the thirty days allowed them by law after the conviction before the death penalty is executed, and accept the execution of the sentence of death at once.

I wish to enter my dissent, also, on the sufficiency of the evidence to support this conviction. Appellant is a negro man of full age,—as the witnesses say, “a full-grown negro.” He had been working for six weeks with the father of the little child as a section hand, and living in the section house with the other negroes, some 25 yards from the dwelling in which the father of the child, with his family, resided. On the 21st of August, the day of the alleged assault, appellant was what the mother of the child termed “laying off,” because of some injury he had received about a week or ten days before. He was able to walk about on a crutch. Between 1:30 and 2 o'clock the little child is said to have received the injuries which form the basis of this conviction. Just before this occurrence, the mother of the child testified that her three children—two little boys and

this little girl—were playing at the swing between the dwelling house and the section house. Defendant was lying in the shade at the end of the negro house, near the swing. The mother called the two little boys, and sent them to bring in wood, which was on the opposite side of the house from the swing. They were employed at this work twenty-five or thirty minutes. During this time the little girl was not seen. About twenty-five or thirty minutes after the mother lost sight of the child, she heard her coming around the house, calling her. She went and met her, and found her pale, excited, complaining, and holding her hands over her privates. The first thing she said was, “I want you to go out yonder and kill that old, mean, black negro, because he hurt me so bad.” I asked her what negro, and she said, ‘George.’ I asked her, ‘What for?’ and she said, ‘Because he hurt me.’ I asked her how he hurt her, and she said: ‘He took me up in his arms and carried me in his house, stating he wanted to get a tick off of me. When he got me in the house, he put me on the bed, raised up my clothes, and took a great, big, old, long black thing out of his pants and rubbed it all over me down here. [Putting her hands over her privates to indicate the place.]’” The mother examined her as hurriedly as possible, and found semen messed and smeared all over her down there, and some in her privates,—about an inch. She washed her thoroughly. She further says that she found her bruised and puffed up, and her privates inflamed about an inch inside, but there was no blood, and the skin was not broken. At the time there was no other man about the house or premises, except defendant and the little boys, nine and eleven years of age, respectively. About twenty-five or thirty minutes after this alleged occurrence, the mother saw defendant lying down in the back yard, in the shade of the negro cabin. She says she was greatly excited and alarmed, and did not know what to do, but concluded to wait until her husband came home from work that night as section-boss, before taking any action. He came about sundown, and she informed him of what had happened. The husband wanted to shoot appellant, but she protested, because of her pregnancy. Shortly after the crime on the little girl is said to have happened, this witness testified that defendant walked up to the postoffice, and was gone until about 5:30 o'clock P. M., when he returned home, bringing a watermelon. It seems he and the two little boys ate this in the yard. He stayed around there, and was sitting on the fence when the husband and the other section

hands returned from work. He was arrested and carried away. Dr. Park testified that he was a physician and surgeon at Elkhart; that, on the night of the day Adele Hawkins was said to have been assaulted, he was called to the house of Mrs. Hawkins to examine the child. It was about 8 o'clock in the evening when he reached the residence, and made a thorough examination. He says: "I found that the lips of her privates were inflamed and red, and showed evidences of friction. There was no abrasion of the skin." He further testified: "The privates of a child of that age are such that the lips can be entered by a man's male organ to the hymen, which is located inside from 1 to 1¼ inches, with out causing any abrasion of the skin. . . . It showed conclusively that something had entered in the lips of this child's privates, and the inflammation extended inside an inch or more." On cross-examination: "I examined this child carefully, and know that the skin was not broken. The vagina (or connecting muscular tube) between the mouth of the womb and the inner lips of the surface opening (reaching to within about 1¼ to 1¾ inches of the outer surface of the outer lips of the female organ) had not been entered; neither had the hymen been ruptured or broken." Dr. Parsons testified that he was a practising physician, and had been for many years. "The private parts of a child of three years and eight months old may be entered by a man's male organ or penis from 1 inch to 2½ inches into between the lips without bloodshed or injury to the child, and without entering the vagina or rupturing the hymen. Outside the hearsay statement of the little child, there is no evidence to connect appellant with the act. Not a witness swears he touched the child, and the case depends upon the declaration of the child to the mother. For appellant, witnesses Horn and Douthitt, two white men, testified that on the afternoon of the alleged injury, about 2 o'clock, defendant was in front of the postoffice and about the little town of Elkhart, on the gallery in front of Boyd's store, standing around or sitting around talking to other parties for a period of about three hours. During this time his demeanor and conduct was just such as was usual for him when he was about there. That nothing strange was said or done by him that afternoon. Appellant took the stand in his own behalf, and stated: "I did not, on the afternoon of the al-

65 L. R. A.

leged injury, touch the child, Adele Hawkins, in any manner whatever, nor did I at any other time touch the said child. I am not guilty of the charge against me. About 12 o'clock, or some time soon thereafter, I went from the section house up to the postoffice and the other stores, and stayed there until about 5 o'clock. After this I went home, carrying with me a watermelon, which the little boys and I ate in the yard. Then I went out on the front side and sat on the fence until the section hands came in, and stayed about the premises, and was there in the section house that night when I was arrested." This is the case on the facts. If the little girl's testimony is true, there was no rape, for her statement renders it certain that defendant simply rubbed his private parts over hers. She did not complain of penetration, or anything of the sort. This was outrageous conduct, and, under *Croomes's Case*, 40 Tex. Crim. Rep. 672, 51 S. W. 924, 53 S. W. 882, may be assault to rape, but not rape. This case comes, it seems to me, within the rule in *Draper v. State* (Tex. Crim. App.) 57 S. W. 655. I do not believe it will be contended that, under the testimony of the physicians, a conviction ought to have been had. It may be a child three years and eight months of age is so constructed, from an anatomical standpoint, that the male organ of a grown negro man can penetrate her from 1 to 2½ inches without abrasion or producing bloodshed, but it staggers credulity. Perhaps not the least remarkable part of this testimony is the fact of appellant staying at the place of the alleged outrage complacently, as testified by the mother of the child, for twenty-five or thirty minutes after the outrage, and then leisurely walking down in town, spending the evening, and returning to what he knew meant death, if he was guilty of the imputed conduct.

I further believe the charge requested by appellant should have been given. The more intense the excitement and greater the strain of public opinion adverse to a party charged with crime of this character, and which stirs up the mob spirit of the community, the more careful ought the trial court to be to guard the legal prerequisites which lead to the conviction.

For these reasons, it has suggested itself to my mind that this conviction ought not to stand. The judgment ought to have been reversed, and I therefore dissent from the affirmance.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

F. D. GIDDINGS *et al.*, *Plffs. in Err.*,
v.

William G. FREEDLEY *et al.*

(128 Fed. 355.)

1. The main belt which transmits the power from an engine which is so affixed to the building as to be real estate, to the machinery in the mill, is, as between the owner and attaching creditors, real estate.
2. Statutory authority is necessary to justify the seizure and removal from a mill of a portion of the fixtures in it under a writ of attachment.
3. An exception to the "instructions on the question of exemplary damages" is too indefinite to raise any question in the appellate court.
4. A single exception covering several distinct propositions of an instruction collectively is inoperative if one of the propositions is sound.
5. Exemplary damages may be awarded against attaching officers who, although they have no personal acquaintance with, or ill-will against, defendant, wilfully and knowingly allow themselves to become tools of the attaching creditors, whose object is apparently malicious, and make an unlawful levy in a high-handed and oppressive way to oppress the debtor.
6. Damages cannot be disallowed for stoppage of gangs of saws by the wrongful removal of a belt from a mill under a writ of attachment, because they themselves might have been rightfully attached, and the same injury thereby wrought.
7. Damages which are the natural and reasonably-to-be-expected result of the wrongful stoppage of an engine under a writ of attachment may be recovered in an action for the trespass, although they were not specially pleaded.

(January 6, 1904.)

ERROR to the Circuit Court of the United States for the District of Vermont to review a judgment in favor of plaintiffs in an action of trespass to recover damages for the alleged wrongful levying of an attachment upon plaintiff's property. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. L. Martin and O. M. Barber for plaintiffs in error.

Messrs. Fred M. Butler and Thomas W. Moloney, for defendants in error:

The attachment of real estate creates a

lien in favor of the creditor, and includes the right to redeem. But "the officer has no right to take actual exclusive possession of the property, or in any way to disturb the possession of the occupants."

Drake, Attachm. §§ 236-239; *Chandler v. Dyer*, 37 Vt. 345.

By the attachment no estate passes, no interest vests in the creditor, neither the interest, nor the possession, of the debtor is divested, nor does the officer or creditor claim any right to take the issues or profits.

Taylor v. Mixer, 11 Pick. 347.

The engine, shafting, and pulleys-engine bed, anchor stone and engine crank, are real estate.

Hill v. Wentworth, 28 Vt. 433; *Kendall v. Hathaway*, 67 Vt. 126, 30 Atl. 850; *Hackett v. Amsden*, 57 Vt. 432; *Hill v. Farmers' & M. Nat. Bank*, 97 U. S. 450, 24 L. ed. 1051; *Bigler v. National Bank*, 26 Hun, 520; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719.

If the object and purpose, as appears from the location of the property itself, were to improve the inheritance and make it useful, the chattels became fixtures and a part of the realty.

Newhall v. Kinney, 56 Vt. 591; *Bartlett v. Wood*, 32 Vt. 372; *Davenport v. Shants*, 43 Vt. 546; *Fullam v. Stearns*, 30 Vt. 443; *Sweetzer v. Jones*, 35 Vt. 321, 82 Am. Dec. 639; *Harris v. Haynes*, 34 Vt. 220; *Gray v. Holdship*, 17 Serg. & R. 413, 17 Am. Dec. 680.

A request to charge must be sound law and applicable to the issues, or it need not be complied with.

Rea v. Harrington, 58 Vt. 181, 56 Am. Rep. 561, 2 Atl. 475.

Unless special damages are alleged, the plaintiff is entitled to recover such damages as would naturally and necessarily result from the trespass complained of.

2 Greenl. Ev. § 254; *Clark v. Boardman*, 42 Vt. 667; *Folsom v. Underhill*, 36 Vt. 580; *Hutchinson v. Granger*, 13 Vt. 386.

When one has received an actionable injury at the hands of two or more wrongdoers, all are jointly and severally liable to the full extent of the injury.

Burk v. Howley, 179 Pa. 539, 57 Am. St. Rep. 607, 36 Atl. 327; *Russall v. McCall*, 38 Am. St. Rep. 807, note, 141 N. Y. 437, 36

NOTE.—For other cases in this series as to what are fixtures generally in the absence of any agreement, see *Southbridge Sav. Bank v. Mason*, 1 L. R. A. 350; *Binkley v. Forkner*, 3 L. R. A. 33, and *note*; *Atchison, T. & S. F. R. Co. v. Morgan*, 4 L. R. A. 284; *Hill v. Munday*, 4 L. R. A. 674, and *note*; *McGorrick v. Dwyer*, 5 65 L. R. A.

L. R. A. 594, and *note*; *Hopewell Mills v. Taunton Sav. Bank*, 6 L. R. A. 249; *Overman v. Sasser*, 10 L. R. A. 722, and *note*; *Philadelphia Mortg. & T. Co. v. Miller*, 44 L. R. A. 559; *Thomson v. Smith*, 50 L. R. A. 780; and *Murray v. Bender*, 63 L. R. A. 783.

N. E. 498; *Vandiver v. Pollak*, 54 Am. St. Rep. 118, and note, 107 Ala. 547, 19 So. 180.

All are liable for exemplary or punitive damages.

Devine v. Rand, 38 Vt. 621; *Edwards v. Leavitt*, 46 Vt. 126.

Exemplary damages are given on account of the bad spirit, malice, and wantonness of the defendants, as manifested by their acts, and are recoverable under common allegations of damages.

Hoadley v. Watson, 45 Vt. 289, 12 Am. Rep. 197; *Earl v. Tupper*, 45 Vt. 275.

When both compensatory and exemplary damages are claimed in a suit instituted for tort against several defendants jointly, and all join in their pleas, it is proper to assess damages against all jointly.

Watson, Damages, § 736; *Reizenstein v. Clark*, 104 Iowa, 287, 73 N. W. 588.

The motives of the party must be determined by their acts, and, when they are both engaged in the same act, the malicious motives of one party are not different from those of the other, and would not tend to enhance the damages of the other.

Cleghorn v. New York C. & H. R. R. Co. 56 N. Y. 44, 15 Am. Rep. 375; *Lombard v. Batchelder*, 58 Vt. 558, 5 Atl. 511; *Boutwell v. Marr*, 71 Vt. 1, 43 L. R. A. 803, 76 Am. St. Rep. 746, 42 Atl. 607.

Lacombe, Circuit Judge, delivered the opinion of the court:

The plaintiffs, citizens and residents of Pennsylvania, owned a marble mill operated by steam, and a quarry connected therewith, all in Dorset, Vermont. On April 8, 1902, a writ of attachment in favor of one Gilman B. Wilson, of Dorset, against the senior plaintiff, William G. Freedley, was duly issued, in which the *ad damnum* was \$12,000. This writ was seasonably placed in the hands of defendant Giddings, of Manchester, a constable having authority to serve the same. Under the laws of Vermont, such an attachment can be served upon real property only by delivering a true and attested copy of such attachment, with a description of the estate attached, to the party whose estate is so attached (or leaving same at his place of abode), and by filing the same in the office where by law a deed of such real estate is required to be recorded. In Dorset such office would be that of the town clerk. In the case of personal property the writ of attachment may be executed in either of two ways. The officer serving the process may lodge a copy of the same, with his return, in the town clerk's office, "which lodgement shall hold the property against all subsequent

sales, attachments, or executions, as if it had been actually removed and taken into the possession of the officer." Or the officer "may remove the . . . [personal property attached] and take it into his possession, in which case he need not leave a copy of the attachment or execution in the . . . clerk's office." Vt. Stat. §§ 1101, 1103, 1108. On April 10th Giddings went to the mill, found one Nadeau, plaintiffs' superintendent, in charge, explained to him what his business was, and showed him the writ. He told Nadeau that, in order to make said attachment upon the personal property, it was necessary to take possession of the mill, and asked Nadeau to assist him in getting things into shape, as he wished to take possession some time during that day. To this Nadeau assented. A memorandum was made by Giddings of the property to be attached. He made a copy of the writ, and indorsed upon it a list of the property attached by him,—dericks, movable machinery, finished and unfinished marble, etc.—and arranged with Nadeau for the latter to act for him as keeper of said property. No effort was made to remove any of the personal property.

On Saturday, April 12th, Nadeau telegraphed Giddings that he wanted to be released as keeper of said property, and on the following day declined to continue as keeper, and surrendered the keys to Giddings, who had come to Dorset in response to the telegram. The latter fastened up the doors of the mill, including engine house and boiler house, by nailing strips of board across them. He removed none of the property, put no one in charge, and left it boarded up as described.

On the next day plaintiffs, without Giddings's knowledge or consent, knocked off the strips of board, entered the premises, and proceeded to operate the mill, which fact was at once made known to Giddings by Gilman S. Wilson. Giddings went again to the mill on Tuesday, April 15th, and had an interview with Nadeau. Giddings's version of the interview is that Nadeau stated he intended to hold the property by force, that he had help enough to defend it, and would throw Giddings into the brook if necessary. Nadeau denies that he said anything of the sort, although he admitted that he refused to give Giddings possession of the mill. Our attention is called to no provision of law which authorized the attaching officer to take possession of the real estate. Under the verdict of the jury, all disputed questions of fact are to be considered in this court as resolved against the defendants. The next day Giddings called on the de-

fendant Henry S. Wilson, of Arlington, high sheriff of the county, to assist him in executing the attachment. Having consulted with a firm of lawyers, the two defendants went to the mill on April 17th, and it is their joint action on that day which is the subject of this action. Freedley and Nadeau were both present, and the mill was in operation. Giddings testified that he repeatedly requested that the mill should be shut down, and the attached property surrendered to him as attaching officer, and that upon Nadeau's continued refusal he notified him that he would shut down the mill and the main belt. Nadeau's story is that he never objected to the officers taking away or moving or taking hold of any of the personal property that was on the list, and that he told them "if they took the main belt they would have to take it by force; they would have to use force, and stop the engine themselves." Evidently the jury believed Nadeau's version to be the correct one; not unnaturally, since both officers admitted they entered the premises with the intention to remove the main belt, well knowing that would have the effect of shutting down the mill. Upon Nadeau's refusal to shut down the mill and deliver up the main belt, Giddings broke open the doors that led into the boiler room and into the engine room, and the defendant Wilson, under the direction of Giddings, then cut the lacing of the belt, and Giddings caused it to be carried away. Thereupon the officers left without removing, or undertaking to remove, a single item of the personal property they claimed to have attached.

The first question raised on this appeal is whether the main belt was personal property. If it were, defendants were protected by their writ; if it were not, they were trespassers.

The plant was operated by a 80-horse-power steam engine and two boilers, which were located in a room attached to the mill building. The engine was set on a solid foundation of masonry, composed of stone and brick, 3 or 4 feet high, which was called the engine bed. Underneath this bed, and resting on the earth, were anchor stones to which the engine was fastened by iron rods running through the bed, and through the anchor stones, for the purpose of holding the engine immovable on its bed. The engine was connected with the main-line shaft by the main belt, above referred to. This was a double leather belt, 24 inches in width and several feet in length. It extended from the drive wheel of the engine to a pulley on the main-line shaft. The engine had no fly wheel or balance wheel. The belt is the sole means

by which power generated on the engine shaft is transmitted to the main shaft, which latter is the immediate source of power on which the various steam-driven machines and working devices are entirely dependent for their operation.

The question is to be determined, not as it would be under the rules which public policy requires to be laid down when a tenant, for the use of his own business, has put mechanical appliances in his landlord's building, but under the rules which apply as between vendor and purchaser. In *Newhall v. Kinney*, 56 Vt. 591, the court held that "a levying creditor, in the eye of the law, is a purchaser of the property set off to him in satisfaction of his debt against the judgment debtor," and that an attachment of the debtor's real estate, followed by a levy upon a "sawmill," includes a circular sawmill, which is in and constitutes a part of the sawmill. The court says: "The simple fact that the circular sawmill might be removed and another substituted in its place, without material injury to other parts of the building, is not determinative of whether it was intended to pass to the purchaser, or to a party who stands in the relation of a purchaser, upon a conveyance of the property. Such removal and substitution can be made of almost any other part of a sawmill, of the doors, windows, water wheel, sills, ridge pole even. But when once fitted up with these, or with a circular sawmill, the removal thereof without a substitution takes away an essential part of the sawmill, and the purchaser . . . would fail to receive the property which he bargained for under the description 'sawmill.'"

The case of *Kendall v. Hathaway*, 67 Vt. 122, 30 Atl. 859, where a circular sawmill so attached that it could be readily removed was held to be personal property, is not in conflict with *Newhall v. Kinney*, because in the later case the circular sawmill was put in a building which had been erected on land already covered by a mortgage, under circumstances which the court found evidenced an intention to keep it in the building "only so long as the owners might desire." In *Winslow v. Merchants' Ins. Co.* 4 Met. 306, 38 Am. Dec. 368, the court held that a steam engine and boilers, and all the engines and frames adapted to be moved and used by the steam engine, by means of connecting wheels, bands, or other gearing, as between mortgagor and mortgagee, are fixtures or in the nature of fixtures, and constitute a part of the realty. After pointing out that the mode of attachment is "far from constituting the criterion" by which to dispose of the question, the court says: "The difficulty is

somewhat increased when the question arises in respect to a mill or manufactory, where the parts are often so arranged and adapted, so ingeniously combined, as to be occasionally connected or disengaged, as the objects to be accomplished may require. In general terms, we think it may be said that when a building is erected as a mill, and the waterworks or steamworks which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, . . . [they] are yet parts of it [the mill], and pass with it by a conveyance, mortgage, or attachment."

This case is cited with approval in *Hill v. Wentworth*, 28 Vt. 428, where the court says: "The iron shafting put up in the building for the purpose of turning and putting in motion the machinery . . . we are disposed to regard as a constituent part of the mill. The shafting was necessary to communicate the motive power to the machinery, and should be regarded as a part of the mill as much as a water wheel by which a water power is called into existence."

To the same effect is the following excerpt from *Harris v. Haynes*, 34 Vt. 220: "Understanding . . . the object and purpose of the annexation of the engine and its adjuncts to the realty to have been the furnishing of motive power to the machinery of the shop, and having reference to the manner in which they were fitted and adapted to the shop and the business there carried on, we are of opinion that" the engine and boilers, arch mouth and grate, and certain shafting and pulleys were fixtures. In *Keeler v. Keeler*, 31 N. J. Eq. 190, it was held that the "machinery and apparatus for furnishing motive power" were a part of the realty. "The steam engine is securely and permanently bolted to a foundation, . . . and it was put in for permanent use. It, with its appurtenances, is part of the realty, and so are the boilers, which are a necessary adjunct to it; also the shafting, belting, coupling, and pulleys to communicate the power; and also the water wheels and water-wheel governor."

The precise question now presented was considered in *Burnside v. Twitchell*, 43 N. H. 394, where the court says: "The belting, also, of a mill runs from the large wheel connected with the motive power over a drum upon the main horizontal shaft, upon which are various other drums, upon which are belts connected with the various distinct portions and parts of the machinery. Whether the belting could be removed whole without removing any of

the machinery, or whether, as is the case ordinarily, it could not be disengaged from the drums and shafts altogether, without removing some of the permanent parts or attachments of the mill, or by disuniting the belts by removing the thongs by which the ends are usually fastened together, the case does not show. But when a mill of any kind is constructed so as to make belts necessary, in order to run the mill, they would seem to be a part, and as essential a part as any other, of the mill. Some gristmills are constructed in this way, with a belt attached to the main shaft and connected with each run of stones, another to the bolt, another to the smutmill, etc.; others are constructed with a large cogwheel, with other smaller cogwheels, that can be thrown into it or upon it, to carry each of the other several parts of the machinery. In one case the drums and belts perform the same office that the wheels and gearing do in the other. The belting is as necessary as the drums, and both are as necessary in one case as the cogwheels are in the other, one of which might be removed, perhaps, with as little trouble as the other. Why, then, should the cogwheels be considered as a part of the mill, and the belting not be so considered?"

We are entirely in accord with these propositions, and do not find anything in the cases cited to us from the Vermont Reports which would prevent their application in the case at bar. It is conceded by defendants that the engine which supplies the motive power for the mill is real estate, and the belting by means of which such power is transmitted from the engine to the main shaft is certainly an adjunct of the engine. Without it or its equivalent the engine would not discharge the function for which it was erected,—it would not supply motive power to the mill. It would hardly be contended that, if the power were transmitted by cranks, or by a pitman, or by a train of gearing, such devices were not fixtures; and there is no sound reason for reaching a different conclusion when the transmitting device is a leather belt. We conclude, therefore, that defendants had no right to seize and remove the main belt as personal property under the writ.

Defendants next assign as error that "the court did not correctly instruct the jury on the subject of exemplary damages." Reference to the brief shows that it is contended that two propositions should have been called to the attention of the jury, viz.: (a) That, "when defendant acts on the advice of counsel in the commission of the act complained of, such fact should be considered on the question of exem-

plary damages;" and (b) that, "where the only evidence of malice is the presumption which arises from the mere doing of an unlawful act, if it is shown that the defendant acted in good faith, and on the advice of counsel, exemplary damages are not recoverable." The trial judge was not requested to charge either of these propositions, nor, indeed, did defendants ask for any instructions whatever on that branch of the case. The court charged the jury at some length on the subject of exemplary damages, telling them that if they found the purpose was to shut down the mill instead of making a fair attachment; to oppress Freedley & Son by taking an unfair advantage of them; if defendants' action was high-handed and oppressive, and done with a wrong purpose to do damage unlawfully,—the jury might add what was right to the damages by way of example. The only exception reserved to this part of the charge was "to the instructions on the question of exemplary damages, and to the instruction that exemplary damages may be recovered in this case against both defendants." The first part of this exception is too indefinite. It is not contended that the charge on this branch of the case was wholly erroneous. Manifestly no such contention could be made, for the doing of an illegal act with a wrong purpose to do damage unlawfully would certainly support a claim for exemplary damage. Where a single exception covers several distinct propositions collectively it is inoperative, if one of the propositions is sound. The defendants should have called the court's attention to the particular propositions complained of, and, if it were thought the instructions should be made fuller, have stated precisely what they wished to have charged. The exception, however, sufficiently raises the question whether the evidence warranted the jury in giving exemplary damages.

It appears that defendants had no personal acquaintance with Freedley, and had no ill-will towards him. Nevertheless, if they willingly and knowingly allowed themselves to become the tools of another person, whose object was apparently malicious, and carried out an unlawful act in a high-handed and oppressive way, the jury would be entitled to find their conduct malicious, and to punish it by assessing punitive damages. The evidence quite clearly shows that this was just what they did, and we need not look beyond their own admissions for proof. The real estate was valuable and unencumbered. There was personal property worth several thousand dollars. The mere filing of a copy in the town clerk's office would have effected a levy

on all the property. The defendants filed no copy, and thus made no effort to secure the real estate. Out of the personal property they seized and removed only the main belt, worth less than \$20. The defendant Sheriff Wilson admitted that ordinarily he would have looked up the title to the real estate and attached that by filing copy, and that in the ordinary course of serving a writ he would not have removed the main belt. The defendant Giddings had a conversation with Wilson, who sued out the attachment, and after that conversation went to the mill with the intention of removing the main belt. Both defendants took legal advice before they seized the belt, but the lawyers they consulted were the counsel of the attaching creditor, who told them to remove the belt. Both knew perfectly well that their seizure of the belt would effectually shut down the mill, and entail a loss far in excess of the \$20 they secured thereby. They admit that ordinarily they do not require a bond of indemnity from the attaching creditor where there is no question as to the ownership of the property they are about to levy on, but that, when the circumstances are "rather peculiar,—out of the ordinary,"—they do require such security. They quite wisely concluded that the circumstances of this case were rather peculiar, and, before electing to seize a \$20 leather belt for a \$12,000 claim, instead of filing a copy in the clerk's office, Giddings asked Wilson, of Dorset, for a bond of indemnity, which was given; thereupon the latter "told [him] what to do," and he did "just what he told [him]." Comment is superfluous.

Defendants reserved an exception to this excerpt from the charge: "Freedley had a right to have his property there undisturbed except by due process of law. If this man living there [Wilson, of Dorset], thought he would oppress Freedley a little by attaching in this way, when he might have done it in another way, and not interfere with his business so, you should add whatever you think is about right."

It is contended that this instruction allowed the jury to punish defendants for the attaching creditor's wrong, when they can only be punished for their own acts. But the charge must be considered as a whole, and we are satisfied the jury could not have been misled by this part of it. It was the acts of the defendants—"peculiar and out of the ordinary"—in assisting the attaching creditor to oppress the plaintiffs, when as intelligent men they must have known his object, which were left to the consideration of the jury.

Exception was taken to instructions which allowed the jury to include damages

sustained by the loss of the use of the gangs of saws, which of course could not run when the main belt no longer transmitted power to the main shaft from which (or from some subsidiary shaft) they were driven. The gangs were personal property, and could have been removed. If defendants had directed their attention to them, taken down and removed them, there could be no recovery for the loss of their use. But it would be going too far to hold that damages necessarily resulting from an unlawful act are to be disallowed on the theory that, if defendants had kept within the limits of the law, similar damages would have ensued. They elected to

act outside the limits of the law, and for the damages resulting from their unlawful act they must respond.

Exception was reserved to the admission of evidence, and its submission to the jury, showing damage to the foundation of the engine and engine bed from the sudden stopping of the engine, on the ground that such damages were not specially pleaded. The jury was charged to confine the damages to such as directly resulted from the stoppage of the engine, and the damages testified to seem to be the natural and reasonably-to-be-expected result of the trespass complained of.

The judgment is affirmed.

VERMONT SUPREME COURT.

Mary Ann BAILEY

v.

George BAILEY.

(.....Vt.....)

A pension received by a soldier of the Civil War from the Federal government may be taken into consideration as part of his resources, in fixing the future alimony to be paid by him, when his wife is granted a divorce, although, under the Federal statutes, it is not subject to seizure by any legal process until it has reached his possession.

(Tyler, J., dissents.)

(February 13, 1904.)

EXCEPTIONS by defendant to an order of the Caledonia County Court fixing the amount of alimony to be paid upon dissolution of a marriage. *Affirmed.*

The facts are stated in the opinion.

Messrs. Harland B. Howe and Marshall Montgomery, for defendant:

The court had no jurisdiction to decree to a wife, divorced absolutely, property of the husband not then owned by him, but to be subsequently acquired.

Vt. Stat. §§ 2091 et seq.; *Buckminster v. Buckminster*; 38 Vt. 248, 8 Am. Dec. 652; 2 Bishop, Marr. & Div. §§ 475, 511, 857, 887; *Chenault v. Chenault*, 5 Sneed, 248; *Boggers v. Boggers*, 6 Baxt. 299; *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375; *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35, 24 N. W. 579; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Le Barron v. Le Barron*, 35

Vt. 365; *Hayward v. Clark*, 50 Vt. 617; 2 Am. & Eng. Enc. Law, 2d ed. pp. 98, 124.

It is beyond the power of any court to award pension money, not received by the petitioner at the date of the decree, as alimony to a divorced wife, no matter how meritorious is her claim for divorce.

U. S. Rev. Stat. § 4747 (U. S. Comp. Stat. 1901, p. 3279).

Messrs. May & Hill, for petitioner:

The pension money received is exempt only from levy, etc., while in the hands of the Pension Office, or while being transmitted to the pensioner; but the order of the court does not make, nor does the petitioner claim that by reason of that order she has, any lien or right of any kind in the pension money so received.

By the state law, oxen or horses and the homestead are exempt. Can it be urged that a trial court cannot legally consider the exempted oxen, horses, or the rents and the profits of the homestead of the husband in making its order for alimony?

An order for alimony is not barred by a discharge in bankruptcy.

Dunbar v. Dunbar, 190 W. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757.

The orders in divorce cases do not originate in, nor are they founded upon, contracts.

Andrew v. Andrew, 62 Vt. 495, 20 Atl. 817.

If pension money was exempt from levy of execution, etc., in cases founded upon contract, it would not follow that it would be exempt from consideration in a suit for divorce.

2 Bishop, Marr. & Div. 6th ed. § 446; *Stewart, Marr. & Div. § 373.*

A pension is an income.

Hayward v. Clark, 50 Vt. 617; *Rozelle v.*

NOTE.—As to the extension of the exemption of pension money to property purchased therewith, see note to *Wylie v. Grundysen*, 19 L. R. A. 34.
65 L. R. A.

Rhodes, 116 Pa. 129, 2 Am. St. Rep. 591, 9 Atl. 160.

Watson, J., delivered the opinion of the court:

On dissolution of the marriage for the cause of intolerable severity, the court decreed to the petitioner as permanent alimony the sum of \$400, payable \$100 on the 20th days of October, 1903, January, April, and July, 1904, respectively, with interest after maturity, if not paid, and made the same a charge upon the petitionee's interest in certain real estate. The petitioner was also decreed all the articles of personal property and the household furniture then in her possession. It was further decreed that the petitionee should pay to the clerk of the court, for the benefit of the petitioner, the sum of \$36 on the 15th day of October, 15th day of January, the 15th day of April, and the 15th day of July, annually thereafter, until further order of court, as a continuing alimony. In the making of this last order the court took into consideration the pension of \$24 per month which the petitionee received from the United States government for disabilities resulting from his service as a soldier in the Civil War, holding, as a matter of law, that the court might properly consider that as a part of his financial resources. To this holding the petitioner excepted. Beyond this no exception was taken, and our consideration of the case is confined accordingly.

The Revised Statutes of the United States, § 4747 (U. S. Comp. Stat. 1901, p. 3279), provides that "no sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy, or seizure, by or under any legal or equitable process whatever, whether the same remains with the Pension Office, or any officer or agent there-

of, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." It is contended that by force of this section the court has no power to award pension money, not received by the husband at the date of the decree, as alimony to a divorced wife. But this is not the question. The question is, Had the court a right, as a matter of law, to consider such a pension as a part of the petitionee's financial resources? The exemption under the law covers pension money only during its transmission to the pensioner. When it has been received by him, it has inured wholly to his benefit, within the meaning of this statute. Then, to the same extent as money from other sources, it is subject to attachment, levy, and seizure as opportunity presents itself. *McIntosh v. Aubrey*, 185 U. S. 122, 46 L. ed. 834, 22 Sup. Ct. Rep. 561. And so, in effect, was the holding of this court in *Martin v. Hurlburt*, 60 Vt. 364, 14 Atl. 649. Nor did the fact that it was neither property in hand nor the income of such property render its consideration improper. A husband's faculties are his capabilities of maintaining a family, ordinarily consisting of his income from whatever source derived, and they, with all the other circumstances surrounding the parties, should be taken into consideration when alimony or other annual allowance is decreed to be paid by the husband to the wife. 2 Bishop, Marr. & Div. §§ 1005, 1006, 1017. See also *Hedrick v. Hedrick*, 128 Ind. 522, 26 N. E. 768; *Tully v. Tully*, 159 Mass. 91, 34 N. E. 79; *Eidenmuller v. Eidenmuller*, 37 Cal. 364; and *Holmes v. Holmes*, 29 N. J. Eq. 9.

Judgment affirmed.

Tyler, J., dissents.

WASHINGTON SUPREME COURT.

David L. COPLAND, Exr., etc., of William Copland, Deceased, *Appt.*,
v.

City of SEATTLE *et al.*

(.....Wash.....)

1. A municipal corporation is not liable for the death of one killed by the fall of material from a building in process of construction adjoining a street,

by the mere fact that it granted a permit for the construction of the building, and took no precautions to warn passersby of danger in using the street pending the construction of the building.

2. An executor may bring an action for the negligent killing of his testator, under a statute providing that the action may be brought by heirs or personal representatives, although the statute expressly provides that the action shall be in favor of the wife or children of decedent, and a widow

NOTE.—As to duty of city to see that no harm comes to travelers on street from use of a portion of it for deposit of building materials by private parties, see, in this series, *Kansas City v. McDonald*, 45 L. R. A. 429.

As to liability of city for injury caused by 65 L. R. A.

fall of lumber piled in street by private parties, see *Evansville v. Senhenn*, 41 L. R. A. 728.

As to liability of municipality for injury to person because of wagon in street, left there with permission of city, see *Cohen v. New York*, 4 L. R. A. 406.

survives him, provided it is shown that the action is brought with her consent.

(December 10, 1903.)

A PPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendants in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed in part.*

The facts are stated in the opinion.

Mr. R. W. McClelland, with **Mr. C. W. Turner**, for appellant:

The executor has authority to sue; it is not compulsory that the widow exercise her right.

2 Ballinger's Anno. Codes & Statutes, §§ 4828, 4838; *Louisville & N. R. Co. v. Sanders*, 86 Ky. 259, 5 S. W. 563; *Henderson v. Kentucky C. R. Co.* 86 Ky. 389, 5 S. W. 875; *Jordan v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 40, 11 S. W. 1013; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Hartigan v. Southern P. Co.* 86 Cal. 143, 24 Pac. 851; *Webster v. Norwegian Min. Co.* 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276.

The city cannot shift its liability to keep its streets in a safe condition by the mere granting of a building permit.

2 Dill. Mun. Corp. 4th ed. §§ 1027, 1034.

Even under a general allegation of negligence, any other act of negligence, besides those specifically allowed, may be proved.

Cogswell v. West Street & N. E. Electric R. Co. 5 Wash. 56, 31 Pac. 411; *Collett v. Northern P. R. Co.* 23 Wash. 606, 63 Pac. 225; *Uren v. Golden Tunnel Min. Co.* 24 Wash. 265, 64 Pac. 174.

Messrs. M. Gilliam, William Parmelee, Wright & Kelleher, and John T. Condon, for respondents:

The only interest the city could possibly have in controlling the erection of buildings within it is that of the general public welfare,—to see, for instance, that no frame buildings are erected within certain fire limits established by it; and again, to see that no building is erected within its confines that would be dangerous to the people occupying or coming in contact with it.

Olympia v. Mann, 1 Wash. 389, 12 L. R. A. 150, 25 Pac. 337; *Baxter v. Seattle*, 3 Wash. 352, 28 Pac. 537.

An abutting owner's right temporarily to use a part of the street for building purposes is well established.

Raymond v. Keseberg, 84 Wis. 302, 19 L. R. A. 643, 54 N. W. 612.

The policy of the law of this state is that every action shall be prosecuted in the name of the real party in interest, unless otherwise provided by law.

(65 L. R. A.

The statute follows the "American policy" by giving the action directly to certain relatives named in the statute.

Robinson v. Baltimore & S. Min. & Reduction Co. 26 Wash. 484, 67 Pac. 274; *Noble v. Seattle*, 19 Wash. 133, 40 L. R. A. 822, 52 Pac. 1013.

The result is to give to the widow, there being no children, and the widow being a resident and legally capable of bringing the suit, the prior and exclusive right to maintain such suit.

Henderson v. Kentucky C. R. Co. 86 Ky. 389, 5 S. W. 875; *Carden v. Louisville & N. R. Co.* (Ky.) 37 S. W. 839; *Belding v. Black Hills & Ft. P. R. Co.* 3 S. D. 369, 53 N. W. 750.

Fullerton, Ch. J., delivered the opinion of the court:

In this action the appellant, as executor of the estate of William Copland, deceased, sought to recover damages for the death of his testator, caused, as he alleges, by the wrongful and negligent acts of the respondents. The respondents separately interposed demurrers to the complaint on the grounds, among others, that the appellant had no legal capacity to sue, and that the complaint failed to state facts sufficient to constitute a cause of action, which demurrers the trial court sustained, entering a judgment of dismissal after the appellant had elected to abide by his complaint.

For a cause of action the appellant alleged, in substance, that on May 15, 1901, the respondent the Swedish Evangelical Lutheran Gethsemane Church was engaged as proprietor, and under its own supervision, in the construction of a church building on its own property situated in the city of Seattle; that while it was so engaged in the construction of the building the appellant's testator passed along the street in front of the building, the street being a public thoroughfare of the city of Seattle, when the church, without fault of his testator, or warning or notice to him, "caused to be hurled down or thrown upon said street from the roof of said building, and from a distance of more than 20 feet from and above said street, a piece of plank or timber, which struck the said William Copland upon the head, and thereby fractured and crushed his skull, and inflicted upon him a mortal wound, from which said wound he . . . died." He further alleged that the "building was authorized by" the respondent city, but that neither the church nor the city took any precautions whatever to prevent the use of the street by pedestrians, or placed any kind of a warning thereon notifying pedestrians that its use was dangerous. On the matter of his right to main-

tain the action the appellant alleged that the deceased died testate, naming the appellant as his executor; that he had been confirmed as such by the superior court having jurisdiction over the testator's estate; that the deceased left a widow dependent upon him for support, but no child or children; that the widow was damaged because of the death of the deceased in the sum of \$15,000, for which sum judgment was demanded "for the benefit of such widow . . . and . . . to her use, as damages," etc.

Taking up the question of the sufficiency of the facts to constitute a cause of action, it is at once apparent that the demurrer of the city was properly sustained on that ground. True, it is alleged that the city "authorized" the construction of the building, and gave no notice or warning that there was danger in passing it while it was in the course of construction; but this is insufficient either to fasten upon it the neglect of its correspondent, which caused the death complained of, or charge it with an independent neglect. The allegation that the city authorized the construction of the building, when taken in connection with what is elsewhere alleged in the complaint, means no more than that the city granted to its correspondent a permit to construct the building, or did not forbid its construction. It carries with it no implication of participation on the part of the city. Clearly, a city, by granting a building permit, does not render itself liable for the negligent acts of persons constructing a building under a permit so granted. Nor is this allegation aided by the allegation that no notice or warning of the danger was given. This was not a danger that the city was bound to guard against. Had it granted to the respondent church the right to use the street, and then knowingly suffered it to so use it as to endanger the lives of persons traveling upon the street, a different question would be presented; but it was not bound to anticipate that the persons erecting the building would be so grossly negligent as to throw a board from the roof of the building into the street. If it can be held liable for such an act, there is no wrong which one of its citizens may inflict upon another for which it is not liable.

It is not questioned that the facts stated are sufficient as against the demurrer on that ground of the respondent the Swedish Evangelical Lutheran Gethsemane Church, but it is contended on its behalf that the appellant has no legal capacity to sue. The argument is that, inasmuch as the right of one person to maintain an action for the death of another is a statutory, and not a common-law, right, and as the statute of this state grants the right only where there

is a surviving widow or child or surviving children, the right to sue must be vested in those in whom the beneficial interest is vested; and an executor or administrator, or the estate which he represents, has no such interest. The sections of the Code conferring the right to maintain an action for the death of a person caused by the wrongful act or neglect of another are as follows (Ballinger's Anno. Codes & Statutes, §§ 4828, 4838):

"The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as, under all circumstances of the case, may to them seem just."

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine by reason of such death if he have a wife or child living, but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children."

Construing these sections, we have held that the term "heirs" meant the widow and children of the deceased, and did not include parents and collateral heirs, and that the only persons who could be the beneficiaries of such an action were the wife and children of the deceased. *Graetz v. McKenzie*, 3 Wash. 194, 28 Pac. 331; *Northern P. R. Co. v. Ellison*, 3 Wash. 225, 28 Pac. 333, 29 Pac. 263; *Hedrick v. Ilwaco R. & Nav. Co.* 4 Wash. 400, 30 Pac. 714; *Dahl v. Tibbals*, 5 Wash. 259, 31 Pac. 868; *Noble v. Seattle*, 19 Wash. 133, 40 L. R. A. 822, 52 Pac. 1013; *Nesbitt v. Northern P. R. Co.* 22 Wash. 698, 61 Pac. 141; *Robinson v. Baltimore & S. Min. & Reduction Co.* 26 Wash. 484, 67 Pac. 274. While in none of these cases was the precise question here presented before the court, yet in several of them it was touched upon, incidentally it may be, but in such a way as to clearly indicate what the courts views thereon were at the time the case was under considera-

tion. For example, in *Graetz v. McKensie* it was said that under the 1st section above quoted "either the heirs or personal representatives, but not both, may bring the action therein provided for, and recover such damages, pecuniary or exemplary, as to the jury may seem just under the circumstances." In *Hedrick v. Ilwaco R. & Nav. Co.* it was said: "Usually the right of action, as in Lord Campbell's act, is given to the executor or administrator, and the sum recovered inures to the benefit of the particular individuals designated by the statute. In this state, as has been seen, . . . the heirs or personal representatives may maintain the action." And in *Noble v. Seattle* the court quoted approvingly from *Henderson v. Kentucky C. R. Co.* 86 Ky. 389, 5 S. W. 875, where it was stated by the Kentucky court, when passing upon a statute in the respect in question almost exactly like our own, that the right to maintain the action was vested in the administrator by the language used, although he could exercise the right only for the use and benefit of the wife and children of the deceased. These cases, as we say, accepted the rule as unquestioned that an executor or administrator could maintain an action against anyone who, by wrongful or negligent acts, caused the death of his testator or intestate, provided the deceased left a widow, a child, or children, dependent upon him for support; and this whether such persons were or were not under disability to sue in their own names. It seems to us now that this is the correct construction of the statute. It is the only way effect can be given to the phrase "personal representatives," as used therein, without departing from its natural and usual meaning. The legislature has power to confer upon one person the right to maintain an action for the use and benefit of another, and the argument *ab inconvenienti* will not be allowed to weigh as against a plain grant of the right. It is true the defendant cannot be subjected to two actions for the one cause, and, as the widow has the first right to sue, it must be made to appear at some stage of the proceedings prior to the time the defendant is called on to put in his defense that the widow has knowledge of and sanctions the action brought by the personal representative, so that she cannot afterwards repudiate his acts and maintain an action in her own name. The danger of a defendant's being subjected to more than one action is, however, not very real. It is always within the power of the courts to protect a defendant against the possibility of being so subjected, and doubtless they will do so when called on at the proper time. Of the cases from other jurisdictions, where similar statutes exist, the only one cited as 85 L. R. A.

taking an opposite view is the supreme court of South Dakota in the case of *Belding v. Black Hills & Ft. P. R. Co.* 3 S. D. 369, 53 N. W. 750. That court held in the case cited that the statute created successive rights of action, vesting the right first in the widow to the exclusion of the heirs and personal representatives, next in the heirs to the exclusion of the personal representatives, and lastly in the personal representatives for the benefit of the estate of the deceased; holding that the right to maintain the action carried with it the exclusive right to the damages recovered. This construction of the statute as to the persons entitled to the damages recovered, it will be noticed, is at variance with the decisions of this court in the cases cited *supra*, and we cannot think it in point on the question under discussion for that reason. If it be the rule that the right to the damages goes first to the widow to the exclusion of the heirs and personal representatives, and to the others in order, then the holding that the one entitled to the damages must sue for it, and has the exclusive right so to do, is undoubtedly sound. But we have held that the widow and children share the damages recovered jointly, and that, if there be no widow or children, there is no right of recovery at all,—a construction of the statute wholly different from that given it by the South Dakota court, and one which seems to us must call for a different rule on the question as to who has the right to maintain the action. Other cases more nearly in point are the following, which support the rule as we have announced it: *Louisville & N. R. Co. v. Sanders*, 86 Ky. 259, 5 S. W. 563; *Henderson v. Kentucky C. R. Co.* 86 Ky. 389, 5 S. W. 875; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 522, 18 Am. St. Rep. 248, 24 Pac. 303; *Dueber v. Northern P. R. Co.* 100 Fed. 424.

The judgment appealed from is affirmed as to the respondent the city of Seattle, and reversed and remanded as to the respondent the Swedish Evangelical Lutheran Gethsemane Church, with leave to such respondent to answer to the merits within such time as the trial court may fix.

Mount, Dunbar, Anders, and Hadley, JJ., concur.

A. E. NATHAN, Appt.,
v.

COUNTY OF SPOKANE *et al.*, Respts.

(.....Wash.....)

1. The principle of uniformity in taxa-

NOTE.—For discrimination against nonresidents in tax laws generally, see, in this series,

tion is not violated by providing a mode of levying a tax against the goods of a merchant, who, after the taxes for the year have been assessed, brings his stock into the state with the intention of disposing of it without engaging in business permanently, different from that employed in case of resident merchants.

2. Property liable to taxation under the general laws of a state is not exempt therefrom because it may have been returned for taxation for the same year in another state.
3. The objection that a statute imposing a tax is void for failure to provide notice to the property owner is not available to one who has an opportunity to submit evidence to the assessor, and to be heard with regard to the value of such property.
4. The law will presume that a tax officer will do his duty under the law, and not act unfairly or arbitrarily regarding the assessment of property for taxation.
5. The question, what remedy may be open to a taxpayer in case of an illegal assessment or over valuation of his property, is not properly before the court upon appeal from a decision refusing to enjoin collection of the taxes on the ground that the statute under which it is levied is unconstitutional.
6. A tax law cannot be held to deprive a taxpayer of his property without due process of law, because he is given no opportunity, by its express terms, of having the assessment reviewed by a board of equalization or otherwise, if it gives him an opportunity to submit his proofs and make a showing to the assessor in the matter of the assessment of his property.
7. A statutory provision for a writ of review when an inferior tribunal, board, or officer exercising judicial functions is acting illegally, or to correct an erroneous or void proceeding, is available for the correction of the acts of a county assessor where there is no other method of reviewing such acts.
8. The legislature has no power to permit a person who, upon bringing a stock of goods into a state after the time for levying the taxes for a year has passed, pays the tax for the whole year, to deduct from the regular assessment against him at the beginning of the next year the amount representing the time when his property was not in the state; since it would grant him a special privilege, and create unequal taxation.
9. A statute providing for the taxation of property brought into the state by a merchant after the regular tax is levied in any year is not rendered void by the failure of a proviso granting him a rebate from the next regular tax levied against him.

(April 19, 1904)

Sprague v. Fletcher, 37 L. R. A. 840, and *State v. Travelers' Ins. Co.* 57 L. R. A. 481.

As to taxation of shares of stock in foreign corporations while exempting those in domestic corporations, see *Bacon v. State Tax Comrs.* 60 L. R. A. 321.

As to right to tax same thing in two jurisdictions, see *Grigsby Constr. Co. v. Freeman*, 58 L. R. A. 349.

A PPEAL by plaintiff from a judgment of the Superior Court for Spokane County in favor of defendants in an action brought to enjoin the collection of a tax. *Affirmed.*

The facts are stated in the opinion.

Messrs. Robertson, Miller, & Rosenhaupt, for appellant:

The law is special legislation in that it would tax the permanent merchant who sold such a stock of goods purchased without the state in a temporary place, temporarily rented for its sale, while exempting the permanent merchant who sold in his customary place of business a stock of goods similarly purchased.

Tacoma v. Krech, 15 Wash. 296, 34 L. R. A. 68, 46 Pac. 255. See *Cooley*, Const. Lim. pp. 479-490.

A state cannot discriminate in taxation between the products of different states.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

A state cannot impose, for the privilege of doing business within its limits, a license tax heavier upon nonresidents than upon residents doing the same business.

Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; *State v. Wiggin*, 64 N. H. 508, 1 L. R. A. 56, 15 Atl. 128; *Cooley*, Const. Lim. pp. 596-598; 2 Smith, *Maxims of Policy*, p. 9; *Cooley*, Taxn. pp. 354, 355.

Notice must be given of all proceedings. *Blackwell*, Tax Titles, § 397; 1 *Desty*, Taxn. p. 597; *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *South Platte Land Co. v. Buffalo County*, 7 Neb. 254; *Cooley*, Taxn. pp. 354, 355; *Whatcom County v. Fairhaven Land Co.* 7 Wash. 101, 34 Pac. 563.

Property not in existence, or not in the state, at the time of the assessment cannot be taxed for the year.

People v. Kohl, 40 Cal. 127; *Wangler Bros. v. Black Hawk County*, 56 Iowa, 384, 9 N. W. 314.

There cannot be two rules of apportionment for the same tax in the same district; if there could be, there might be any number,—and, in effect, there would be none at all,—and every man might be assessed arbitrarily.

As to necessity of equality and uniformity in taxation generally, see *notes* to *Daly v. Morgan*, 1 L. R. A. 758; *Chaddock v. Day*, 4 L. R. A. 809; *Cook v. Port of Portland*, 13 L. R. A. 533; and *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 583.

Cooley, Taxn. p. 245.

No method of appeal is provided; no manner of regulating the amount assessed.

Andrews v. King County, 1 Wash. 46, 22 Am. St. Rep. 136, 23 Pac. 409; *Cincinnati Southern R. Co. v. Guenther*, 19 Fed. 395.

The law of the land provides a hearing before any person can be divested of life, liberty, or property; otherwise there would be no due process of law.

Cooley, Const. Lim. p. 431; Blackwell, Tax Titles, § 90; *Patten v. Green*, 13 Cal. 330.

The right of hearing cannot be denied; and this rule applies to the taxing power of the state.

Railroad Tax Case, 13 Fed. 722; Cooley, Taxn. pp. 52, 361, 362, 364.

It is not enough that the owner may, by chance, have notice, or that he may, as a matter of favor, have a hearing.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289.

There being no board to which an appeal could be made for revision or correction, the plaintiff was deprived of his property without due process of law.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Darling v. Gunn*, 50 Ill. 424; *Oglehorn v. Postlewaite*, 43 Ill. 428.

Messrs. Horace Kimball and Miles Polindexter, for respondents:

The judgment of the assessor will not be interfered with by the courts in an injunction proceeding for mere overvaluation, in the absence of fraud.

Andrews v. King County, 1 Wash. 46, 22 Am. St. Rep. 136, 23 Pac. 409.

Acts providing for the assessment of property coming into the state after the regular assessment, and which may be consumed or removed before the next regular assessment, are necessary and in force in all the states, in order to prevent the escape from taxation, and from a just share of the burdens of the government, of a vast amount of property, which derives protection from the government.

Carton v. Unita County, 10 Wyo. 416, 69 Pac. 1013; *Kelley v. Rhoads*, 7 Wyo. 237, 39 L. R. A. 594, 75 Am. St. Rep. 904, 51 Pac. 593; *Wright v. Stinson*, 16 Wash. 368, 47 Pac. 761; *Johnston v. Whatcom County*, 27 Wash. 95, 67 Pac. 569.

The right of appeal, or rehearing, on the assessor's action is not essential.

Cooley, Taxn. 2d ed. pp. 361, 366.

The statute applies alike to every section and to every person in the state coming within the conditions specified by the statute. The act is, therefore, public, general, and uniform.

State v. Nichols, 28 Wash. 628, 69 Pac. 65 L. R. A.

372; *Black, Tax Titles*, § 28; *Kelley v. Rhoads*, 7 Wyo. 237, 39 L. R. A. 594, 75 Am. St. Rep. 904, 51 Pac. 593; *Com. v. Brush Electric Light Co.* 145 Pa. 147, 22 Atl. 844; *Norris v. Waco*, 57 Tex. 635; *Gay v. Thomas*, 5 Okla. 1, 46 Pac. 578; *Boyd v. Wiggins*, 7 Okla. 85, 54 Pac. 411.

Provision for a board of equalization, or an opportunity for a review of the assessment, is purely a matter of statutory regulation, and not a constitutional question.

Cooley, Taxn. 2d ed. 418; 25 Am. & Eng. Enc. Law, p. 241; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Per Curiam:

This is an action instituted in the superior court of Spokane county by A. E. Nathan, appellant and plaintiff below, against Spokane county, George Mudgett, as county treasurer, and A. P. Williams, county assessor of such county, defendants and respondents. The object of the suit is to enjoin the collection of \$750 taxes levied upon plaintiff's property for the year 1901. The court below sustained a general demurrer to the complaint. The plaintiff elected to stand on his complaint. The action was thereupon dismissed, and an appeal taken to this court.

The assignments of error present but the one question, whether the complaint states sufficient facts to entitle appellant to relief. His brief in this court contains the following statement: "The action was presented in the court below, and is presented now to this court, to determine the constitutionality of § 12, chap. 141, p. 295, Sess. Laws 1899." The transcript discloses that appellant, in order to prevent distraint of his goods and merchandise, deposited \$750 in the hands of the county treasurer, which, by stipulation, stands in lieu of a levy, if the appellant shall be adjudged to pay the tax. The complaint, among other things, alleges that on or about the 10th day of November, 1901, appellant, A. E. Nathan, brought a stock of goods and merchandise from the state of Montana to the city and county of Spokane; that the value placed on such stock by appellant was \$8,000; that appellant, immediately upon his arrival in Spokane, commenced doing business as a merchant under the style of A. E. Nathan & Company, and proceeded in the regular and ordinary course of business to dispose of his merchandise at a place of business in said city temporarily used for that purpose, without the intention on the part of appellant of permanently engaging in trade at such place; that on or about the 12th day of November, 1901, respondent A. P. Williams, the county assessor of

Spokane county, by himself and deputies, came into the store of appellant and notified him that he (the assessor) would forthwith proceed to assess such stock of goods; that appellant then and there offered to show to said assessor the value of such stock, and that the same had been assessed and taxes paid thereon in Montana for the then current year (1901), that such assessor proceeded to assess such merchandise, and on the 12th day of November, 1901, the county treasurer, George Mudgett, came to appellant's said place of business and threatened to distrain appellant's goods unless such taxes were paid; that, in order to prevent such levy, appellant, under protest, deposited the sum of \$750 in hands of said Mudgett, not as county treasurer, but as a private individual, pending the final determination of this controversy; and that this has been done with the consent of the prosecuting attorney of Spokane county. The complaint further alleges that the above statute under which this tax levy was made is unconstitutional, for the following reasons: (1) The said enactment provides a different mode and manner of the assessment levied against the property of appellant than is provided for other persons and property similarly situated; (2) that there is no provision made for any board of equalization or other person to hear and determine the matter as to the justness of such tax, and the value of the property sought to be assessed; (3) that it provides for a rebate to persons residing permanently in this state, and is a discrimination against persons temporarily residing therein; (4) that this law is special in its character, and unequal in its application.

The provision of law attacked by appellant is as follows: "Whenever any person, firm, or corporation shall, subsequent to the 1st day of March of any year, bring or send into any county any stock of goods or merchandise to be sold or disposed of in a place of business temporarily occupied for their sale, without the intention of engaging in permanent trade in such place, the owner, consignee, or person in charge of the said goods or merchandise shall immediately notify the county assessor, and thereupon the assessor shall at once proceed to value the said stock of goods and merchandise at its true value, and upon such valuation the said owner, consignee, or person in charge shall pay to the collector of taxes a tax at the rate assessed for state, county, and local purposes in the taxing district in the year then current. And it shall not be lawful to sell or dispose of any such goods or merchandise as aforesaid in such taxing district until the assessor shall

have been so notified as aforesaid and the tax assessed thereon paid to the collector. Every person, firm, or corporation bringing into any county of this state goods or merchandise after the 1st day of March shall be deemed subject to the provisions of this section: Provided, that all persons having paid the tax as herein provided for shall, at the time of the regular assessment next succeeding said payment, be allowed by the county assessor, in making his assessment, a deduction in a sum equal to that part of the entire assessment of the previous year as the number of days of the previous assessment year he was not in such county bears to the whole of such assessment year." Laws 1899, p. 295, chap. 141, § 12 (Pierce's Code, § 8679; 3 Balinger's Anno. Codes & Statutes, § 1740a).

Article 7, § 1, of the Constitution of the state of Washington, provides: "All property in the state not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law." The object and intent of the framers of the Constitution were that all property not exempt by virtue of the provisions of such instrument should bear a tax in proportion to its value; that the listing, assessment, levy, enforcement, and collection of taxes, subject to certain limitations unnecessary to notice in this connection, were and are in the discretion of the legislature. The expediency of such enactments, within the limitations prescribed by this Constitution, constitutes a subject-matter with which the courts will not intermeddle. The legislature is a branch of our state government co-ordinate with the executive and judicial. Each department is supreme within its proper sphere. The law-making power is vested in the legislature, under the provisions of our fundamental law. Judge Cooley, in his able treatise entitled *Constitutional Limitations*, 5th ed. *479, uses the following pertinent language: "The power to impose taxes is one so unlimited in force, and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property." Again, at page 645 of the same treatise, the learned jurist observes: "What method shall be devised for the collection of a tax, the legislature must determine, subject, only, to such rules, limitations, and restraints as

the Constitution of the state may have imposed. Very summary methods are sanctioned by practice and precedent."

This court, in the case of *Johnston v. Whatcom County*, 27 Wash. 95, 67 Pac. 569, construed the above statutory provision as applying to persons, firms, or corporations bringing their goods and merchandise into this state from beyond its boundaries after the 1st day of March, to be sold or disposed of in a place of business temporarily occupied for their sale, without the intention of engaging in permanent trade at such place; holding it did not apply to merchants moving their goods from one county into another within the state after the 1st day of March, when such goods had already been listed and assessed for taxes in the county of the situs of the property at that date for the then current year. It is true that the constitutionality of this statute was not considered in the above case, but the contention of appellant that this enactment is unconstitutional, because it "provides a different mode and manner of the assessment levied against the property of this appellant than is provided for other persons and other property similarly situated," is met by the decision of this court in *Wright v. Stinson*, 16 Wash. 368, 47 Pac. 761. We held in that case that the migratory stock act (Laws 1895, p. 105, chap. 61) was not unconstitutional on account of making distinctions as to the manner of assessment and collection of taxes levied against the different kinds of personal property.

The case of *Kelley v. Rhoads*, 7 Wyo. 237, 39 L. R. A. 594, 75 Am. St. Rep. 904, 51 Pac. 593, was in many of its features similar to the case at bar. The court held that the provision of the state Constitution of Wyoming requiring property to be uniformly assessed for taxation does not mean that, in the case of the assessment of all kinds of taxable property, the same officers shall act, or that the proceedings touching the assessment shall be the same; that there is uniformity in the assessment if the same basis of valuation is taken as to all property of like character; that, as long as the rate and method of valuation are the same as in case of other property, a statute may be enacted affecting the taxation of a peculiar class of property, to guard against its escape therefrom, without violating any constitutional provision. This case is also authority on the proposition presented in this controversy,—that, where personal property is otherwise taxable in the state of Washington, it is not exempt from taxation because it may have been returned for taxation for the same year in another state. See also *Cooley*, Taxn. 2d ed. 37, 65 L. R. A.

219-221; *Coe v. Errol*, 116 U. S. 517, 524, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; exhaustive note to *Buck v. Miller*, 62 Am. St. Rep. 448.

The appellant, in his complaint, alleges that the tax in question was assessed and levied against his property after the time fixed by law for the equalization of taxes by the county board, and therefore the proceedings had in that behalf were invalid, because he had no opportunity, under the provisions of this statute, to have the valuation of his goods, as determined by the county assessor for the purposes of taxation, reviewed in any manner; that the law in question is also unconstitutional in this: It fails to provide for the giving of notice to the owner of the property before the assessment and levy of the tax. In the case of *Kelley v. Rhoads*, 7 Wyo. 237, 39 L. R. A. 594, 75 Am. St. Rep. 904, 51 Pac. 593, it would seem, from the opinion of the court, that the party assessed under the provisions of the Wyoming statute before or after the annual levy, and feeling himself aggrieved, may subsequently appear before the county board, at either a regular or special session, and obtain relief.

The authorities cited by appellant's counsel on the proposition that a statute authorizing a board of equalization to raise the valuation of the property of an individual taxpayer, listed by him for taxation, without providing for notice to him of the proposed increase in his assessment, is unconstitutional and void, are not applicable to the questions under consideration. This statute provides that the owner, consignee, or person in charge of the goods or merchandise shall immediately notify the county assessor, who shall thereupon proceed to value the same at their true value, upon which valuation the taxes for the then current year shall be assessed and collected. The party liable to the payment of the tax has the opportunity to submit evidence to the assessor, and to be heard with regard to the valuation of such property. It is presumed that the assessor, being a sworn officer, will do his duty under the law, and that he will not act unfairly and arbitrarily regarding the assessment of property for the purposes of taxation. In *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, the court held that the duties of assessors, in determining the value of property for the purposes of general taxation, are judicial in their nature. Thus, in the case at bar, respondent Williams, the county assessor, acted in a judicial capacity in placing the valuation upon appellant's goods for such purposes. Assessors are usually classified as officials performing both

ministerial and judicial functions. We are therefore of the opinion that this statute does not deprive a party of his property without due process of law, as urged by appellant, in that it fails to provide for a hearing in behalf of an aggrieved party whose property is sought to be charged with the tax. *Hagar v. Reclamation Dist.* No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The question as to what remedies may be open to a taxpayer under this law, in case of an illegal assessment or overvaluation of his property, is not properly before us on this appeal. The present inquiry, on the face of the record, by the stipulation of the parties to this controversy, is limited to the single proposition regarding the constitutionality of the above statutory provision. Inasmuch as this law provides that the party charged with the tax has an opportunity to submit his proofs and make his showing to the assessor in the matter of assessing his property for taxation, we are not justified in concluding that such party is deprived of his property "without due process of law" because he is given no opportunity, by the express terms of the revenue law, of having the assessment reviewed by a board of equalization or otherwise. Undoubtedly, in case the assessor should act arbitrarily, unfairly, or fraudulently in the performance of his duties under this statute, the aggrieved party might, if he saw fit, invoke the common-law remedies in the courts to redress the wrongs which he suffers in consequence of such official misfeasance or malfeasance. Moreover, the Code provides that "a writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal. nor, in the judgment of the court, any plain, speedy, and adequate remedy at law." *Pierce's Code*, § 1396; *Laws* 1895, pp. 114, 115, chap. 65, § 4 (*Pierce's Code*, § 1396; 2 *Ballinger's Anno. Codes & Statutes*, § 5741). This court, in *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143, held that the above provisions applied to a county treasurer exercising judicial functions, where "there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy at law." We see no reason why this remedy may not be invoked, in a proper case, regarding the acts of a county assessor or other official exercising judicial functions. Under the provisions of 65 L. R. A.

chapter 59, *Pierce's Code*, the court issuing the writ is vested with ample powers to inquire into the merits of the controversy, and "give judgment, either affirming or annulling or modifying the proceedings below." See, further, *Lewis v. Bishop*, 19 Wash. 312, 53 Pac. 165, and authorities cited.

Coming now to the consideration of the constitutionality of the proviso contained in the above statute, we think that the legislature was without power or authority to enact any law providing that, after the payment of such taxes, the person paying them should be allowed certain deductions from the next regular assessment of such property. Article 1, § 12, of the state Constitution, provides: "No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." This law, by the terms of the proviso, not only discriminates between taxpayers of the same class, but grants privileges and immunities to taxpayers who own or possess property at the time of the next regular assessment, which are withheld from and denied to parties similarly situated, who may have paid their taxes levied pursuant to the above statute, and who cease to own or have property on the tax rolls at the time of the next regular assessment. Again, this provision discriminates among taxpayers whose property is listed on rolls of the next regular assessment after the itinerant shall have paid his tax. He is granted exemptions in the latter instance which are denied to other property owners or taxpayers of the same class whose property is listed for the regular assessment named in such proviso. The legislature cannot grant such exemptions or immunities directly; neither can it accomplish the same object by indirection. *Cooley, Const. Lim.* 5th ed. *391. Absolute equality in matters of taxation is an impossibility. An eminent jurist,—the late Mr. Justice Miller, of the Supreme Court of the United States,—in one of his opinions, remarked that such a condition was an "unrealized dream." Moreover, we think that this proviso is repugnant to the purview of the section to which it is appended. This section was evidently enacted for the purpose of reaching a certain class of property that was liable to escape taxation unless special measures and remedies were provided for the assessment and collection of the tax. While it was competent for the legislature to enact such a law, it was not competent for it to tuck on a further provision, allowing a commutation or abatement of the tax, or any portion thereof,

either directly or indirectly. The logic of this conclusion is made the more apparent when we read the proviso in the light of the enactments found in our state Constitution, above noted. It is provided in our organic law (Const. art. 7, § 1) that all property, unless legally exempt, "shall be taxed in proportion to its value, to be ascertained as provided by law." It is significant in this connection that there are no exemptions mentioned or provided for in our fundamental law authorizing the legislature to make any deductions from the amount of any tax after it shall have been assessed, levied, and collected pursuant to law. See also article 11, § 9, Const., which provides that "no county nor the inhabitants thereof, nor the property therein, shall be released or discharged from its or their proportionate share of taxes to be levied for state purposes; nor shall commutation for such taxes be authorized in any form whatever." True, this provision only relates to the discharge or release of state taxes. Still, if this proviso were allowed to stand, it would have the indirect effect to authorize and permit a release *pro tanto* of the state's revenue. We are fully aware of the rule of law enunciated by some authors, as well as courts of high repute, that "a saving clause which is repugnant to the enacting part of the statute is void; but a proviso which is repugnant to the purview of the act will override and control the latter." Black, *Constr. & Interpretation of Laws*, p. 278. This same learned author, on the next page, says that the distinction drawn between saving clauses and provisos has been much criticised. The following language of Chancellor Kent in volume 1 of his *Commentaries*, p. 463, is quoted by Mr. Black with approval: "There is a distinction in some of the books between a saving clause and a proviso in the statute, though the reason of the distinction is not very apparent. . . . It may

be remarked that a proviso repugnant to the purview of the statute renders it equally nugatory and void as a repugnant saving clause; and it is difficult to see why the act should be destroyed by the one, and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected." Be this rule of construction as it may, the foregoing distinction is without significance as applied to the facts in the action at bar, since we have reached the conclusion that the proviso of the above statute is void on constitutional grounds, and must therefore be rejected. Eliminating the proviso from the above § 12 of the act of 1895, such enactment seems to be complete in itself, fully authorizing the assessment, levy, and collection of the tax in question. *Seanor v. Whatcom County*, 13 Wash. 52, 42 Pac. 552. Judge Cooley, in his work on *Constitutional Limitations*, 5th ed. *178, uses the following language: "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall."

Testing appellant's complaint in the light of the foregoing propositions of law, we are of the opinion that it fails to state a cause of action against respondents, or either of them, and that there is no error in the record of which appellant has any legal ground for complaint.

The judgment of the Superior Court is therefore affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

W. P. SLAUGHTER, Receiver of Thacker Coal Company, *Plff. in Err.*,
v.

THACKER COAL & COKE COMPANY.

(.....W. Va.....)

*Three coal-mining companies operating in the same vein or seam in close proximity to one another, and just hav-

*Headnote by POFFENBARGER, J.

ing commenced the development of that particular kind of coal, organize indirectly and nominally in the names of individuals a third corporation to act as their general sales agent, and each gives it, by contract, the exclusive right to sell its entire output of coal at prices uniform as to all three companies, and not to be departed from without the consent of all the companies, and said agent company is to advertise and introduce the coal in the markets, establish and control all agencies and subagencies, and make all sales and collections, and deduct for its compensation 10

NOTE.—For other cases in this series as to validity of combinations to create monopoly or control prices, see *People v. North River Sugar* 65 L. R. A.

Ref. Co. 2 L. R. A. 33, and *note*; *Richardson v. Buhl*, 6 L. R. A. 457, and *note*; *National Benefit Co. v. Union Hospital Co.* 11 L. R. A. 437;

cents per ton out of the proceeds of sales. *Held*, that the contract is illegal and void, its tendency being to suppress competition and restrain trade, contrary to public policy.

(April 1, 1904.)

ERROR to the Circuit Court for Mingo County to review a judgment in favor of defendant in an action brought to recover damages for breach of contract to deliver coal to the Thacker Coal Company for sale. *Affirmed*.

The facts are stated in the opinion.

Messrs. Simms & Enslow, for plaintiff in error:

Under the English common law, a mere contract to raise the price of property of the parties combining, involving no interference with the legal rights of others, did not constitute a crime.

Mogul S. S. Co. v. McGregor, L. R. 21 Q. B. Div. 544, 57 L. J. Q. B. N. S. 541, 59 L. T. N. S. 514, 37 Week. Rep. 286, 53 J. P. 391, 6 Asp. Mar. L. Cas. 320, L. R. 23 Q. B. Div. 598 [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

Messrs. Rucker, Anderson, & Hughes, for defendant in error:

The plaintiff being both insolvent and indebted to the defendant, the only way it could insist upon a continuance of the contract was by first paying every cent it owed the defendant, and then tendering, in advance, the price of every shipment of coal demanded. Having utterly failed in both particulars, the plaintiff cannot recover damages from the defendant for a breach of the contract.

Ex parte Chalmers, L. R. 8 Ch. 289, 42 L. J. Bankr. N. S. 37, 28 L. T. N. S. 325, 21 Week. Rep. 349.

Messrs. Campbell, Holt, & Duncan also for defendant in error.

Poffenbarger, J., delivered the opinion of the court:

On the 1st day of May, 1895, there were four coal companies, corporations, operating in what is known as the Thacker Coal Vein in Mingo county. They were the

Thacker Coal & Coke Company, the Lynn Coal & Coke Company, the Logan Consolidated Coal Company, and the Maritime Coal Company. On said date another corporation was organized, called the Thacker Coal Company. Its capital stock paid in was \$640, and the principal stockholders were the presidents of the Thacker Coal & Coke Company, the Lynn Coal & Coke Company, and the Logan Consolidated Coal Company. Small amounts of stock were taken by two other persons simply for the purpose, as is supposed, of making up the required number of persons. A. Moore, president of the Thacker Coal & Coke Company, was elected president of the new company. Said new company was organized, not for the purpose of mining coal, nor of selling coal generally, but for the sole purpose of acting as sales agent of the companies operating in said Thacker vein, but the Maritime Company refused to take part in its organization, and also to contract with it. On said 1st day of May, 1895, said agent corporation entered into a contract with the Thacker Coal & Coke Company whereby it agreed to sell for said company, for the period of five years, not less than 20,000 tons of coal each year, or, in default thereof, to pay the Thacker Coal & Coke Company 20 cents per ton for so much coal as it should fail to sell, in case it did fail to sell the amount stipulated. From the proceeds the agent company was to deduct and retain as compensation 10 cents per ton. The Thacker Coal & Coke Company covenanted to deliver to the agent company as much coal as it could sell, not exceeding, however, 84,000 tons each year. It was further agreed that, if the mining company should fail to deliver coal according to the agreement, it should pay the agent company 10 cents per ton for coal not delivered, as compensation or liquidated damages. It was further provided that either party might terminate the agreement at the end of any year by giving sixty days' notice prior thereto, April 1st being the beginning of the year fixed in the contract. The prices at which the coal was to be sold were fixed in the agreement, and it was further provided that they should be adhered to by the agent company unless departure therefrom should be authorized by a minute signed by all parties producing coal from said vein for whom the said agent company

Gloucester Isinglass & Glue Co. v. Russia Cement Co. 12 L. R. A. 568; *Lovejoy v. Michels*, 13 L. R. A. 773, and *note*; *Ford v. Chicago Milk Shippers' Asso.* 27 L. R. A. 298; *People v. Milk Exchange*, 27 L. R. A. 437; *United States v. E. C. Knight Co.* 24 L. R. A. 428, *Affirmed* in 39 L. ed. U. S. 325; *State v. Phipps*, 18 L. R. A. 657; *Queen Ins. Co. v. State*, 22 L. R. A. 483; *Nester v. Continental Brewing Co.* 24 L. R. A. 65 L. R. A.

247; *National Harrow Co. v. Hench*, 39 L. R. A. 299; *San Diego Water Co. v. San Diego Flume Co.* 29 L. R. A. 839; *Trenton Potteries Co. v. Oliphant*, 46 L. R. A. 255; *Tuscaloosa Ice Mfg. Co. v. Williams*, 50 L. R. A. 175; *Com. v. Grinstead*, 56 L. R. A. 709; *Gibbs v. McNeeley*, 60 L. R. A. 152; and *John D. Parks & Sons Co. v. National Wholesale Druggists' Asso.* 62 L. R. A. 632.

should act as agent. The agent company was required to account for and pay over the proceeds of sales on or before the 15th day of each month. The general nature of the agent company's business, as set forth in the contract, was the selling, advertising, and introducing of Thacker coal, and it had authority to adjust and settle complaints made by consumers, and to select and appoint all subagents for the sale of said coal.

Under this contract, the agent company sold for the three producing companies with which it had contracts, up to the 1st of May, 1896, 124,087 tons. In the meantime, there had been paid in on the capital stock of the agent company, by deduction from the proceeds of coal sold by the three operating companies, \$5,360, which, with the amount originally paid in, \$640, made the total sum paid in \$6,000. Practically all of this money and the commissions, amounting to about \$12,400, had been expended in the business of the agent company, advertising the coal, establishing agencies and subagencies, and providing facilities for handling and disposing of the coal. During this time Moore, president of the Thacker Coal & Coke Company, was president and had the management of the Thacker Coal Company. About the 1st of May, 1896, he retired from the presidency of the agent company, and Walter Graham, president of the Logan Consolidated Coal Company, succeeded him. On May 22, 1896, Moore, acting as president of the Thacker Coal & Coke Company, notified the agent company by letter that his company would not deliver any more coal under the contract, assigning as ground for its refusal that the agent company had, in the month of April, 1896, sold the coal of his company at prices less than the minimum prices stipulated in the agreement, without any authority so to do, and that the agent company had further violated the agreement by not accounting for and paying the proceeds of the sales made in April, 1896, on or before the 15th day of May, 1896. The payment complained of was by checks sent from Bluefield to Thacker under date of May 18, 1896. In reply to this letter, Graham, president of the agent company, wrote Moore, and called his attention to the fact that all parties interested had, at a certain meeting, upon the recommendation of Moore himself, unanimously agreed that the president of the Thacker Coal Company should have discretion to make concessions in price when he should deem it expedient, and that Moore himself, as president of the agent company, had directed the sales complained of to be made as they were made. He further reminded him that it had been the practice, as established by himself, to

65 L. R. A.

remit for the proceeds as the money was received from the sale of the coal, without regard to the day of payment stipulated in the agreement. The letter further notified the Thacker Coal & Coke Company that it would be expected to adhere to the agreement and accord to the agent company the exclusive right to sell all coal which the mining company should produce. Moore, as president, replied that it would withdraw from the agent company. He was then notified that the agent company would demand of his company a sum equal to 10 cents per ton for 84,000 tons of coal, less the amount which had been furnished since April 1, 1896, as damages for the breach of the contract. The agent company continued until the 31st day of July, 1896, to handle the coal of the other two companies. On that date the Thacker Coal & Coke Company, or Moore, with the aid of parties representing the Lynn Coal & Coke Company interest, or having purchased that interest, at a meeting, after due notice, passed a resolution dissolving the agent corporation and appointing a trustee to wind up the business. This was followed by a chancery suit in which the assets of the defunct corporation were collected by W. P. Slaughter, special receiver, and paid out *pro rata* on its indebtedness, the amount realized by the corporations being 54 cents on the dollar. The heavy creditors were the three producing coal companies, the amounts due them having been as follows: The Thacker Coal & Coke Company, \$2,702.34, for coal sold prior to May 22d; the Lynn Coal & Coke Company, \$977.38, for coal sold probably in June and July; the Logan Consolidated Coal Company, \$1,166.89, for coal probably sold in July. The other indebtedness consisted of small amounts due to various persons, making the total indebtedness \$5,164.14, while the total assets amounted to \$3,951.71. In said chancery suit, upon petition of the Logan company, an order was made directing Slaughter, special receiver, to sue the Thacker Coal & Coke Company for the damages claimed on account of the breach of the contract. In pursuance thereof this action of assumpsit was brought. In addition to the common counts the declaration contains a special count on the contract. A demurrer was interposed and overruled, and there was a verdict and judgment for the defendant, and the plaintiff complains of that judgment.

Under rule 10 of this court (45 S. E. xi.) the defendant cross-assigns error in the overruling of the demurrer. I am of the opinion that this assignment is well taken. But for § 10 of chapter 99 of the Code of 1890, an action of assumpsit would not lie upon any sealed instrument. Under it

such action does lie upon a promise, undertaking, or obligation in such instrument for the payment of money. The covenant which forms the basis of this action is to deliver coal. It is true that there is a clause by which the defendant company agrees to pay 10 cents per ton as liquidated damages, but that only becomes effective upon the breach of the covenant to deliver coal. In the absence of such breach there is no agreement to pay money. The condition upon which this promise to pay money arises is one of the class the determination of which is peculiarly the subject of an action of covenant. The demand sued for here is materially different from those involved in *Kern v. Zeigler*, 13 W. Va. 707, and *Jones v. Singer Mfg. Co.* 38 W. Va. 147, 18 S. E. 478. However, the majority are of a different opinion, and on this point the judgment of the court below must stand.

For the plaintiff in error it is said there is no evidence against his right to recover, but it is insisted for the defendant in error that the judgment cannot be disturbed for two reasons. The first is that the contract was entered into by the parties for the purpose of destroying competition, and is in restraint of trade, and therefore void, as against public policy. In this connection it is shown that, while the stock of the agent corporation stood in the name of Graham, Moore, and Kirk, presidents of the three producing companies, it was taken in their names for convenience, and paid for by the coal companies; and, further, that an effort was made by these companies to get the Maritime Coal Company to join them. Unless this contract is within the inhibition of act Cong. July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, declaring illegal every contract and combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, it is not necessarily illegal. Although on its face it carries an apparent tendency to stifle competition, and is, in that sense, in restraint of trade, it is not illegal by reason of that act, unless it affects commerce among the several states or with foreign nations. *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 325, 41 L. ed. 1007, 1022, 17 Sup. Ct. Rep. 540. This contract relates simply to the sale of the output of one mine; but it appears from the evidence in the case that the agent corporation was organized for the purpose of handling the output of all the companies operating in a certain vein or seam of coal, and that two other companies had contracts with it like or similar to the contract with the defendant company. But it does not appear that this coal was to be

sold in any particular place, nor that, under this contract, it must necessarily go beyond the state lines. An examination of the decisions of the United States Supreme Court construing the act makes it certain that, to be illegal thereunder, it must fall clearly within the terms of the act. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. As this contract does not do so, it must be held valid so far as that act is concerned. Is it void at common law? The modern rule on that subject is that, although a contract may be in restraint of trade, if it is not unreasonably so, it is enforceable. "Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade, and still be valid at common law." Mr. Justice Peckham in *United States v. Trans-Missouri Freight Asso.* "The sense of the modern decisions is that, if the restraint is only commensurate with the fair protection of the business sold, the contract is reasonable, valid, and enforceable." *United States Chemical Co. v. Provident Chemical Co.* 64 Fed. 946. In that case one company sold out its competing business to another, agreeing not to engage in the business any more during the term of the lease. There is ample ground for applying this principle here. These companies were developing a new coal field. Their product was unknown in the markets, and it was necessary, in order to find sale for it, to spend large amounts of money in advertising it and establishing agencies. As they all produced the same kind of coal, this could be done more advantageously and economically through one agency than by separate action. In accomplishing this purpose it was necessary that a uniform price as to the product of each company should be maintained; otherwise the common agent, by discriminating between them, could have sold the coal of one company to the exclusion of that of the others, and the enterprise would have become impracticable, and defeated its own purpose. The agreement to maintain uniformity of price seems, therefore, to have been rather an incident to the main purpose than a design to stifle competition. "The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the

length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced. They do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England." *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981. In *Skrainka v. Scharringhausen*, 8 Mo. App. 522, the contract under consideration—very much like this one—was held good. The owners of certain stone quarries entered into an agreement to secure "a fair, proportionate sale of the product of all quarries at uniform prices and living rates," the terms of the agreement restricting the production of stone within certain territory, putting the sales in the hands of an agent for the interest of all parties, appointing a committee of five persons to modify prices and settle complaints, and imposing a penalty for every sale made in violation of the agreement.

It is not intended here to affirm the correctness of the decision; but it illustrates the view taken by certain courts, and shows that much latitude is allowed to manufacturers and producers of commodities in arrangements for facilitating production and sale. In *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419, Andrews, J., said: "In the present state of the authorities, we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed." Another interesting case is that of *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629. In that case the contract was one made by three manufacturers of a certain kind of curtain fixtures under different letters patent, owned by them severally, for the purpose of avoiding competition. It was held valid. In *Cohen v. Berlin & J. Envelope Co.* 9 App. Div. 425, 41 N. Y. Supp. 345, manufacturers of envelopes made a contract with another envelope manufacturer by which they agreed to purchase from him, at prices to be fixed from time to time by the former, a stated quantity of goods manufactured by him during a stated period, and he agreed that during such time he would not sell to others at a less price. Nineteen other concerns throughout the country engaged in manufacturing envelopes

were not parties to the agreement, and their goods were in competition with those of the contracting parties. The contract was held valid, and the court recognized, as facts to be considered, that the agreement included but a small number of the manufacturers of envelopes, and that at the time it was made the business of manufacturing envelopes was demoralized through excessive competition. This case well illustrates the nature of the facts and circumstances to be considered in the present state of the law in determining whether a contract such as we have here is void as being in restraint of trade. In *Horner v. Graves*, 7 Bing. 735, 5 Moore & P. 768, 9 L. J. C. P. 192, Tindal, Ch. J., said: "We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy." Applying here this test, and the general principles recognized in *Cohen v. Berlin & J. Envelope Co.*, it is impossible to see how the public was, or could have been injured by this contract. Three small companies out of the vast number of coal producing companies in this state entered into it. The quantity of coal put upon the market by them is an utterly insignificant portion of the vast quantities thrown upon the market by the numerous competing producers. In the absence of some great combination virtually controlling the production and price of a commodity in the country, the price is regulated and determined by the law of supply and demand. It is manifest that by this agreement the production of these three mines was facilitated and increased, rather than stifled or curtailed. If their operation can be said to have affected the price of coal to the consumer, it is perfectly clear that the tendency was to reduce, instead of increase, it, because that advantageous arrangement for the sale of their output enabled them to put upon the market increased quantities of coal. The validity of this contract must be determined by its practical effect, rather than by ascertaining whether it falls within the terms of a legal definition. Contracts in restraint of trade and contracts, eliminating competition, as a general proposition, are

illegal and void on the ground of public policy. But it is nevertheless true that there are numerous contracts, which all the courts hold good, and which at the same time tend, in some degree, to restrain trade and stifle competition. As the sole and true test is whether the contract is injurious to the public,—and it is impossible to see how, in any practical sense, this contract could have injured the public,—there is no reason why it should be held invalid. Under different circumstances, given more extended application, one or more of the principles embodied in the contract would become injurious to the public, and therefore vicious. So strychnine, arsenic, and other drugs are deadly poisons, but great blessings to humanity in the hands of physicians, who, by means of them, alleviate suffering and save life. Competition is said to be the life of trade, but undue or excessive competition has been judicially declared hurtful and injurious to the public. We must look at the facts, as well as at the definition of restraint of trade, to reach a correct and just conclusion.

Upon this view of the contract, my inclination is to hold it legal, but my associates are of a different opinion. Applying the principles hereinafter stated, they consider it void, as against public policy. "By the weight of recent authority the character of the article or legitimate trade, sought to be monopolized is immaterial, the true test of the illegality of the combination being the injury to the public, and whether its necessary consequence is to control prices, limit production, or suppress competition in such a way as to restrain trade and create a monopoly. To render the combination illegal on this ground, it is not necessary that evil intent or actual injury be shown, but it is sufficient to know that the inevitable tendency of the act is injurious to the public. The fact that the immediate result of the combination has been temporarily to reduce prices, or that it may reduce them, is immaterial in determining the legality of the combination, the court not being governed by the temporary effect upon the prices, but by the power of the combination to control them." 20 Am. & Eng. Enc. Law, 2d ed. pp. 849, 850. "In some way several corporations competing in production merge into one, and cease competitive production. By means of large capital this new corporation can produce largely, or limit production, lessen supply, enhance prices, and lower the prices of materials used in production. It may be at once said that, no matter what the form adopted may be, if the end is to curtail production, enhance prices, restrain trade

and competition, control the market in commodities, it is condemned by common law, and by many statutes in the different states." Brannon, 14th Amend. 373. Discussing the rule stated by Tindal, Ch. J., in *Horner v. Graves*, 7 Bing. 735, 5 Moore & P. 768, 9 L. J. C. P. 192, and hereinbefore quoted, Judge Taft said in *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271: "This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract, as expressed therein, is merely to restrain competition and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party except the vague and varying opinions of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster." The contract being, in the opinion of the majority of the court, illegal, and so held, no recovery can be had on it. This action, being for the liquidated damages covenanted to be paid, is based directly and solely upon the contract. Hence, whatever errors the court may have committed during the progress of the trial, *its final judgment of nil capiat* is right, and *must be affirmed*, and it is useless to discuss further assignments of error.

C. P. DORR, *Plff. in Err.*,
v.

J. N. CAMDEN.

(.....W. Va.....)

1. Neither agents or subagents, nor attorneys or assistants thereto, can withhold from principal or client information acquired by them in the exercise of such agency or attorneyship, and use the same to extort an increased compensation from such principal or client, or coerce such principal or client into a contract he would not enter into upon full information.
2. To sustain a contingent fee it must be shown that no unfair advantage was taken of his client by the attorney, but that the same was entered into by the client, after full knowledge of the facts and circumstances, for legal services of skill, judgment, and ability of a character to justify a contract for such contingent fee. Ordinary services requiring no legal ability are not a sufficient consideration for such fee wholly disproportionate thereto.
3. When the services rendered are not of such character as to furnish consideration for a contract for a contingent fee unfairly obtained from a client, the attorney may recover for the value of his actual services rendered his client upon pleadings and proofs justifying such recovery.
4. When the court has improperly instructed the jury as to the law governing the facts as shown in evidence, a verdict in accordance with such instructions should, on motion of the prejudiced party, be promptly set aside, and a new trial granted.

(March 8, 1904.)

ERROR to the Circuit Court for Wood County to review a judgment in favor of defendant in an action brought to recover the alleged contract price for services rendered. *Affirmed.*

The facts are stated in the opinion.

Messrs. Van Winkle & Ambler, for plaintiff in error:

The verdict settles in Dorr's favor any controversy as to the making of the contract, the performance by Dorr, and the recovery of the land by Camden, upon which Camden agreed to pay \$1 per acre.

Sisler v. Shaffer, 43 W. Va. 769, 28 S. E. 721; *Gregory v. Ohio River R. Co.* 37 W. Va. 606, 16 S. E. 819; *Pitcairn v. Philip Hiss Co.* 51 C. C. A. 323, 113 Fed. 492; *Haigh v. United States Bldg. Land & L. Asso.* 19 W. Va. 792; *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447.

*Headnotes by DENT, J.

NOTE.—As to validity of contracts to pay attorney percentage of amount recovered, see, in this series, *Levens v. Briggs*, 14 L. R. A. 188; *Reece v. Kyle*, 16 L. R. A. 723; and *Newman v. Freitas*, 50 L. R. A. 548.

As to champertous agreements between attorney and client generally, see *Manning v. 65 L. R. A.*

The contract was not contrary to public policy.

Perry v. Dicken, 105 Pa. 83, 51 Am. Rep. 181; 15 Am. & Eng. Enc. Law, 2d ed. title, *Illegal Contracts*, p. 978; *Greenhood*, Pub. Pol. ed. 1886, p. 441; *Wellington v. Kelly*, 84 N. Y. 543; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370.

If Mr. Dorr did, in point of fact, furnish such information, as he had, he is not to be deprived of his compensation because others were aware of the facts.

Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 372.

It is lawful to assist another in obtaining evidence where a party believes he is interested, and all the more so where he is a party impleaded.

Lewis v. Broun, 36 W. Va. 1, 14 S. E. 444; *Beach*, Modern Law of Contracts, pp. 1953, 2024; *Plate v. Durst*, 42 W. Va. 63, 32 L. R. A. 404, 24 S. E. 580.

Dorr was not precluded by his professional relations from making the contract with Camden. When we remember that Dorr was counsel of Winchester, it certainly could not be wrong for him to aid in the prevention of fraud, or in the enforcement of the agreement that his client, Winchester, made with the Dewings.

1 *Greenhood*, Pub. Pol. § 240.

Judgment should be entered for Dorr upon the verdict.

State v. Cooper, 26 W. Va. 338; *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880.

Messrs. S. V. Woods, W. E. Haymond, and *John H. Holt* also for plaintiff in error.

Mr. George E. Price for defendant in error.

Dent, J., delivered the opinion of the court:

C. P. Dorr, plaintiff, complains of the judgment of the circuit court of Wood county bearing date on the 12th of January, 1903, in favor of Johnson N. Camden, defendant, setting aside the verdict of a jury in favor of the plaintiff for the sum of \$15,972.61, and granting the defendant a new trial. The gist of the action is stated in the declaration as follows, to wit:

"And for this, also, that heretofore, to wit, on the — day of —, 1890, the said defendant claiming a right to certain lands, the legal title to which was in one William S. Dewing, which lands lie in the counties

Sprague, 1 L. R. A. 516, and *note*; *Gilman v. Jones*, 4 L. R. A. 113, and *note*; *Burnham v. Heselton*, 9 L. R. A. 90, and *note*; *Croco v. Oregon Short-Line R. Co.* 44 L. R. A. 285; *Geer v. Frank*, 45 L. R. A. 110; and *Davis v. Webber*, 45 L. R. A. 196.

of Greenbrier, Nicholas, and Webster, in the state of West Virginia, and lying within the boundaries of certain lands known as the 'Caperton lands;' and the said plaintiff then and there being an attorney at law duly licensed and practising under the laws of West Virginia, having a knowledge of the facts and circumstances connected with the transactions as to said land, and the rights thereto, which were of value to the said defendant,—the said defendant then agreed with the plaintiff that he (the plaintiff) should furnish him the said information and certain assistance in proceeding for the recovery of the said land, to wit, should furnish the said defendant information of certain facts which were necessary in the preparation of the proper pleadings in such proceeding, and information as to obtaining the proof necessary in such proceeding, and that he (the said defendant) would pay the said plaintiff the sum of \$1 per acre for every acre that he (defendant) should recover of the said land; and he (the defendant) then and there faithfully promised the plaintiff to pay him the said sum of \$1 per acre for every acre so recovered, in consideration of the said assistance and information."

This undoubtedly shows a good cause of action free from maintenance or champerty. It is for compensation for services to be rendered, and for information to be given in support of defendant's suit, to be contingent upon and measured by the extent of defendant's final recovery, and, if plaintiff had sustained it by proof limited to such allegations, his right of recovery would have been unquestionable. He was to have no share or portion in the thing to be recovered, but his compensation was to be in proportion to the extent thereof; and it must be viewed as alleging, in effect, a contract between an attorney and his client for a fee contingent in amount on the extent of the recovery. *Anderson v. Caraway*, 27 W. Va. 385.

This action is a sequence to the suits of *Dorr v. Dewing*, 36 W. Va. 466, 15 S. E. 93; *Dewing v. Hutton*, 40 W. Va. 521, 21 S. E. 780; *Hutton v. Dewing*, 42 W. Va. 691, 26 S. E. 197; *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670; and *Camden v. Dewing*, 47 W. Va. 310, 81 Am. St. Rep. 797, 34 S. E. 911. The principal actors in all this comedy of errors, of which this seems to be the last scene or postlude, are A. H. Winchester, Elihu Hutton, Bernard J. Butcher, and C. P. Dorr, plaintiff, acting as attorneys and agents for Dewing & Sons and Johnson N. Camden, defendant. A. H. Winchester was the confidential and secret agent of Dewing & Sons, of Kalamazoo, Michigan, sent into the

state of West Virginia to buy timber lands for his principals. When it came to purchasing what is known as the "Gauley lands" he took into partnership with him Elihu Hutton and Bernard L. Butcher. This partnership, finding Mr. Camden, the defendant, engaged in taking options upon and acquiring lands in the Gauley region, where they designed to make their purchases, entered into a contract with the defendant, for the purpose of avoiding competition and securing their lands at a very low rate, that if he would turn over to them his options, and abandon the region to them, they would purchase for him certain large tracts of land containing 13,366 acres, now involved in the suit, and lying within what is known as the "Caperton survey," and charge him therefor only the actual price and expense of obtaining the same. Mr. Winchester employed the plaintiff as attorney and agent to assist in buying and securing the title to these lands, both for the partnership and for the defendant. He was fully aware that these lands were being purchased for the defendant. The defendant faithfully complied with his partnership contract, and the partnership, by reason thereof, with the aid and assistance of their attorney, the plaintiff, were enabled to purchase in this Gauley region about 55,000 acres of land, including defendant's, at a little more than \$1 per acre. Excluding their purchases for defendant, they amounted to over 40,000 acres. After these purchases were completed, Butcher having withdrawn from the partnership, Dewing & Sons take the place of Winchester, pay the purchase money for these lands, and then buy out Hutton by agreeing to pay him the rate of 50 cents per acre. William S. Dewing, acting in behalf of Dewing & Sons, agreed to take the place of Winchester, and to carry out all agreements, contracts, and understandings, in good faith, of the former partnership. Having purchased Hutton's interest, Dewing & Sons insisted that all these lands should be conveyed to them, and that they would hold the defendant's lands in trust for him, and to be conveyed to him on payment of the purchase money and expenses. The plaintiff, not having been paid for his services in full by Winchester, sued Dewing & Sons for the balance due him, and obtained a decree therefor amounting to \$7,100, which decree was affirmed by this court. The defendant, not having received his portion of the lands according to his contract, and having learned that the title thereto had been invested in Dewing & Sons, demanded the same from Dewing & Sons, and, they refusing to convey the same, was preparing to institute suit to enforce the con-

tract between himself and Winchester, Hutton, and Butcher, and of which they and Dewing & Sons had received the full benefit, enabling them to make thousands of dollars that they might not otherwise have made. The plaintiff, being employed by Winchester, Hutton, and Butcher to assist them as agent and attorney in carrying out their contract with and for the defendant, and having received a handsome compensation for his services in behalf of the defendant, approached the defendant in company with Mr. Hutton, and proposed to the defendant, to use his own language: "If you will give me \$2 an acre, I will see that you get the facts sufficient to recover this land,"—meaning the land that he had assisted Mr. Winchester, Mr. Hutton, and Mr. Butcher in acquiring for the defendant, and for which service he had been paid by Dewing & Sons. According to the plaintiff's testimony, the defendant replied to this proposition: "Other people are interested with me, and I would have to pay the purchase money, and I will give you \$1 an acre for all the land I will recover in a case of that kind." He says, "I will take it." Plaintiff then told Mr. Hutton, in defendant's presence, that he would give him one half the amount if he would aid him, to which Mr. Hutton assented. This is the contract on which this suit is brought. It is simply an agreement by an attorney to furnish the facts to secure a recovery, provided he receives compensation proportionate to such recovery. It is, in other words, a proposition by defendant's agent and attorney to furnish him information that this agent and attorney had acquired while acting as his agent in procuring these same lands for him, and for which he had received full compensation, but which had not vested according to contract, such information to be used in completing such contract according to the true tenor and effect thereof.

This proposition is innocent enough in itself, but it has no consideration to support it. This information, possessed by his agents and acquired by them in complying with this very contract, belonged to the defendant as a matter of law, and these agents had no right to charge him therefor, or make merchandise thereof at his expense. It may be said that the agency, especially that of Dorr, was at an end. Agency never ceases, in so far as the knowledge and information acquired by the agent in carrying out the same is concerned, until the contract which rendered the agency necessary is fully consummated, or the purpose which gave rise to the agency has been attained. While Dorr was not a party to the contract, nor obligated to see that it was fully carried out, yet,

having been employed by Winchester as attorney and agent to aid in carrying it out, to the full extent and scope of his employment, he became as fully the defendant's agent as Winchester, Hutton, and Dewing, and the information thus acquired by law belonged to his principal without money or reward other than he had already received for his services rendered. As shown in evidence, the only testimony that Dorr proposed to produce besides his own, for which he had no right to charge, was that of Winchester, Hutton, and Butcher, defendant's agents to carry out this very contract, all of whom were under obligation, and had been fully compensated, to see that it was consummated. Therefore, neither the testimony of plaintiff nor of these other agents, furnishes any consideration for plaintiff's alleged contract.

"Assumpsit will not lie to recover money promised for doing that which it was the parties' duty to do without reward, for it is extortion and illegal." "So this action, being an equitable one, cannot be supported where the assumpsit arises from an unconscientious demand." 2 Tucker, 134, 135. In obtaining these lands for the defendant, Dewing & Sons, Winchester, Hutton, Butcher, and Dorr all acted as agents for the defendant and received compensation therefor, and now Dorr, one of these agents, demands a further compensation to furnish the necessary information growing out of the agency to enable the principal to compel the other agents to fulfil the contract under which they were all acting. This is an unconscientious demand unsustained by a good legal consideration. 6 Am. & Eng. Enc. Law, 2d ed. p. 752. Not only is this true, but this alleged contract was obtained by open collusion between Dorr and Hutton, both of whom had been acting as agents for the defendant and under contract to secure these lands for him. By open collusion I mean they went together into the defendant's presence, and, while the proposition was not made jointly to him, yet he was informed that Hutton was to participate in the additional compensation to the extent of one moiety thereof. Hutton had all the information the defendant needed, and he was under legal obligation to furnish it to him, and to see that he obtained the title to his lands from the parties whom Hutton had constituted trustee thereof for defendant's benefit, and, if it took any additional compensation to obtain the lands, Hutton was in duty bound to pay it in order to carry out the contract in good faith.

All the knowledge of the agent belongs to the principal, and he has no right to use it for his own benefit to extort money or other thing from his principal. 1 Perry, Tr. § 65 L. R. A.

206. This same rule applies to attorneys at law. In 1 Perry on Trusts, § 202, it is said: "The client is so completely in the hands of the attorney in relation to the subject-matter of litigation that it would be almost impossible for him to enter into a free and fair contract in regard to it. . . . This disability of an attorney continues as long as the relation of attorney and client continues, and as much longer as the influence of the relation can be supposed to extend. If the relation has ceased, but the influence of the relation continues to affect the minds of the parties, all contracts made under the influence will be avoided." Also, in § 206: "Whatever an agent may be employed to do, he cannot use his position, nor the knowledge obtained by his employment, to obtain a bargain from his principal." If he does, such bargain will be held invalid for undue influence. 27 Am. & Eng. Enc. Law, p. 477. In the present case, the plaintiff and Hutton, having been agents to acquire these lands for the defendant, and without giving him the information with regard to the lands he was entitled to have through Dorr alone, advised the defendant they had the necessary information to acquire these lands for him, which he had already fully compensated them for acquiring, if he would agree to pay Dorr \$1 per acre for every acre recovered, to be divided between himself and Hutton. By this proposition, under the circumstances, defendant was placed in a very unfair position. He knew his case depended upon the evidence of these, his agents, together with his other two agents, Butcher and Winchester, to some extent at least, unknown to the defendant. If he rejected their proposal outright, they could give him much trouble, and probably succeed, if they made up their minds to do so, in depriving him of his lands altogether. They seemingly already having broken faith with him, he was placed in the quandary of accepting an unjust contract or of running the risk of losing his lands, and he might have been thereby driven to say such things as led them to believe that he accepted their proposition, and which, as between strangers dealing at arm's length, would make a valid contract.

Subagents and assistant attorneys are the agents and attorneys of the principal and client, it matters not by whom they are employed, and are subject to all the obligations of agency or attorneyship toward their principal or client, in so far as the information acquired by them during the exercise of the agency is concerned. Neither agents nor attorneys can withhold information acquired by virtue of and in the discharge of the duties of such agency or at-

torneyship, and use it for the purpose of extorting from principal or client, to whom such information belongs as a matter of right and law, an increased compensation for doing that for which they had already been fully compensated.

It may be urged that there is included in the contract the future service of Dorr as attorney, as Mr. Hutton says, in setting up the proof and getting the same in shape so a recovery might be had, which would furnish a sufficient consideration to sustain the contract for a contingent fee. In 5 Am. & Eng. Enc. Law, 2d ed. p. 827, the principle of law governing contingent fees is given as follows: "It may be stated as a well-grounded rule that a contract for a contingent fee must be made in good faith, *uberima fides*, without suppression or reserve of fact or apprehended difficulties, or undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction is characterized throughout by all good faith to the client." Where an attorney suppresses the facts of the case, or uses any unfairness in securing a contract of this character, it will be held invalid, and, if he has rendered any service in carrying out such contract, he will be remitted to a recovery on a *quantum meruit*. *Chester County v. Barber*, 97 Pa. 455; *Stewart v. Houston & T. O. R. Co.* 62 Tex. 248. A contingent fee is only permitted to attorneys as reward for skill and diligence exercised in the prosecution of doubtful and litigated claims, and is not allowed for the rendition of mere minor services which any layman or inexperienced attorney might perform. It is the skill, diligence, ability, experience, judicial knowledge, and judgment of the attorney that is thereby rewarded, and the performance of duties that require no such qualities is wholly insufficient to sustain such fee, as the true measure of such services can be ascertained on a *quantum meruit*.

The evidence of this case clearly shows that the only duty the plaintiff was to perform was to furnish the evidence of himself, Winchester, Butcher, and Hutton, and the record and decision in the case of *Camden v. Dewing* shows the case wholly depended on the evidence of Winchester, Butcher, and Hutton, all of whom were under obligation to the defendant, as his fully compensated agents, to furnish him their evidence free of charge or compensation of any kind whatsoever. It is therefore clear from the proofs that the plaintiff did nothing requiring skill, diligence, experience, ability, legal knowledge, or judgment, entitling him to a contingent fee for legal services, and, as before seen, the contract,

if entered into at all, was coerced from the defendant by the unfair advantage taken of him by his agents withholding from him information that belonged to him.

This brings forward for consideration the question as to whether the contract as alleged is supported by a preponderance of the evidence. To constitute a contract there must be free, mutual assent. 7 Am. & Eng. Enc. Law, 2d ed. p. 110. As heretofore shown, defendant was placed in an unfair position by the proposers, and was not dealing with them at arm's length. Even with this unfairness it is hard to say that he assented to the proposition made by one of them. The beneficiaries, plaintiff and Hutton, say that he did. He denies, and says he did not, but answered them diplomatically by referring them to his attorney, Mr. Mollohan, who had been engaged to manage the suit for him. The beneficiaries say that after he accepted, and while they were considering the matter as to whether he should sign the writing prepared by the plaintiff, Mr. Mollohan came in, and the matter was referred to him, and he advised against signing any writing, for the reason that they would all have to be witnesses in the case, and it would be dangerous for them to have such contract brought out in evidence. Mr. Mollohan is an attorney of skill and ability, of long experience and high standing in his profession. He testifies that, when the plaintiff offered to show him the writing, he refused to have anything to do with it, and advised the beneficiaries that such contract was not legal, and he then went and advised his client not to enter into or make any such contract. On such points, the beneficiaries on one side, and the defendant and his attorney on the other, plainly contradict each other, while the facts and circumstances plainly preponderate in favor of the latter.

The plaintiff in his evidence, in detailing his conversation with the defendant, starts out with the idea that the defendant knew nothing about the matter, while the fact is at least presumable that he had full information from his agents, Winchester, Butcher, and Hutton, all about the matter, and, if he did not, Hutton was in position to furnish him, and was in duty bound to do so, such information at any time demanded. All he needed to sustain his case was for Winchester, Butcher, and Hutton to stand by him, and he had other lawyers to perform the heavy legal duties of his case. Hence there was not the least necessity for

him to enter into such contract, unless it was to prevent his agents from becoming false to him. He was afraid of his agents, and therefore he had to treat them diplomatically. It is therefore very plain that both Mr. Mollohan and Mr. Camden, the defendant, testified fully to the truth of the transaction as they understood it, and the facts and circumstances bear them out. Nor can we say that the beneficiaries testified falsely, though contradicted. They went to the defendant to secure a certain contract from him for the information they had acquired about his business. He treated them diplomatically. From his diplomacy they may have inferred assent to their proposition.

But such inference on the consideration proposed will not justify or sustain a contract for a contingent fee, although it might sustain an action for services rendered by reason thereof upon a *quantum meruit*. It is therefore very plain that plaintiff is not entitled to recover on the special count under an express contract for a contingent fee, as set out in his declaration, and which he has endeavored to sustain in his evidence, but he may be entitled to recover under a general count for the value of the services actually rendered by him. Such invalid contract furnishes no criterion as to the amount that plaintiff will be entitled to recover, if anything. 5 Am. & Eng. Enc. Law, 2d ed. p. 828.

From what has been said, it is plain that the court instructed the jury under a mistaken view of the law, as applicable to the facts; and the court should have sustained the motion of the defendant to exclude the evidence, and direct a verdict for the defendant on the grounds that it did not sustain the special contract set out in the declaration, nor as set forth in the bill of particulars. The circuit court therefore committed no error in setting aside the verdict of the jury and in granting the defendant a new trial. As the plaintiff cannot recover on his alleged contract for a contingent fee, this court would probably be justified in entering a judgment for the defendant were it not that the plaintiff may be entitled to recover in this action, on proper allegations and proofs, for the actual services rendered by him under his invalid contract, or attempt to make a contract, being the actual services rendered by him for the defendant, and of which the defendant enjoyed the benefit.

The judgment is therefore affirmed.

ARKANSAS SUPREME COURT.

H. P. SMEAD *et al.*, *Appts.*,
v.

D. W. CHANDLER & COMPANY.

(71 Ark. 505.)

1. A deed of trust to secure debts executed by a corporation at its domicile in one state will, as to its nature, character, and interpretation, be governed by the laws of that state, although it involves choses in action in another state where the corporation is doing business, and in whose courts the interpretation of the instrument is called in question.
2. A deed of trust to pay debts is a mortgage, and not an assignment for benefit of creditors, where it is not the intention of the parties to devert the debtor of the title, or to make an appropriation of the

property affected to the raising of a fund to pay debts.

3. Whether or not a valid lien has been created by an execution of a mortgage by a corporation at its domicile upon a chose in action located in another state, where the action is brought to enforce it, depends upon the law of the latter.
4. Garnishment of a debt which has been delivered to attorneys for collection, and for which a receiver has been appointed, will take precedence of a deed granting it in trust for creditors, previously executed by the creditor but subsequently recorded, which has the force of a mortgage, where, by statute, such mortgage does not become binding against creditors until it is recorded in the county where the property is situated.

(June 6, 1903.)

NOTE.—Transfer of property out of the state by bankruptcy or insolvency proceedings or assignment for creditors.

- I. Voluntary assignments.
 - a. When assignment regarded as voluntary, 353.
 - b. Discrimination between residents and nonresidents, generally, 354.
 - c. When foreign assignment not opposed to *lex rei sitæ et fori*, 355.
 - d. Law determining pailidity of assignments.
 1. Personal property.
 - (a) General rule, 358.
 - (b) Formal validity, 358.
 - (c) Notice; record; taking possession, 359.
 - (d) Preferences, 360.
 - (e) Exemptions, 362.
 - (f) Assignment by corporation, 362.
 2. Real property, 362.
 - e. Law determining assignee's right to avoid fraudulent transfers and conveyances, 365.
 - f. As to effect of assignment to avoid previous attachment or transfer, 365.
 - g. As between law of assignor's domicile and that of place where assignment made, 365.
- II. Assignments under insolvency or bankruptcy statutes.
 - a. General rule, 366.
 - b. Choses in action, 367.
 - c. Discrimination between residents and nonresidents, 368.
 - d. Right of assignee to sue in other state, 369.

1. Voluntary assignments.

a. When assignment regarded as voluntary.

Cases upon the extraterritorial effect of receivership proceedings are not included in this note. See, as to that subject, *note to Gilman v. Hudson River Boot & Shoe Mfg. Co.* 28 L. R. A. 52.

As shown in the *note to Long v. Forrest*, 23 L. R. A. 33, foreign assignments *in invitum*, by operation of an insolvency or bankruptcy statute, 65 L. R. A.

ute, are governed, with respect to their extraterritorial effect, by different principles than voluntary assignments for the benefit of creditors. The question sometimes arises to which one of these two classes a particular assignment is to be referred.

A conveyance of the property of a corporation to a receiver, under a decree which three fourths of its shareholders had sought, and none opposed, is to be deemed voluntary for the purpose of determining its effect on the title of personal property in another state. *Ward v. Connecticut Pipe Mfg. Co.* 71 Conn. 345, 42 L. R. A. 706, 71 Am. St. Rep. 207, 41 Atl. 1057.

But the rule that a voluntary assignment for creditors is valid in other states when upheld by the law of the domicile of the owner does not apply to an assignment, which, though voluntarily made, is made under a statute which provides for the discharge of the debts of all creditors who accept any dividends under the assignment, or otherwise participate therein; but such an assignment is to be treated as a transfer *in invitum* under the insolvency or bankrupt laws. *Barth v. Backus*, 140 N. Y. 230, 23 L. R. A. 47, 37 Am. St. Rep. 545, 35 N. E. 425. The assignment in this case was made under the Wisconsin statute.

An assignment for creditors, voluntarily made under the Wisconsin statute, which provides that every creditor residing within or without the state, who shall accept a dividend or participate in any way in the proceedings shall be bound by the order discharging the assignor from his debts, will not carry the title to personal property of the assignor in another state, since such provision is, in its essential features, a bankrupt law, and can be given no extraterritorial effect. *Segnitz v. Garden City Bkg. & T. Co.* 107 Wis. 171, 50 L. R. A. 327, 81 Am. St. Rep. 830, 83 N. W. 327. The property involved was a deposit to the credit of the assignor in a bank in Illinois, the bank claiming the right to apply it to notes of the assignor held by it.

An assignment for creditors, made in Wisconsin by a corporation domiciled in that state, under the law of Wisconsin, which provides for a discharge of the assignor from his debts, and declares that the discharge shall be effective

A PPEAL by the garnishees and claimant from a judgment of the Circuit Court for Columbia County in favor of plaintiff in a proceeding brought to reach a debt owing to the J. F. Crawford Lumber Company by the Creel Lumber Company which was alleged to be applicable to the claim of the plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. John W. Matson and Smead & Powell, for appellants:

Where an instrument is made to secure the payment of a debt, with the right secured to the parties executing it to redeem the property therein described by payment of the debt before the sale under the instrument, it is in law a mortgage.

Both the deed of trust and assignment are

Missouri contracts, and will be construed and governed by the laws of that state in force at the time of their execution.

Bishop, Contr. §§ 1370, 1373; Clark, Contr. p. 502; Lawson, Contr. § 347; Jones, Chat. Mortg. pp. 299-301; Cobbe, Chat. Mortg. § 475; 3 Am. & Eng. Enc. Law, p. 542, and notes; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Ringgold v. Neukirk*, 3 Ark. 96; *McGuire v. Neukirk*, 6 Ark. 142; *Jordan v. Thornton*, 7 Ark. 231, 44 Am. Dec. 546; *Gracie v. Sandford*, 9 Ark. 233; *Pryor v. Wright*, 14 Ark. 189; *Moore v. Clopton*, 22 Ark. 125; *Parsel v. Barnes*, 25 Ark. 261; *Parrott v. Nimmo*, 28 Ark. 351; *Hall v. Pillow*, 31 Ark. 32; *Bowles v. Eddy*, 33 Ark. 645; *White v. Friedlander*, 35 Ark. 52; *Wallis v. Lehman*, 36 Ark. 569;

as against all creditors residing in the state, and such as reside outside of the state who have proved their claims against the insolvent debtor, or otherwise participated in the estate, will not be treated as a voluntary assignment for the purpose of giving it effect to transfer or convey property in another state; and such an assignment is ineffectual for that purpose, even as against creditors who are nonresidents of the latter state. *Townsend v. Cox*, 151 Ill. 62, 37 N. E. 689. Real property only was involved in this case, but the foregoing statement clearly applies to personal, as well as real, property. The attaching creditors were residents of Pennsylvania and New York, but the rule would undoubtedly have been applied even if they had been residents of Wisconsin.

An assignment executed in Minnesota by a Minnesota corporation pursuant to the general assignment law of that state, which limits the distribution of the insolvent debtor's property to such of his creditors as shall file releases of their demand, does not pass personal property situated in Massachusetts as against creditors resident in New York, who, subsequently to the assignment, seize the property upon attachment against the insolvent corporation. *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545. The decision is upon the ground that such statute is, in substance and effect, an insolvent law, and is operative as to property in another state only so far as the courts of that state choose to respect it.

McClure v. Campbell, 71 Wis. 350, 5 Am. St. Rep. 220, 37 N. W. 343, also holds that the Minnesota statute is in effect a bankrupt act, and that an assignment thereunder does not operate to pass the title to personal property in Wisconsin. So far as appears, the assignment was made upon the debtor's own motion.

Whitman v. Mast, B. & B. Co. 11 Wash. 318, 48 Am. St. Rep. 874, 39 Pac. 649, however, holds that an assignment for the benefit of creditors, made under the provisions of the insolvency statute of Minnesota, is a voluntary assignment when made upon the motion of the debtor himself, and will pass the personal property of the debtor in Washington to the assignee as against a subsequent attaching creditor who is a resident of Missouri, notwithstanding that such statute requires creditors to file releases of their demands.

The statute of Tennessee, declaring that any 65 L. R. A.

instrument or transfer by an insolvent debtor of all his property for the benefit of certain creditors shall be illegal, and the property shall be distributed *pro rata* amongst all the debtor's creditors, is, in effect, an insolvent law which has no extraterritorial operation, and therefore does not apply to a sale by a resident of Tennessee to another resident of that state, of personal property situated in Mississippi. *Toof v. Miller*, 73 Miss. 756, 19 So. 577. In this case it was held that the transfer was good as against a subsequent attaching creditor.

So, *Catlin v. Wilcox Silver-Plate Co.* 123 Ind. 477, 8 L. R. A. 62, 18 Am. St. Rep. 338, 24 N. E. 250, held that a general deed of assignment to a receiver, executed by a partnership in another state pursuant to a decree of the court of that state, would not be regarded as a voluntary assignment so far as its effect upon personal property or funds in another state was concerned; but that it must be regarded as a transfer *in invitum*, and subject to the principles declared with reference to such transfers.

b. *Discrimination between residents and non-residents, generally.*

For earlier cases, see note to *Long v. Forrest*, 23 L. R. A. 33, 1 a, 4, 5, 6.

It will be observed, by referring to the earlier note, that many of the cases, in determining the effect of an assignment made in one state upon real or personal property in another, have discriminated in favor of residents of the latter who attached the property, or garnished a resident debtor of the assignor subsequently to the assignment, and against attaching or garnishing creditors who were non-residents, whether residents of the state where the assignment was made or of a third state. The extent to which this discrimination has been carried by the later cases will presently be shown. The right to make this discrimination has been challenged upon constitutional grounds. Thus, *Belfast Sav. Bank v. Stowe*, 34 C. C. A. 229, 63 U. S. App. 14, 92 Fed. 100, held that such discrimination is contrary to the doctrine of *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165, which held that a statute of Tennessee, providing that, in the distribution of the assets of insolvent corporations, residents of Tennessee shall have priority over simple contract creditors who are nonresidents, was repugnant to the Federal

Laird v. Hodges, 26 Ark. 356; *Robards v. Brown*, 40 Ark. 423; *Howcott v. Kilbourn*, 44 Ark. 213; *Grider v. Driver*, 46 Ark. 66; *Parsons Oil Co. v. Boyett*, 44 Ark. 230; *Bank of Harrison v. Gibson*, 60 Ark. 269, 30 S. W. 39; *Tenny v. Porter*, 61 Ark. 329, 33 S. W. 211; *State Mut. F. Ins. Assn. v. Brinkley Stave & Heading Co.* 61 Ark. 1, 29 L. R. A. 712, 54 Am. St. Rep. 191, 31 S. W. 157.

The J. F. Crawford Lumber Company had a right, by deed of trust, though in failing circumstances, to prefer one or more of its creditors over others, and, in so doing, thus to secure said preferred creditors to the exclusion of all others.

If the deed of trust to Frank E. Gates, as trustee, and the deed of assignment to Wil-

liam E. Hill were given to different persons for different considerations, not executed at the same time, nor relative to the same subject-matter, nor to effectuate the same object, nor in pursuance of a contract made by the grantees jointly, they will be considered and take effect as separate instruments.

Foster v. Mullanphy Planing Mill Co. 92 Mo. 79, 4 S. W. 260; *Schufeldt v. Smith*, 131 Mo. 280, 29 L. R. A. 830, 52 Am. St. Rep. 628, 31 S. W. 1039; *Brownell & W. Car Co. v. Barnard*, 116 Mo. 667, 22 S. W. 503; *Wilson v. St. Louis & S. F. R. Co.* 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286; *Knapp, S. & Co. v. Standley*, 45 Mo. App. 264; *Waggoner-Gates Mill. Co. v. Ziegler-Zaiss Commission Co.* 128 Mo. 473, 31 S. W. 28; *Butler v. Harrison Land & Min. Co.*

Constitution upon the ground that it withheld from citizens of other states, as such and because they were such, privileges granted to citizens of the state enacting it.

The court, in *Franzen v. Hutchinson*, 94 Iowa, 95, 62 N. W. 698, said that one line of cases holds that a voluntary assignment, valid according to the law of the state where made, is, as to personal property owned by the assignor, valid everywhere; another class holds that, though the assignment may be valid where made, yet, if invalid by the law of the state where the debts are located, or other personal property of the assignor is found, the assignment is void as to creditors of the assignor resident in the latter state, but is valid as to the creditors residing in other states; still another class holds that, where a foreign assignment is invalid, according to the law of the state where the property or debt is situated, the objection may be raised by anyone, whether residing in the state of the suit or not. The court adopted the rule established in the third class of cases. The rule, as there stated, seems to be applicable to voluntary assignments for creditors without any insolvency or bankruptcy features; but the assignment in this case was made under a Minnesota statute, which makes the release of the assignor a condition of sharing in the proceeds of the assigned property; and, besides, the case did not involve the rights of a nonresident creditor, but of a resident who claimed the right to set off, against an indebtedness due from him to the assignor, certain claims against the assignor which had been assigned to him.

In *Segnitz v. Garden City Bkg. & T. Co.* 107 Wis. 171, 50 L. R. A. 327, 81 Am. St. Rep. 830, 83 N. W. 327, the court said that the general proposition may be stated that a voluntary common-law assignment for the benefit of creditors, good in the state where made, carries title to personal property wherever situated; and cites a number of cases to that effect. It further said that, in Illinois, Louisiana, and Maine, and possibly some other states, the rule is limited, and will not be allowed to prevail as against creditors of the assignor residing in those states; but the court apparently repudiated such qualification of the rule, though in this case the rule was not applied because of the bankruptcy features of the statute under which the assignment was made.

So, the court, in *Barth v. Backus*, 140 N. Y. 65 L. R. A.

230, 23 L. R. A. 47, 87 Am. St. Rep. 545, 35 N. E. 425, *infra*, which expressly repudiates the distinction so far as assignments under insolvency or bankruptcy laws are concerned, uses language indicating that it should also be repudiated as applied to voluntary assignments.

c. *When foreign assignment not opposed to lex rei sitae et fori.*

For earlier cases, see note to *Long v. Forrest*, 23 L. R. A. 33, latter part of I. c. 8.

As pointed out in the earlier note, the courts of Illinois and Maine have carried the discrimination in favor of resident creditors to the extent of denying, as against such creditors, any effect to a foreign voluntary assignment for creditors valid by the law of the state where made, even if not contrary to the law or public policy of the forum (which is also the place where the property is situated, or where the debtor of the assignor is domiciled). This doctrine (which, as applied to assignments that do not violate the law or public policy of the forum, is contrary to the weight of authority in other states) has since been reasserted and applied in Illinois to such cases. Thus, in *Woodward v. Brooks*, 128 Ill. 222, 8 L. R. A. 702, 20 N. E. 685, the court said: "As a voluntary foreign assignment, valid in the state where made, is enforced in this state as a matter of comity, our courts will not enforce it to the prejudice of our citizens who may have demands against the assignor. It is contrary to the policy of our laws to allow the property or funds of a nonresident debtor to be withdrawn from this state before his creditors residing here have been paid, and thus compel them to seek redress in a foreign jurisdiction." The case is *obiter* on this point, however, as the creditor claiming against the assignment was a nonresident of Illinois.

Courts of Illinois will not enforce a voluntary assignment as against a domestic creditor who garnishes an indebtedness due to the assignor, since the enforcement of such assignment is a matter of comity only. *Smith v. Lamson Bros.* 184 Ill. 71, 56 N. E. 387, *Affirming* 82 Ill. App. 466. It seems to be assumed that the principle is applicable, even if the assignment, if made in Illinois, would be valid by the law of that state; and it does not appear in this case that the assignment was invalid tested by the law of Illinois.

Sheldon v. Wheeler, 32 Fed. 773, upon the

139 Mo. 467, 61 Am. St. Rep. 464, 41 S. W. 234; *Woodson v. Carson*, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197; *Calihan v. Powers*, 133 Mo. 481, 34 S. W. 848; *Fogg v. Blair*, 133 U. S. 534, 33 L. ed. 721, 10 Sup. Ct. Rep. 338.

The Missouri statute in relation to assignments for the benefit of creditors does not abridge the common-law right of a debtor to prefer a creditor by sale, mortgage, pledge, or payment; and no instrument can be construed to be a general assignment under the statute, unless it was intended by the grantor to operate as such.

Haase v. Nelson Distilling Co. 64 Mo. App. 131; *Kempner, H. & McD. Dry Goods Co. v. Kennard Grocer Co.* 68 Mo. App. 290; *Jaffrey v. Matheux*, 120 Mo. 317, 25 S. W. 187;

Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013.

An insolvent debtor has a right to make a preference; and a conveyance by an insolvent debtor or corporation which subjects his property to the payment of an honest debt is not fraudulent as to the other creditors.

Bangs Mill. Co. v. Burns, 152 Mo. 350, 53 S. W. 923; *Hall v. Goodnight*, 138 Mo. 576, 37 S. W. 916; *Guttapercha Rubber Mfg. Co. v. Kansas City Fire Dept. Supply Co.* 149 Mo. 538, 50 S. W. 912; *Crothers v. Busch*, 153 Mo. 606, 55 S. W. 149; *Kincaid v. Irvine*, 140 Mo. 615, 41 S. W. 963; *Donk Bros. Coal & Coke Co. v. Kinealy*, 83 Mo. App. 40; *Barry County Bank v. Russey*, 74 Mo. App.

authority of *Heyer v. Alexander*, 108 Ill. 385, held that a voluntary assignment for creditors, made in Connecticut by parties domiciled there, did not pass the title to an indebtedness due to the assignors by a resident of Illinois, as against a garnishing creditor who was a resident of the latter state, notwithstanding that, so far as appeared in this case, the instrument would have been valid if made in Illinois. The decision is put upon the ground that each state will see to it that its own citizens are protected in the collection of their debts against non-resident debtors so far as the assets of such debtors are within the jurisdiction of the state.

In *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 76 Am. St. Rep. 51, 56 N. E. 1106, the attaching creditor, a New Jersey corporation, sought to bring itself within the protection of the rule declared in the foregoing cases, upon the ground that it maintained a branch office in Illinois and transacted business there, and that the indebtedness sought to be recovered by the attachment grew out of contracts entered into in Illinois. It appeared, however, that the corporation had not, at the time its attachment was levied, complied with the requirements of the Illinois statute prescribing the conditions of doing business within the state, though it did comply with the same before the final determination of the action. Its contention was, therefore, rejected; but it does not appear what the decision would have been if it had complied with the statute before the attachment.

The Illinois doctrine seems to have been adopted in Washington. Thus:

An assignment for creditors, voluntarily made under the Illinois statute, while passing the title to the assignor's real property in Washington, does so subject to the rights of creditors resident in that state to enforce their claims by attachment of the property. *Happy v. Prickett*, 24 Wash. 290, 64 Pac. 528. So far as appears, there was nothing in this assignment which would render it invalid, even tested by the laws of Washington. It is not entirely clear whether the decision is upon the assumption that the Illinois statute was, in substance, an involuntary insolvency act or not.

The doctrine of the Illinois and Maine cases was, however, repudiated by the United States circuit court sitting in Maine, in *Stowe v. Belfast Sav. Bank*, 92 Fed. 90. It was there held that a voluntary assignment for creditors, 65 L. R. A.

made in Massachusetts by a resident of that state, complying with all of the requirements of the law of Maine as to the conveyance of real property, was effective to transfer the title to such property in the latter state, even as against a resident of Maine who attached the same subsequently to the assignment. The court refused to follow the decision in *Fox v. Adams*, 5 Me. 245, wherein the doctrine above stated was announced, because it deemed that decision erroneous, and not a decision which the Federal courts were bound to follow. The decision of the circuit court was affirmed by the circuit court of appeals in *Belfast Sav. Bank v. Stowe*, 34 C. C. A. 229, 63 U. S. App. 14, 92 Fed. 100. The latter court, as already shown, held that the local rule announced in *Fox v. Adams*, and restated in *Chafee v. Fourth Nat. Bank*, 71 Me. 514, 36 Am. Rep. 345, had, in effect, been abrogated by a decision of the United States Supreme Court. (See *supra*.)

With the exceptions above noted, and those referred to in the earlier note, and intimations in the opinions in some of the Massachusetts cases, which seem, however, never to have been practically acted upon in that state, the courts have assumed that a voluntary assignment, if valid by the law of the place where made and where the assignor was domiciled, and not contrary to the law or public policy of the forum, is effective to pass the title to personal property, and (if executed in the manner required by the *lex rei sitæ* for the conveyance of such property) the title to real property, located at the forum, as against a subsequent attaching creditor, whether a resident of the state in which the assignment was made, of the state in which the property is located, or of a third state. In addition to the cases cited in the previous note, it will be observed that the following cases, upon the assumption that the assignment was valid by the law of the place where made, and was not contrary to the law or the public policy of the forum, have upheld it, even against subsequent attachments upon property at the forum by residents of the forum.

A voluntary assignment for creditors which is valid in the state where the assignors reside will be held to pass personal property included therein, the situs of which is in other states, if the foreign assignment is not repugnant to the laws of the state in which domestic creditors have attached property located therein.

651; *Schawacker v. Ludington*, 77 Mo. App. 415; *Western Mfg. Co. v. Woodson*, 130 Mo. 119, 31 S. W. 1037; *Mills v. Williams*, 31 Mo. App. 447; *Rosenthal v. Frank*, 37 Mo. App. 272.

To bring the deed of trust within the exception to the rule that the law of the place of contract shall govern, it must be not only unenforceable if made here, but repugnant to our laws, and contrary to common principles of justice and morality.

Lawson, Contr. § 347; Bishop, Contr. §§ 1377-1383; Jones, Chat. Mortg. § 299.

Matters relating to the validity, interpretation, and effect of a contract are to be determined by the *lex loci contractus*.

Princeton Mfg. Co. v. White, 68 Ga. 96; *Wilson v. Carson*, 12 Md. 54; *Walter v.*

Whitlock, 9 Fla. 86, 76 Am. Dec. 607; *Gregg v. Sloan*, 76 Va. 497; *Kelstadt v. Reilly*, 55 How. Pr. 373; *Weider v. Maddow*, 66 Tex. 372, 59 Am. Rep. 617, 1 S. W. 168; *Speed v. May*, 17 Pa. 91, 55 Am. Dec. 540; *West v. Tupper*, 1 Bail. L. 193; *Greene v. Moury*, 2 Bail. L. 163; *Frazier v. Fredericks*, 24 N. J. L. 162; *Oaskie v. Webster*, 2 Wall. Jr. 131, Fed. Cas. No. 2,500; *Black v. Zacharie*, 3 How. 483, 11 L. ed. 690; *Van Wyck v. Read*, 43 Fed. 716; *Long v. Girdwood*, 150 Pa. 413, 23 L. R. A. 33, 24 Atl. 711; *Birdseye v. Underhill*, 82 Ga. 142, *sub nom. Birdseye v. Baker*, 2 L. R. A. 99, 14 Am. St. Rep. 142, 7 S. E. 863.

The situs of a debt is the domicile of the creditor.

Birdseye v. Underhill, 82 Ga. 143, *sub*

Campbell v. Colorado Coal & I. Co. 9 Colo. 60, 10 Pac. 248.

Each state has the right to regulate the transfer of personal property owned by non-residents but situate within its limits; and, although a foreign contract or assignment may be valid in the state where made, it will not be enforced in another if repugnant to the law or policy of the latter state. But the general rule is that the validity of a transfer of personal property is governed by the law of the domicile of the owner, according to the maxim, *Mobilia sequuntur personam*. *Moore v. Land, Title, & T. Co.* 82 Md. 288, 33 Atl. 641.

Assignments of personal property which are valid by the law of the domicile of the assignor are generally recognized as valid by the law of the state where the property may be situated, unless they violate its statutory law, or its known and settled policy. *Vanderpool v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, 37 Am. St. Rep. 601, 35 N. E. 932.

A voluntary general assignment for creditors, valid in the state where executed, will pass the title to the assignor's personality in Texas if not in contravention of any law or public policy of that state, even as against an attaching creditor who is a citizen of Texas. *Carter-Battle Grocer Co. v. Jackson*, 13 Tex. Civ. App. 353, 45 S. W. 615.

In the following cases, where the assignment was upheld, the attaching creditor was a non-resident of the forum; but these cases are, of course, no authority for any distinction based upon the residence of the attaching creditor, assuming that the assignment, is not contrary to the law or public policy of the forum.

Garnishment of a debt due to a foreign corporation is precluded by a previous voluntary assignment for creditors made by the corporation in another state, as the right to the chose in action is thereby vested in the assignee. *Fenton v. Edwards*, 126 Cal. 43, 46 L. R. A. 832, 77 Am. St. Rep. 141, 58 Pac. 320. The corporation was a Minnesota corporation, the assignment was made in conformity with the law of Illinois, where the corporation was doing business (it not appearing whether it was executed in Minnesota and in Illinois), and the garnishing creditor was a citizen of Nebraska. The court said that there was no question as to the rights of any citizens of California, or of property situated within the state; that the chose in action had no situs in California, but 65 L. R. A.

must follow the person of the owner, and was, therefore, in contemplation of law, situated in Minnesota at the time of the assignment. The debtors of the assignor seem to have been residents of California.

A common-law assignment made in another state by a person domiciled in that state, which would be enforced if it had been made in New Hampshire, will pass the title to a fund in New Hampshire as against a subsequent attachment. *Roberts v. Norcross*, 69 N. H. 533, 45 Atl. 560. The attaching creditor was a resident of Maine, but the decision would apparently have been the same if he had been a resident of New Hampshire. The court distinguishes between voluntary assignments and assignments under insolvency acts.

The title to personal property in Pennsylvania, as against a subsequent nonresident attaching creditor, passes by an assignment for creditors executed in another state. *Wing v. Bradner*, 162 Pa. 72, 29 Atl. 291.

Property in Wisconsin, which has been reduced to possession by the assignee in a voluntary assignment made in another state and there valid, cannot be held under attachment by a creditor, since the title of the assignee and the validity of the assignment will be recognized in Wisconsin on the ground of judicial comity. *Cook v. VanHorn*, 81 Wis. 291, 50 N. W. 593. The attaching creditors were residents of a third state.

Even under the Illinois doctrine, the assignment, if valid by the law of the state where made, and not contrary to the law or public policy of the forum, will be upheld as against a nonresident who subsequently attaches property, or garnishes a debtor, therein. Thus, *Woodward v. Brooks*, 128 Ill. 222, 3 L. R. A. 702, 15 Am. St. Rep. 104, 20 N. E. 685, says: In the absence of claims of domestic creditors, the assignee under a valid voluntary foreign assignment for creditors may reduce to his possession the property, and collect the debts assigned to him within Illinois; and the debtors in the latter state owing the assignor and having no set-off will be compelled to pay the assignee. But if the foreign assignment, if made here, would be set aside as fraudulent, or as contrary to the policy of our laws, our courts will not enforce it as against attaching creditors, whether foreign or domestic, although it may be valid in the state where made. In this case it was held that a voluntary assign-

nom. Birdseye v. Baker, 2 L. R. A. 99, 14 Am. St. Rep. 142, 7 S. E. 863; *Story*, Conf. L. 8th ed. 559; *Burrill*, Assignm. 471; *Princeton Mfg. Co. v. White*, 68 Ga. 96; *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250; *Caskie v. Webster*, 2 Wall. Jr. 131, Fed. Cas. No. 2,500; *Speed v. May*, 17 Pa. 91, 55 Am. Dec. 540; *Guillander v. Howell*, 35 N. Y. 657; *Howard Nat. Bank v. King*, 10 Abb. N. C. 346; *Osgood v. McGuire*, 61 N. Y. 524; *Williams v. Ingersoll*, 89 N. Y. 508; *People ex rel. Hoyt v. Tax & A. Comrs.* 23 N. Y. 224; *Bentley v. Whittemore*, 19 N. J. Eq. 462, 97 Am. Dec. 671; *Van Wyck v. Read*, 43 Fed. 716.

A conveyance for creditors, made in another state, will be upheld, if it has been executed by a transfer of possession to the trustee or assignee.

ment for creditors, executed in Pennsylvania by a person domiciled there, carried a debt due the assignor from a person in Illinois as against a subsequent attaching creditor, also a resident of Pennsylvania. The decision, however, does not rest upon the fact that the attaching creditor was a resident of Pennsylvania, except so far as that fact negatived his residence in Illinois. The decision would apparently have been the same if he had been a resident of any other state except Illinois.

So, a voluntary assignment for creditors with preferences, valid by the law of the state in which it was made and in which the assignor was domiciled, will be carried into effect in Illinois as against a creditor, a nonresident of that state, who has levied a writ of attachment on personal property in the possession of the assignee under the authority of the assignment. *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 76 Am. St. Rep. 51, 56 N. E. 1106.

d. Law determining validity of assignments.

1. Personal property.

(a) General rule.

For earlier cases, see *note to Long v. Forrest*, 23 L. R. A. 33, 1. a.

It will be observed that the principle supported by the great weight of authority, that a voluntary assignment, valid by the law of the state or country where made and where the assignor is domiciled, will pass the title to real or personal property in another, as against subsequent attaching creditors, residents or non-residents, is generally stated with the qualification that it does not violate the statutory law or the known and settled public policy of the latter. (See statement of qualification in *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, 37 Am. St. Rep. 601, 35 N. E. 932.) Without explication, this qualification, even with respect to personal property, would seem to restrict the principle to cases where the assignment was not only in accordance with the law of the place where made, but also in accordance with the law of the place where the property is located. The qualification, however, is not so broad as its literal terms would imply. As applied to personal property, whether chattels or choses in action, the qualification 65 L. R. A.

Forbes v. Scannell, 13 Cal. 242; *Ockerman v. Cross*, 54 N. Y. 29; *Cook v. Van Horn*, 81 Wis. 291, 50 N. W. 893; *Barnett v. Kinney*, 147 U. S. 483, 37 L. ed. 249, 13 Sup. Ct. Rep. 403; *Varnum v. Camp*, 13 N. J. L. 326, 25 Am. Dec. 476; *Whitenright v. Leavitt*, 4 La. Ann. 351; *Law v. Mills*, 18 Pa. 185; *Hunt v. Lathrop*, 7 R. I. 58; *Schroder v. Tompkins*, 58 Fed. 672; *Mead v. Dayton*, 28 Conn. 33; *Cragin v. Lamkin*, 7 Allen, 395; *Wales v. Alden*, 22 Pick. 245; *Martin v. Potter*, 11 Gray, 37, 71 Am. Dec. 689.

Messrs. J. M. Barker and Gaughan & Siford, for appellee:

The lien of a garnishment dates from the time the garnishment writ is served upon the garnishee.

only embraces those statutes of the forum (which is also the state where the property is situated) which, either by virtue of the language used or the public policy embodied in them, must be held to apply to foreign, as well as domestic, assignments. The distinction, already referred to, between cases involving the rights of creditors resident in the state where the property or the debt is garnished and those involving the rights of nonresidents, may be important in this connection. Thus:

Voluntary assignments valid in the state or territory where made will, on principle of comity, be upheld by the courts of other states against nonresident attaching creditors, although the assignment is contrary to the policy and laws of the state where it is sought to be enforced; but such rule cannot be invoked as against resident creditors. *Williams v. Kemper, H. & McD. Dry Goods Co.* 4 Okla. 145, 43 Pac. 1148.

The title of an assignee for creditors under an assignment, valid by the laws of the state where the property is located, is not affected, even as against resident creditors, by bringing the property into Minnesota, where the assignment would be invalid. *McKibbin v. Ellingson*, 58 Minn. 205, 49 Am. St. Rep. 499, 59 N. W. 1008.

Ordinarily, the question as to the effect of a voluntary assignment for creditors, made in one state upon property in, or a debt due from a resident of, another, arises in the latter state. In *Bloomington v. Maas*, 30 Misc. 672, 64 N. Y. Supp. 260, however, the court, upon the authority of *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, held that an injunction would lie in New York at the instance of an assignee for creditors under an assignment made in that state, to restrain creditors who were residents of New York from prosecuting attachment or garnishment proceedings, commenced in another state subsequently to the assignment, to reach a debt due the assignor from a resident of the latter state, in the absence of proof that the courts of the latter state would refuse to give effect to the assignment as against such creditors.

(b) Formal validity.

For earlier cases see *note to Long v. Forrest*, 23 L. R. A. 33, 1. a.

The application that has been made of the

Bergman v. Sells, 39 Ark. 97; *Adams v. Pensell*, 40 Ark. 537.

Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before.

Sandels & Hill's Dig. § 5091.

The courts of Arkansas will not give effect to the deed of trust, as against citizens of our state.

2 Kent, Com. p. 580; *Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599; *Story*, Conf. L. § 390; *Union Locomotive & Exp. Co. v. Erie R. Co.* 37 N. J. L. 23; *Commercial Nat. Bank v. Davidson*, 18 Or. 57, 22 Pac. 517; *Pittsburgh & S. L. R. Co.'s Appeal* (Pa.) 4 Atl. 385; *Varnum v. Camp*, 13 N. J. L. 326, 25 Am. Dec. 476; *Moore v.*

Bonnell, 31 N. J. L. 90; *Thurston v. Rosenfield*, 42 Mo. 474, 97 Am. Dec. 351; *Stricker v. Tinkham*, 35 Ga. 176, 89 Am. Dec. 280; *Dearing v. McKinnon Dash & Hardware Co.* 165 N. Y. 78, 80 Am. St. Rep. 708, 58 N. E. 773.

Contracts made in England, releasing a carrier from damage to goods caused by his negligence, are valid, but have been held no protection in our tribunals.

The Guildhall, 58 Fed. 799; *Lewisohn v. National S. S. Co.* 56 Fed. 602; *The Iowa*, 50 Fed. 561; *The Hugo*, 57 Fed. 403; *The Brantford City*, 29 Fed. 395; *Botany Worsted Mills v. Knott*, 27 C. C. A. 326, 51 U. S. App. 467, 82 Fed. 471; *The Kensington*, 36 C. C. A. 533, 94 Fed. 885; *The Enertia*, 56 Fed. 124; *The Major Reybold*, 111 Fed. 415; *The Glenmavis*, 69 Fed. 472; *Chi-*

distinction based upon the residence of the attaching creditor, by courts that do not carry it to the extent of denying the effect, as against resident creditors, of a foreign voluntary assignment not contrary to the law or public policy of the forum, will be subsequently shown. In the meantime, it may be stated that the courts do not ordinarily regard local statutes relating to the formal validity of assignments for creditors (not expressly covering foreign assignments) as embodying such a distinctive public policy as to require their extension to foreign assignments covering personal property within the state; and therefore the validity of the assignments in this respect, so far as personal property is concerned, and without reference to the residence or nonresidence of the attaching creditor, is generally referred to the law of the place where the assignment was made, under the maxim that personal property has no situs of its own, but follows the person of the owner. Thus:

Voluntary assignment laws have no extraterritorial force or operation, and must be so construed as to embrace and operate upon deeds of assignment executed within the jurisdiction only. *Williams v. Kemper, H. & McD. Dry Goods Co.* 4 Okla. 145, 43 Pac. 1148.

An assignment for creditors without preferences, valid by the law of the assignor's domicile, will pass the title to an indebtedness due from a resident of Maryland; and the same is not afterwards liable to attachment even by a resident creditor, notwithstanding that the bond required by the Maryland statute, as a condition of the title passing to an assignee, was not filed, since such statute does not apply to an assignment executed by a nonresident. *Moore v. Land, Title, & T. Co.* 82 Md. 288, 33 Atl. 641.

A voluntary assignment for creditors which is valid in the state in which it is made will be upheld in another state in which some of the assigned personal property is found, unless contrary to the positive law or public policy of the latter state; and a mere difference between the assignment laws of the two states as to details in machinery in carrying into effect an assignment does not produce a conflict which will prevent the operation of the ordinary rule. *Byers v. Tabb*, 76 Miss. 843, 25 So. 492. The garnishing creditors were residents of a third state, but no point is made of that fact. 65 L. R. A.

In *Pitman v. G. W. Marquardt & Sons*, 20 Ind. App. 431, 50 N. E. 894, it was apparently assumed that the prerequisites to the vesting of the title to personal property in Indiana in an assignee, under an assignment made in Kentucky, were to be determined by the law of Kentucky. The question was whether the title passed prior to the filing of the schedules, and it was held that, under the Kentucky statute, it did, though, so far as appears, this would also have been the case under the Indiana statute.

Connor v. Omaha Nat. Bank, 42 Neb. 602, 60 N. W. 911, held that the title to a deposit in a Nebraska bank did not pass to the assignee under an assignment made in Wyoming, because, by the laws of the latter state, the failure of the assignor to make and file his inventory within twenty days rendered the assignment absolutely void.

(c) Notice; record; taking possession.

But, while the formal validity of the assignment with respect to personal property is thus referred to the law of the place where it is made, the courts generally hold that the law of the place where chattels are found, or where a debtor of the assignor is domiciled, governs with respect to the necessity of notice of the assignment, or of the recording thereof, or of taking possession of the property thereunder, in order to uphold the assignment as against third persons. Thus:

An attachment of a debt due from a citizen of Vermont to citizens of New York, after an assignment for creditors made by the latter, but before the Vermont debtor had notice thereof, will prevail over the assignment. *Martin v. Potter*, 34 Vt. 87.

The statute of Kansas, by which every voluntary assignment for creditors must be recorded in the country where the property is situated, and shall from the time of such record impart notice to subsequent purchasers and mortgagees, applies to such an assignment made in Iowa by a person domiciled there, so far as it relates to personal property in Kansas. *Parker v. Brown*, 29 C. C. A. 357, 56 U. S. App. 341, 85 Fed. 595.

In *Woolson v. Pipher*, 100 Ind. 306, the Indiana statute, which prevents the title from passing to the assignee until he has taken

cago, B. & O. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508; *Pope v. Hanke*, 155 Ill. 617, 28 L. R. A. 568, 40 N. E. 839; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Wight v. Rindskopf*, 43 Wis. 344; *Miliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Armstrong v. Best*, 112 N. C. 59, 25 L. R. A. 188, 34 Am. St. Rep. 473, 17 S. E. 14; *Ruhe v. Buck*, 124 Mo. 178, 25 L. R. A. 178, 46 Am. St. Rep. 439, 27 S. W. 412; *Thompson v. Taylor*, 66 N. J. L. 253, 54 L. R. A. 585, 88 Am. St. Rep. 485, 49 Atl. 544.

The courts of Arkansas will not enforce a contract made by a foreign corporation in another jurisdiction, which contract is contrary to the policy of our law and against our statutes, and would have been void if

made here, and the result of such enforcement would be an injury to our own citizens.

Woodward v. Roane, 23 Ark. 525; *Story*, Conf. L. 327; *Greenwood v. Curtis*, 6 Mass. 358, 4 Am. Dec. 145; *Sohlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302; *Faulkner v. Hyman*, 142 Mass. 53, 6 N. E. 846; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927; *Rowland v. Old Dominion Asso.* 115 N. C. 825, 18 S. E. 965; *Randall v. National Bldg. Loan & Protective Asso.* 43 Neb. 876, 62 N. W. 252; *Terry v. Beatrice Staroh Co.* 43 Neb. 866, 62 N. W. 257; *Dicey*, Conf. L. 558; *Rule 148*, Exception 1; *Leroy v. Crowninshield*, 2 Mason, 151, Fed. Cas. No. 8,269; *Merchants' Bank v. Spalding*, 12 Barb. 302; *Loey v. Lalland*, 42 Miss. 444, 2 Am. Rep. 1066, 97

possession of the property, was applied to an assignment made in Ohio by a person domiciled there, as against an attachment levied after the execution of the assignment, but before possession was taken thereunder. It does not appear where the attaching creditors resided.

A general voluntary assignment for creditors, valid under the laws of the place of the assignor's domicile, passes the title to the assignee of personal property assigned, located in another state, without actual delivery of possession to the assignee, unless the operation of such assignment is limited or restrained by the laws of the state in which such property is situated. *Carter-Battle Grocer Co. v. Jackson*, 18 Tex. Civ. App. 353, 45 S. W. 615.

Warner v. Jaffray, 96 N. Y. 248, 48 Am. Rep. 616, held that an assignment made in New York by a resident of that state did not pass the title to chattels in Pennsylvania, as against residents of New York who attached the property in Pennsylvania after delivery but before they had notice of it, and before it had been recorded in the county where the property was located. The Pennsylvania statute, however, expressly provided for the recording of assignments of property within the state by non-residents.

A voluntary assignment made in another state by a person domiciled there must, in order to pass the title to personal property in Tennessee as against subsequent attaching creditors, be registered in conformity to the Tennessee statute. *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874. Some of the attaching creditors in this case were residents, and others were nonresidents, and no distinction is based on that fact. The decision is on the ground that the settled policy of the state requires both domestic and foreign assignments conveying personality within the state to be registered in order to be valid as against creditors. It is to be observed that the Tennessee statute with reference to registration provides that the instrument shall be registered in the county where the vendor or person executing the same resides, and, in case of his nonresidence, where the property is. It would seem, therefore, that the Tennessee statute expressly and in terms covers foreign assignments, and in such case it must, of course, prevail over the ordinary rules of comity.

The Pennsylvania act requiring assignments 65 L. R. A.

for creditors by nonresidents to be recorded within any county where the assignor's estate is situated within Pennsylvania does not apply to an indebtedness due from a Pennsylvania corporation to a resident of Maryland who made an assignment for creditors in the latter state, where the Pennsylvania corporation had complied with the laws of Maryland to enable it to do business in that state, and the debt in question was contracted there. *De Turck v. Woelfel*, 19 Pa. Super. Ct. 265. It was so held, even as against an attaching creditor, a resident of Pennsylvania. The court conceded, upon the authority of *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, that the debt would be deemed part of the estate of the assignor within Pennsylvania if it were necessary to come into Pennsylvania to collect it; and the decision is upon the ground that, under the circumstances, the corporation could be sued for the debt in Maryland.

The doctrine of the last case was applied in *De Turck v. Woelfel*, 19 Pa. Super. Ct. 270, to an indebtedness due from a Minnesota corporation lawfully engaged in business both in Maryland and Pennsylvania, the debt having been garnished in Pennsylvania by a resident of the latter state.

A voluntary assignment for creditors, executed in Ohio by a person domiciled there, valid by the law of that state, and not repugnant to the laws of Indiana, will transfer to the assignee an indebtedness due to the assignor from a resident in Indiana, even as against a subsequent garnishing creditor who was a resident of Indiana, notwithstanding that the assignment was not filed and recorded as required by the Indiana statute with reference to domestic assignments. *Union Sav. Bank & T. Co. v. Indianapolis Lounge Co.* 20 Ind. App. 323, 47 N. E. 846. The court admitted, however, that if the property in Indiana had been tangible property, capable of actual possession, the rule in Indiana, that the title does not vest in the assignee until actual possession has been taken, would apply. The decision with reference to choses in action seems to be upon the theory that their situs is at the domicile of the assignor.

(d.) *Preferences.*

For earlier cases, see note to *Long v. Forrest*, 23 L. R. A. 33, 1 a, 2, 3, 4, 5, 6.

By referring to the note to *Long v. Forrest*,

Am. Dec. 475; *Whiston v. Stodder*, 8 Mart. (La.) 95, 13 Am. Dec. 281; *Saul v. His Creditors*, 5 Mart. N. S. 569; *Arayo v. Currell*, 1 La. 528, 20 Am. Dec. 286; *Bentley v. Whittemore*, 19 N. J. Eq. 462, 97 Am. Dec. 671; *Cole v. Lucas*, 2 La. Ann. 953; *Mary v. Brown*, 5 La. Ann. 269; *Tatum v. Wright*, 7 La. Ann. 358; *Groves v. Nutt*, 13 La. Ann. 117; *Hughes v. Klingender Bros.* 14 La. Ann. 52; *Prentiss v. Savage*, 13 Mass. 20; *Ingraham v. Geyer*, 13 Mass. 146, 7 Am. Dec. 132; *Tappan v. Poor*, 15 Mass. 419; *West Cambridge v. Lexington*, 1 Pick. 506, 11 Am. Dec. 231; *Martin v. Hill*, 12 Barb. 631; *Crosby v. Huston*, 1 Tex. 203; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Territt v. Bartlett*, 21 Vt. 189; *Forbes v. Cochrane*, 2 Barn. & C. 448, 3 Dowl. & R. 679, 2 L. J. K.

B. 67, 26 Revised Rep. 402; *Thurston v. Rosenfield*, 42 Mo. 474, 97 Am. Dec. 351; *Galliano v. Pierre*, 18 La. Ann. 10, 89 Am. Dec. 643; *Walter v. Whitlock*, 9 Fla. 86, 76 Am. Dec. 607; *McLean v. Hardin*, 56 N. C. (3 Jones, Eq.) 294; *Gardner v. Lewis*, 7 Gill, 378; *Gibson v. Sublett*, 4 Ky. L. Rep. 730.

A contract will not be enforced by the courts of a state which violates its positive legislation, or is contrary to its statutes.

Ivey v. Lalland, 42 Miss. 444, 2 Am. Rep. 606, 97 Am. Dec. 475; *Mahorner v. Hoos*, 9 Smedes & M. 247, 48 Am. Dec. 706; *Hinds v. Brazealle*, 2 How. (Miss.) 837, 32 Am. Dec. 307; *Saul v. His Creditors*, 5 Mart. N. S. 569; *Pittsburgh & S. L. R. Co.'s Appeal* (Pa.) 4 Atl. 385; *Swann v. Swann*, 21 Fed.

23 L. R. A. 33, it will be observed that, when it is a question of the recognition of a foreign assignment containing preferences which are allowed by the law of the place where the assignment was made, but not by the law of the forum and of the place where the property is found, many of the cases discriminate in favor of subsequent attaching creditors who are residents of the latter place, and against such creditors who are nonresidents, whether residents of the state where the assignment was made, or of a third state. The cases next cited, which were decided since that note, make the same distinction. It will be observed that these cases have reference to real property, and not to personal property. There seems, however, to be no distinction between the two classes of property in this respect. It is true that the general principle is that real property is governed by the *lex rei sitæ*; but this principle, apparently, does not comprehend laws which, like those with reference to preferences, relate primarily to assignments, and not distinctively to real property, though they may indirectly affect such property.

A voluntary assignment for creditors, made in another jurisdiction by a person domiciled there, if executed in the manner required by the Oklahoma statute to convey real property, will pass the title to real property in Oklahoma, as against a subsequent attaching creditor who is a nonresident of Oklahoma, notwithstanding it provides for preferences which are allowed by the law of the place where it is made, but are not permitted by the law of Oklahoma in domestic assignments. *Williams v. Kemper, H. & McD. Dry Goods Co.* 4 Okla. 145, 43 Pac. 1148.

A voluntary assignment for creditors, executed in New York by persons domiciled in that state, and complying with the Illinois statute for the conveyance of real estate, will pass the title to real estate in that state, as against subsequent attachment by a creditor who is a nonresident of Illinois, notwithstanding that the assignment provides for preferences contrary to the law of Illinois with reference to domestic assignments, but which are allowed by the law of New York. *May v. First Nat. Bank*, 122 Ill. 551, 13 N. E. 806. The Illinois statute forbidding preferences was, by its terms, confined to assignments made in Illinois; and the court held that it was not contrary to the policy of such statute to admit the effect of a foreign assignment with preferences to pass the title to

real property as against creditors who were nonresidents of Illinois, though it was said that it might, as against creditors residing in Illinois, be claimed with some reason that the assignment was invalid as against the public policy of the state. The attaching creditor in this case was a resident of Massachusetts.

It is apparent, of course, from the Illinois cases cited at the beginning of the note, which hold that foreign assignments will not, under any circumstances, be recognized as against subsequent attaching creditors who are residents of Illinois, that a foreign assignment with preferences will not be recognized as against such resident creditors.

Ayres v. Des Portes, 56 S. C. 544, 35 S. E. 218, held that an assignee under an assignment with preferences made in New York by persons domiciled there could not maintain an action in South Carolina to recover an indebtedness due the assignor from residents of South Carolina. The decision is upon the ground that the general rule that a purely voluntary assignment of personal property for the benefit of creditors, if valid by the law of the owner's domicile where made, will operate to transfer the title to such property in another state, is subject to the qualification that the assignment must not conflict with the statute law or public policy of South Carolina. This is an extreme extension of the local policy, and has but little, if any, support from other cases. The distinction between applying the local law with respect to preferences in favor of a resident creditor of the assignor who garnishes an indebtedness due from another resident, and denying the assignee's right to recover the debt when no rights of resident creditors are involved, is obvious.

The provisions of the assignment statutes of Kentucky extending a preference to debts due by the assignor in the character of guardian, trustee of an express trust, etc., and declaring that the assignment shall not be invalidated by any fraudulent intent on the part of the assignor, do not, at least in the absence of anything to show the existence of conditions making such provisions applicable to the particular assignment, render an assignment in that state ineffectual to pass the title to property in Mississippi. *Byers v. Tabb*, 76 Miss. 843, 25 So. 492.

The courts of one state will not refuse to recognize a voluntary assignment under the laws of another state, so far as it affects personal property of the assignor in the former

299; *Faulkner v. Hyman*, 142 Mass. 53, 6 N. E. 848; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927; *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302; *Rowland v. Old Dominion Bldg. & L. Asso.* 115 N. C. 825, 18 S. E. 965; *Randall v. National Bldg. Loan & Protective Asso.* 43 Neb. 876, 62 N. W. 252; *Mumford v. Canty*, 50 Ill. 370, 99 Am. Dec. 525; *Stricker v. Tinkham*, 35 Ga. 176, 89 Am. Dec. 280; *Parsons v. Trask*, 7 Gray, 473, 66 Am. Dec. 502; *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634; *Barnett v. Kinney*, 147 U. S. 483, 37 L. ed. 249, 13 Sup. Ct. Rep. 403; *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597.

state, because the preferences allowable under the statutes of the state in which the assignment was made are less liberal than those allowed by the statutes of the forum. *Pitman v. G. W. Marquardt & Sons*, 20 Ind. App. 431, 50 N. E. 894.

(e) Exemptions.

The title of an assignee in possession of goods in Indiana, under a valid voluntary assignment made in Kentucky by a person domiciled in that state, will not be denied as against a subsequently issued writ of attachment sued out by an Illinois creditor, because the Kentucky statute allows an exemption in other property, and to a greater amount, than would be allowed a resident of Indiana by the laws of that state, and the foreign assignor has, in his own name, claimed his lawful exemption. *Pitman v. G. W. Marquardt & Sons*, 20 Ind. App. 431, 50 N. E. 894. The court said that the decision was based upon the facts of the case, though it did not mean to be understood as holding that the result would be different if the attaching creditor were a citizen of Indiana.

(f) Assignment by corporation.

The presumption is that an assignment for creditors which, it is stipulated, has been made by a foreign corporation in another state to an assignee residing therein and where the company was doing business, in conformity with the laws of that state, is valid, and was made in that state, although the home of the corporation was in another state. *Fenton v. Edwards*, 126 Cal. 43, 46 L. R. A. 832, 77 Am. St. Rep. 141, 58 Pac. 320.

An assignment made in Pennsylvania, by a foreign corporation, of property situated in Pennsylvania is valid, although, by the general law of the state in which the corporation is chartered, such an assignment is not permitted. *Zucker v. Froment*, 5 Pa. Dist. R. 579.

A foreign corporation carrying on business in New York may there make an assignment for the benefit of creditors without preferences, in the absence of any statute of the state of its creation prohibiting such assignment, notwithstanding the provision of N. Y. Laws 1890, chap. 564, § 48, that no corporation shall make any transfer or assignment in case of insolvency. *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, 37 Am. St. Rep. 601, 35 N. E. 35 L. R. A.

Battle, J., delivered the opinion of the court:

The subject-matter of this litigation is a fund in court. It is claimed by D. W. Chandler & Co. under a writ of garnishment, and by Frank E. Gates, as trustee, under a deed of trust.

The Creel Lumber Company was a corporation organized under the laws of Missouri, and operated a sawmill at Milner, in the county of Columbia, in this state. The J. F. Crawford Lumber Company was also a Missouri corporation, and was principally engaged in selling the output of the mill at Milner, for which it was to receive 65 cents per thousand feet.

On the 1st day of July, 1897, in the state of Missouri, the J. F. Crawford Lumber

932. The decision is upon the ground that the New York statute, although not expressly so limited, applies only to domestic corporations.

A corporation of another state has power to make a general assignment for the benefit of creditors under the laws of New York, provided the assignment is valid under the law of the domicile of the corporation. *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. 75. The assignment in this case was delivered to, and accepted by, the assignee in New Jersey, where the corporation was domiciled, but was filed the next day for record in New York, where the corporation carried on its sole business. The attaching creditors seem to have been residents of New York.

An assignment for creditors by a foreign corporation, being presumably valid by the law of the corporation's domicile, will be recognized in New York,—at least to the extent of enabling the assignee to maintain an action to recover assets of the corporation,—no rights of domestic creditors being involved. *Franzen v. Zimmer*, 90 Hun, 103, 35 N. Y. Supp. 612.

An assignment for creditors with preferences, executed by a foreign corporation not doing business in New York, and which is presumably valid by the law of the corporation's domicile, will be recognized in New York, notwithstanding that such an assignment by a domestic corporation is forbidden by the law of New York. *Re Hulbert Bros. & Co.* 38 App. Div. 323, 57 N. Y. Supp. 38. The question as presented before the court merely involved the right of the assignee to collect a debt due to the assignor from a New York debtor, and no rights of creditors of the assignors were involved. The court conceded that the courts of New York might properly refuse to recognize the assignment if contrary to public policy in relation to the transfer of property within the state, but it was held that such a policy was not to be inferred from the mere fact that domestic corporations were not allowed to make assignments with preferences. The decision was reversed in 160 N. Y. 9, 54 N. E. 571, upon a question of practice, without passing upon the point above referred to.

2. Real property.

The interpretation and operation of an assignment for creditors by a corporation having its assets and place of business in the District of Columbia will be governed by the law of the District, although executed in Massachusetts.

Company, by a deed of trust, conveyed to Frank E. Gates, as trustee, all of its property, both real and personal, including an account owed it by the Creel Lumber Company, for the purpose of securing certain creditors named therein. Among these creditors was George P. Gates, of Missouri, to whom it was indebted in a large amount. The deed of trust was delivered to the trustee in the evening of the day of its execution, accepted by him and by him on the following day filed for record in the county of the home office of the company, and by him afterwards filed in the various counties of the state of Missouri where the real estate of the company was situated. On July 17th it was filed in the recorder's office of Columbia county, Arkansas.

Kansas City Packing Co. v. Hoover, 1 App. D. C. 268.

See also *supra*, I. d. 1, (d).

For earlier cases, see *note* to Long v. Forrest, 23 L. R. A. 33, II.

The force and validity of instruments purporting to transfer a title to, or interest in, land, including assignments for creditors, are determined by the law of the place where the land is situated. *Watson v. Holden*, 58 Kan. 657, 50 Pac. 883.

The title and disposition of real property are exclusively subject to the laws of the state wherein it lies, which can alone prescribe the mode whereby the title may be passed; and such rule applies as well to the transmission of title by assignments for creditors as by deeds. *Keane v. Chamberlain*, 14 App. D. C. 84, 27 Wash. L. Rep. 98.

The law of the state in which land is situated must control so far as the mode of executing an assignment for creditors by a firm in another state, passing such land, is concerned. *Paxson v. Brown*, 10 C. C. A. 135, 27 U. S. App. 49, 61 Fed. 874.

As already shown, the general principle announced in the foregoing cases does not necessarily subject a foreign assignment, even with respect to real property, to the law of the place where the property is situated with respect to preferences, though that law may, as in the case of personal property, be applied in favor of resident creditors, or, indeed, in favor of nonresident creditors, if the local policy upon the subject is deemed to protect both classes of creditors against foreign assignments with preferences. Even as applied to the form or mode of execution, this principle does not require that the assignment, in order to pass the title to real property, shall be executed in the form or mode required by the law of the place where the property is situated with respect to domestic assignments. It is enough if the assignment is executed in the manner required by the *lex rei sitæ* for the conveyance of real property generally. Thus:

A voluntary assignment for creditors, executed in Tennessee by persons there domiciled, is sufficient to pass title to real property in Arkansas, as against nonresident creditors, if executed in the forms prescribed by the law of Arkansas for the conveyance of real estate, notwithstanding that it does not comply in all respects with the law of Arkansas with reference

After the execution and delivery of the deed of trust to Frank E. Gates, as trustee, the said J. F. Crawford Lumber Company, on the 2d day of July, 1897, in the state of Missouri, by deed of assignment, conveyed all of its property to William E. Hill, assignee, for the benefit of its creditors.

A short time prior to the 1st day of July, 1897, the J. F. Crawford Lumber Company placed in the hands of Smead & Powell, attorneys at Camden, Arkansas, for collection, the account against the Creel Lumber Company, in the sum of \$25,297.03. And on July 2, 1897, said attorneys filed a bill in chancery in the Columbia circuit court asking that a receiver be appointed to take charge of the assets of the Creel Lumber Company. The prayer was granted, and

to assignments, and for that reason would be insufficient to transfer the title if it had been a domestic assignment. *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 176, 115 Fed. 96. The court said that the assignment would doubtless have been insufficient to transfer the title if it had been a purely domestic assignment, executed in Arkansas by persons there domiciled, inasmuch as the assignee failed to file an inventory and bond in the proper form, as the laws of that state direct, and also failed to comply with the local law in some other respects. There was an alternative ground of decision in this case: but the court clearly took the foregoing view.

A deed of voluntary assignment for the benefit of creditors, executed in another state in conformity to the statute of Illinois with respect to conveyances, will effectually pass the title to real estate situated in Illinois to the assignee, as against foreign attaching creditors of the insolvent with actual knowledge of the assignment before the commencement of their attachments, if the assignment is not in contravention of the laws or public policy of Illinois. A contrary rule prevails as to the creditors of the insolvent residing in Illinois. *Townsend v. Cox*, 151 Ill. 62, 37 N. E. 689.

An assignment for creditors executed in another state by a person domiciled therein, in such manner as is required by the law of Washington for the conveyance of real property, is sufficient to convey real property in the latter state as against a nonresident attachment creditor. *Bloomington v. Well*, 29 Wash. 611, 70 Pac. 94.

An assignment for creditors, voluntarily made under a statute of another state, conveying lands in Texas, executed with words sufficient to convey, and the solemnities required by the law of that state, passes title as between the parties thereto and those claiming under them. *Harvey v. Edens*, 69 Tex. 420, 6 S. W. 306. The court implies that it would be otherwise as against an attaching creditor who is a resident of Texas.

A voluntary, common-law assignment, executed in another state by a resident thereof who did not do business in Minnesota, if valid by the law of the former state, and executed as deeds of conveyance are required to be executed by the laws of Minnesota, is good as a conveyance of land in Minnesota,—at least as against every one but creditors of the assignor,—notwith-

John G. Wepfer was duly appointed receiver by the court. This case remained on the docket, as originally commenced, in the name of the J. F. Crawford Lumber Company, though both Smead & Powell and John G. Wepfer, as receiver of the Creel Lumber Company, were notified by Frank F. Gates immediately after the deed of trust was executed to him, as trustee, by the J. F. Crawford Lumber Company, that he held said indebtedness as such trustee, and it was so understood by Smead & Powell.

Three days after the appointment of John G. Wepfer as receiver of Creel Lumber Company, on the 5th day of July, 1897, D. W. Chandler & Co. commenced an action against the J. F. Crawford Lumber Company in the Columbia circuit court for the sum of \$2,-

338.34, and on the 9th day of said month a summons was issued therein. The indebtedness upon which this action was brought was in the nature of acceptances by the Creel Lumber Company, indorsed by the J. F. Crawford Lumber Company. This claim was also filed by the receiver of the Creel Lumber Company, and was credited with its *pro rata* of the proceeds arising from the sale of the Creel Lumber Company property by the receiver, under order of the court. The balance due after this credit reduced the amount to \$1,496.27, for which the plaintiffs obtained judgment against the J. F. Crawford Lumber Company.

At the institution of the action of D. W. Chandler & Co. against the J. F. Crawford Lumber Company, the plaintiff caused an

standing that the Minnesota statutes prohibit common-law assignments by residents of Minnesota, or by persons doing business in that state. *Thompson v. Ellenz*, 58 Minn. 301, 59 N. W. 1023. Notwithstanding the foregoing statute, the court said the assignment was not repugnant to the laws of Minnesota.

An assignment for creditors executed in Kentucky by a resident of that state, if executed, witnessed, and acknowledged in conformity to the requirements of the Ohio statute with reference to the conveyance of interest in land, will take effect from the time of delivery to the assignee as to land in Ohio, notwithstanding that the Ohio statute declares that an assignment for creditors shall take effect only from the time of delivery to the probate judge. *Wright v. Franklin Bank*, 59 Ohio St. 80, 51 N. E. 876.

Where a voluntary assignment for creditors, executed outside of Oklahoma, is sufficient, under the laws of Oklahoma, to convey real property, and is recorded as deeds are required to be recorded, it is not necessary, in order that the title may pass, that the assignee shall comply with the laws of Oklahoma relating to domestic assignments for creditors, giving bond, filing schedule, etc. *Williams v. Kemper, H. & McD. Dry Goods Co.* 4 Okla. 145, 43 Pac. 1148.

In *Paxson v. Brown*, 10 C. C. A. 135, 27 U. S. App. 49, 61 Fed. 874, involving the question whether the title to real property in Arkansas passed under an assignment for creditors made in New York by a firm doing business there, the court said it would seem that the statutes of Arkansas relative to the filing of the inventory and bond of the assignee related to domestic assignments only, and had no application to an assignment made in another state in accordance with its laws. The point, however, was not authoritatively decided, the case being disposed of upon another ground.

In *Watson v. Holden*, 58 Kan. 657, 50 Pac. 883, however, the court denied the title to real property in Kansas of an assignee, appointed by a court of Missouri in place of the assignees named in a voluntary deed of assignment who had resigned. The decision does not seem to be wholly upon the ground that the title of real property in one state cannot be directly affected by a statute or decree of a court of another; but, in part at least, upon the ground that the assignment, so far as real property 65 L. R. A.

was concerned, was governed by the law of Kansas, under which no title passes to the assignee appointed by the instrument, but passes to the assignee elected by the creditors or appointed by the court; and it would apparently have been held, if necessary, that the title would not have passed to the assignee named in the instrument, even if he had undertaken to serve.

So, an assignment for creditors is subject, so far as concerns the title to real property in another state, to the provisions of the statute of that state, that no title shall pass to an assignee until his bond shall be filed and approved, and to the construction placed upon that statute to the effect that a lien acquired by attaching creditors after the date of the assignment is not affected by the subsequent execution and approval of the assignee's bond. *Keane v. Chamberlain*, 14 App. D. C. 84, 27 Wash. L. Rep. 98.

In *Bloomington v. Well*, 29 Wash. 611, 70 Pac. 94, it was held that even if it were necessary to affix a notarial seal to a certificate of acknowledgment of a foreign assignment for creditors in order to make it effective to convey the legal title to real estate in Washington, the failure to do so did not prevent the assignee from maintaining an action to quiet title as against foreign attachment creditors, since, under the Washington statute, an equitable title is sufficient to support such an action.

A Pennsylvania creditor who accepts benefits under a Pennsylvania assignment for creditors, which purported to include real property in another state, may be enjoined from prosecuting a suit instituted in such other state to secure a preference over other creditors as to the lands there situated. *Kendall v. McClure Coke Co.* 182 Pa. 1, 61 Am. St. Rep. 688, 37 Atl. 823. The decision expressly rests upon the doctrine of estoppel, and it was assumed, for the purposes of the case, that the assignment was not executed and recorded in such manner as to pass the title to the real property in the other state.

An assignment for creditors, though sufficient, according to the laws of the place where it is executed, to pass all the assignor's title and interest in real property, notwithstanding that a life estate only is designated in the schedule, will pass only the life estate in land situated in another state by the law of which the general words of assignment are restricted by the particular description in the schedule.

order of attachment to issue, which was returned without being served. A writ of garnishment was at the same time issued, and was served on the 16th of July, 1897, upon John G. Wepfer, as receiver, and Smead & Powell, as attorneys for the J. F. Crawford Lumber Company.

In the suit of the J. F. Crawford Lumber Company against the Creel Lumber Company a decree was rendered in favor of the plaintiff and intervening creditors, and a distribution of the proceeds of the sale of the property of the defendant was ordered by the court to be made by the receiver. A judgment was rendered in favor of the plaintiff for \$23,000, and a distributive share of about \$7,000 was awarded thereon, and paid to Smead & Powell, by agreement, to hold

subject to the order of the court in the action of D. W. Chandler & Co. against the J. F. Crawford Lumber Company.

Afterwards Smead & Powell, garnishees in the action of D. W. Chandler & Co. against J. F. Crawford Lumber Company, answered, and alleged that they held no funds of the defendant, and that the moneys held by them were the property of Frank E. Gates, as trustee, and were so held by them. Gates, as such trustee, filed his complaint, and claimed the funds in the hands of the garnishees, Smead & Powell, by virtue of the deed of trust executed to him as before stated.

The deed of trust and assignment executed by the J. F. Crawford Lumber Company, the statutes and reports of the opinions of the

Keane v. Chamberlain, 14 App. D. C. 84, 27 Wash. L. Rep. 98.

It will be observed by referring to the case cited in the opinion in the last case that the rule of law which was applied in this case was a general rule for the construction of deeds, and was not a provision of the assignment law.

A sale of land in Kansas by an assignee for creditors of an insolvent in Illinois, with the approval of the court of the latter state, not being made in accordance with the provisions of the Kansas act regulating assignments for creditors, or by the order or judgment of any Kansas court, passes no title. *Thompson v. Adams*, 41 Kan. 38, 20 Pac. 530.

In *Weston v. Nevers*, 72 N. H. 65, 54 Atl. 703, a resident of Maine made a common-law assignment in that state, and on the same day executed a deed of real property in New Hampshire to the assignee in consideration of the trust created by the assignment. The assignments provide that, in case of a decree of insolvency against the assignor under the insolvency laws, the assignee should transfer the property remaining in his hands to the assignee in insolvency. It did not appear that any of the creditors assented to the assignment. The real property in New Hampshire was attached by a New Hampshire creditor after the execution of the assignment and deed. It was held that the attachment prevailed over the assignment and deed upon the ground that, by reason of the provision referred to, the assent of the creditors could not be presumed, and therefore the assignee held the property as the agent of, or trustee for, the debtor alone, and it was therefore subject to attachment by the debtor's creditors.

e. Law determining assignee's right to avoid fraudulent transfers and conveyances.

A voluntary assignment, made in Missouri by a corporation of that state, by the law of that state, vests no right in the assignee, to avoid the fraudulent conveyances of the assignor, and therefore has no such effect with reference to real property in Kansas. *Watson v. Bonfils*, 53 C. C. A. 535, 116 Fed. 157.

Whether a voluntary assignee for creditors represents the assignor only, so that he cannot question transfers or encumbrances that would be valid as against the latter, or represents the creditors also, and may attack transfers or en-

cumbrances which are invalid as against the creditors, depends upon the law of the place where the assignor is domiciled and the assignment is made, not only with respect to personal property in that state, but also with respect to personal property in other states. *Swedish American Nat. Bank v. First Nat. Bank*, 89 Minn. 98, 94 N. W. 218.

f. As to effect of assignment to avoid previous attachment or transfer.

An attachment in a foreign state of an indebtedness is not dissolved by a subsequent general assignment for the benefit of creditors in Washington by the attachment debtor, although the assignment would have had such effect upon an attachment levied within the state. *Neufelder v. North British & M. Ins. Co.* 10 Wash. 393, 45 Am. St. Rep. 793, 39 Pac. 110. The attaching creditors resided in the state where the attachment was levied. The action was by the assignee against the debtor, which was a foreign corporation, but did business in Washington.

Legal proceedings in other states are not affected by Conn. Pub. Acts 1895, p. 491, dissolving attachments made within sixty days before the appointment of a receiver of a corporation. *Ward v. Connecticut Pipe Mfg. Co.* 71 Conn. 345, 42 L. R. A. 706, 71 Am. St. Rep. 207, 41 Atl. 1057.

An assignment of shares in a loan company, made in Ohio by an insolvent in payment of a bona fide indebtedness immediately before the execution of a general assignment for the benefit of creditors, will not be held invalid in Kentucky as an unlawful preference, where it does not appear that any citizen of Kentucky will be prejudiced thereby. *Matthews v. Lloyd*, 89 Ky. 625, 13 S. W. 106.

g. As between law of assignor's domicile and that of place where assignment made.

In most of the cases the assignment was made in the state where the assignor was domiciled, so that there was no conflict between the *lex loci contractus* and *lex domicilii*. Some of these cases describe the governing law in terms of the place where the assignment was made, and others in terms of the assignor's domicile. In case of an assignment made in one state by a person—a natural person, at least—domiciled in another, however, the law of the place where

supreme court of the state of Missouri upon the subject of mortgages and assignments for the benefit of creditors, an agreed statement of facts, and deposition of witnesses were read as evidence in the trial to the court, sitting as a jury; and the foregoing facts appeared, and it was shown that the trustee, Gates, converted the assets in his hands, except property of the value of \$2,000, into money, and paid about 35 per cent of the indebtedness secured by the deed of trust, leaving in his hands about \$1,200 in money to pay costs, expenses, and fees, and the \$7,000 paid on the judgment against the Creel Lumber Company, and that the balance of such indebtedness still due is about \$37,000.

The court sustained the attachment, ren-

dered judgment in favor of plaintiffs for the \$1,496.27, and ordered Smead & Powell to pay the same, if the judgment shall not be reversed by this court; and the garnishees, Smead & Powell, and Gates, as trustee, appealed.

By the laws of what state are the rights of the parties in the case determined?

Every state has jurisdiction over all property, personal and real, within its territorial limits, and, within the bounds of legislation, may regulate and control it in such manner as to it may seem fit or expedient. It may provide how far the laws of a foreign state in which a contract or transfer or mortgage of property has been made shall govern in the enforcement of such contract, transfer, or mortgage by its courts, or that its own

it was made will probably prevail, unless it was intended to have its first operation in the state of the domicil.

In *Schroeder v. Tompkins*, 58 Fed. 672, it was held that a voluntary assignment, made in Ohio by a firm whose principal business domicil was in that state, and one of the members of which resided there, was governed by the law of that state, even with respect to a stock of merchandise in a branch store conducted by the firm in Indiana, where the other member of the firm resided.

In *Egbert v. Baker*, 58 Conn. 319, 20 Atl. 466, where the validity and effect of an assignment made by a partnership were referred to the law of New York where it was made, one of the partners resided in New York and another in New Jersey at the time the assignment was made.

So, in *Re Browning* (N. J.) 57 Atl. 869, it was said that whether the firm by which an assignment was made was domiciled in Pennsylvania or not, the assignment having been executed and delivered in that state, with nothing to indicate that it was to be performed elsewhere, it was to be regarded as a Pennsylvania contract.

Assignors for creditors doing business in New York state, who are residents of a state whose laws forbid the making of a preferential assignment and declare the same void, can make a valid preferential assignment in New York. *Smedley v. Smith*, 15 Daly, 421, 28 N. Y. S. R. 414, 8 N. Y. Supp. 100, Affirmed in 126 N. Y. 637, 27 N. E. 411. The personal property involved was in New York.

But an assignment for the benefit of creditors, executed in another state by a Michigan corporation, with express reference to Michigan, and intended to have its first operation in that state, is to be treated, in passing upon its validity, as if originally executed in Michigan. *Richardson v. Rogers*, 45 Mich. 591, 8 N. W. 520.

An assignment for the benefit of creditors by a resident of North Dakota, where all his property and business were, to an assignee residing in Minnesota, signed, sealed, and delivered in Minnesota, but taken to and recorded in North Dakota as required by the law of that state, is a North Dakota assignment, and its validity is to be determined by the law of that state. *McKibbin v. Ellingson*, 58 Minn. 205, 49 Am. St. Rep. 499, 59 N. W. 1003. The court said 65 L. R. A.

that this would be true, even if the assignment were to be regarded as having been executed in Minnesota; though, as a matter of fact, the court held that recording an assignment in North Dakota was the final act by which the assignment was executed.

Re Paige & S. Lumber Co. 31 Minn. 136, 16 N. W. 700, held that the statute of Minnesota declaring assignments void unless filed in the office of the clerk of the district court of the county where the assignor or assignors reside, did not apply to an assignment executed in another state by an unincorporated association where the principal place of business was in that state, although two of the members resided in Minnesota.

See also I. d., 1, (f), *supra*.

II. Assignments under insolvency or bankruptcy statutes.

a. General rule.

See, for the earlier cases, *note* to *Long v. Forrest*, 23 L. R. A. 33, I. b, 1; I. c; and, with respect to real property, II.

It will be seen by referring to that *note* that the general principle established by the American cases is that an assignment *in invitum*, including also those voluntarily made under a statute with bankruptcy features, does not pass the title either to real or personal property in another state,—at least as against creditors of that state, or creditors of a third state. This general principle is also supported by the later cases. Thus:

A voluntary or common-law assignment, made in the state of the assignor's domicil, will be respected in other states, except so far as it comes in conflict with the rights of local creditors, or with the laws of public policy of the state in which it is sought to be enforced; but the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing doctrine is that conveyance under a state insolvent law operates only upon property within the territory of that state, and that, with respect to property in other states, it is given only such effect as the laws of such state permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situate in another state. Nor, as to personal property,

laws shall be the only rule observed in such cases. But when it has not done so the general rule is that the nature, the obligation, and the interpretation of personal contracts and contracts concerning movable property are governed, in such a state, by the laws of the place where they are made, unless the parties at the time of making them have some other law in view. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 458, 32 L. ed. 798, 9 Sup. Ct. Rep. 478. Such law governs, in such cases, not because it has any extraterritorial force, but by permission, upon a principle of justice and comity. But this rule has its exceptions. There are five instances in which the state of the forum will not enforce the foreign law: "(1) Where the enforcement of the

foreign law would contravene some established and important policy of the state of the forum; (2) where the enforcement of such foreign law would involve injustice and injury to the people of the forum; (3) where such enforcement would contravene the canons of morality established by civilized society; (4) where the foreign law is penal in its nature; and (5) where the question relates to real property." Minor, Conf. L. §§ 5, 13.

It follows, then, that where the owner undertakes, in one state, according to its laws, to mortgage personal property in another state, and the mortgagee attempts to enforce the mortgage in the actual situs of the property against third parties domiciled there, the laws of which situs conflict with

will the title acquired by it prevail against the rights of attaching creditors under the laws of the state where the property is actually situated. *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545.

The distinction between a voluntary conveyance by the owner and an involuntary one, or one made by operation of statute, is universally recognized. The latter class of conveyance has no extraterritorial effect on property in a state other than that where made. *Byers v. Tabb*, 76 Miss. 843, 25 So. 492.

Involuntary assignments have no operation out of the state under whose laws they are made. *Williams v. Kemper, H. & McD.* Dry Goods Co. 4 Okla. 145, 43 Pac. 1148.

An attachment will be upheld as against a prior assignment for the benefit of creditors in another state, which is in fact a transfer *in invitum* under insolvent laws. *Barth v. Backus*, 140 N. Y. 230, 23 L. R. A. 47, 37 Am. St. Rep. 545, 35 N. E. 425.

An assignment by a court of insolvency does not, of its own force, convey to assignees appointed by the court the title to lands situated in another state, unless the laws of the latter state give it such effect. *Chipman v. Peabody*, 159 Mass. 420, 38 Am. St. Rep. 437, 34 N. E. 563.

Whether real property is subject to attachment or levy by creditors, notwithstanding an assignment under a bankruptcy law made in another state, is to be determined exclusively by the *lex rei sitæ*. *Jenks v. Ludden*, 34 Minn. 482, 27 N. W. 188. This was said by a court of Minnesota with reference to the effect of insolvency proceedings in that state upon the title to real property in Wisconsin.

Where there are two insolventcies of the same person in different jurisdictions, the title of the assignee to the land of the debtor situated in one jurisdiction must be determined by the law of that jurisdiction; and where a mortgage of land in Maine was given by a Massachusetts debtor to a Massachusetts creditor to secure a pre-existing debt within six months of insolvency proceedings in Massachusetts, which mortgage, by the law of Maine, was good as against the same assignee appointed by the law of Maine, it was held that the mortgage could not be avoided by him as assignee in Massachusetts. *Chipman v. Peabody*, 159 Mass. 420, 38 Am. St. Rep. 437, 34 N. E. 563.

The rule established by the foregoing case is 65 L. R. A.

not a mere rule of public policy of the state where the property is situated, and as such to be applied only when the question arises in an action in that state; but is a general principle of private international law, to be applied wherever the action is brought.

Thus, in *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545, where the rule was applied, the action was brought in a Federal court sitting in Minnesota, where the assignment was made, to recover from the New York creditors the value of the property which they had attached. See also *Jenks v. Ludden*, 34 Minn. 482, 27 N. W. 188, *infra*.

The execution of an assignment by a resident of Minnesota under the Minnesota insolvent law (a bankrupt act) does not justify a court of that state in enjoining another citizen of that state from enforcing an attachment lien previously acquired by him on real property of the assignor in Wisconsin, although the assignment would have the effect to dissolve such an attachment upon property in Minnesota, where such creditor has not participated in the insolvency proceedings, and there are other creditors, citizens of Wisconsin, who have obtained attachment liens upon the same property, and other general creditors who are residents of a third state. *Jenks v. Ludden*, 34 Minn. 482, 27 N. W. 188. The decision is upon the ground that the assignment does not, of itself, operate to dissolve the attachment upon the Wisconsin real estate, and that, in any event, the attachment by the citizens of Wisconsin would take precedence, and that the courts of Wisconsin would probably, or at least might, hold that the creditors who were residents of the third state could acquire liens on the property paramount to the rights of the assignee under the assignment.

Where, however, a nonresident creditor voluntarily becomes a party to the insolvency proceedings, he thereby elects to take advantage of, and become bound by, those proceedings, and cannot thereafter resort to remedies against the property of the insolvent in other states, to which otherwise he would have a right of recourse. *Gerding v. East Tennessee Land Co.* 185 Mass. 380, 70 N. E. 206; *Wilson v. Keels*, 54 S. C. 545, 71 Am. St. Rep. 816, 32 S. E. 702.

b. *Choses in action.*

See, for earlier cases, *note* to *Long v. Forrest*, 23 L. R. A. 33, 1 b. c.

The rule stated in the last section is applica-

the *lex loci contractus*, the law of the forum will govern. The reason of this rule is, the state of the forum, as before stated, has the right to regulate the transfer of property in its bounds for the purpose of protecting its citizens, and to enforce the laws enacted for that purpose, in such cases. As a general rule, no injustice can be done to the parties by requiring them to conform to such laws. On the contrary, citizens of the situs of the property might be greatly injured if it was not made their duty to do so. They have no just cause of complaint. In sending their property into a state, they impliedly submit to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where they reside. The observance of comity towards other states, to the unjust injury of citizens of the forum, cannot be reasonably expected or required. What we have said in this connection applies only

when the actual situs of the property and the forum are the same. *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Denny v. Faulkner*, 22 Kan. 89, 98; *Minor*, Conf. L. § 14.

"There is usually no difficulty in ascertaining the actual situs of tangible chattels, whenever it becomes necessary to discriminate between the actual and legal situs thereof." "But with respect to intangible chattels and choses in actions, such as bonds, notes, bills of exchange, accounts, and debts of all sorts," the decisions of courts present some difficulty.

The terms or phrases "choses in actions" and "debts" are used by courts to represent the same thing when viewed from opposite sides. "The chose in action is the right of the creditor to be paid, while the debt is the obligation of the debtor to pay." As

ble, not only to real property and chattels, but also to choses in action.

In *Rhawn v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691, it was argued that the situs of the garnished debt was at the residence of the insolvent in Pennsylvania, to whom it was payable. The court, however, said that it was not important whether the debt was strictly in Pennsylvania or not at the time the insolvency proceedings were instituted, since the parties owing the debt resided in Illinois, and the fund was in that state, and was liable, under its laws, to attachment, and the trustees in insolvency under the law of Pennsylvania could only take subject to the remedies provided by the laws where the fund had an actual existence.

In *King v. Cross*, 175 U. S. 396, 44 L. ed. 211, 20 Sup. Ct. Rep. 131, an attempt was made to avoid the effect of the rule that a debt due by a resident to a nonresident is subject to trustee or garnishment process at the instance of a creditor of the latter, upon the ground that the debt in question had, prior to the garnishment, been vested in the court of insolvency of the domicile of the principal defendant by the institution of insolvency proceedings against him. It was argued that a mere credit, though subject to attachment or trustee process at the residence of the debtor, is governed by a different rule from that which controls tangible property; and that the situs of such claim—at least for the purpose of insolvency proceedings,—is at the domicile of the creditor, and passes to the custody of the insolvent court, so that the principle that insolvency proceedings have no extraterritorial operation does not apply. The point, however, was not decided by the court, as the case was disposed of upon another ground.

c. Discrimination between residents and non-residents.

For earlier cases, see note to *Long v. Forrest*, 23 L. R. A. 33, I. b, 2, 3, 4.

Many of the cases cited in the earlier note make an exception to the rule denying the extraterritorial effect of such assignments when the attacking creditor is a resident of the jurisdiction. 65 L. R. A.

in which the insolvency transfer is made. Thus, *Long v. Forrest*, 23 L. R. A. 33, held that citizens of a foreign state will not be aided by the courts of Pennsylvania to obtain, by garnishment, preference of their claims against a foreign debtor in disregard of proceedings in his own country for the sequestration of his estate, and the appointment of a trustee thereof in bankruptcy. In this case the attacking creditors were domiciled in Canada, the defendants in attachment were citizens of Scotland, and the proceedings for the sequestration of their estate was had in that country, and the garnishees were citizens of Pennsylvania.

So, the case next cited seems to assume that, under ordinary circumstances, the position of an attacking creditor who is a resident of the state in which the insolvency proceedings were instituted is less favorable than that of a resident of the forum.

A sale to a resident by a nonresident, of notes against another nonresident, at a discount, and with a guaranty against loss or expense in collection, which is made to avoid the insolvent law of the state where the other parties reside, will not give the transferee, as an attaching creditor, a position superior to that of his nonresident assignor, but his rights will be subject to such insolvent law. *Crippen v. Rogers*, 67 N. H. 207, 25 L. R. A. 821, 30 Atl. 346.

Whatever may be true of a compulsory assignment for creditors executed to a receiver in another state, pursuant to a decree of a court of that state, when credits of the assignor are attached in Massachusetts by inhabitants of the latter state, a court of Massachusetts will not protect, as against the rights of the assignee, an attachment made by an inhabitant of a third state after the assignment. *Witters v. Globe Sav. Bank*, 171 Mass. 425, 50 N. E. 932. The court did not undertake to decide whether such assignment is to be regarded as having the effect of a voluntary assignment, or of a judicial or statutory assignment.

The tendency of the later cases, however, is to repudiate any distinction based on the residence of the attacking creditors, and to deny the effect of the insolvency or bankruptcy proceedings either upon real or personal property,

said by Prof. Minor: "The chose in action, or right of the creditor, is a personal right which adheres to him wherever his situs may be. It may for some purposes be his legal situs (or domicile); for others, his actual situs. Just as, in the case of tangible chattels, though the title thereto follows the owner, and its transfer will be regulated by the law of the owner's situs, yet his or his transferee's ability to enforce that title may be in the exceptional cases determinable by a different system of law, should the chattels be actually situated elsewhere. So, also, in the case of debts, though the right to enforce them follows the owner (the creditor), and his transfer is therefore to be governed by the law of his situs, actual or legal, yet his or his transferee's ability to enforce that right may depend upon another jurisdiction and system of law, if he has to resort to another state to sue the debtor. In other words, though the situs of the creditor's

right follows the creditor, the situs of the debtor's obligation follows the debtor, in the sense that the debtor's legal obligation exists only in the state where it can be enforced against him. The debtor's obligation may be enforced in a proceeding *in rem* in any state where he has property, though he be absent or a nonresident; or, if in a proceeding *in personam*, the debtor must have been actually found within the court's jurisdiction, and process served upon him there, or else he must have voluntarily appeared. It is not essential that the debtor's obligation should be enforced where he resides, though that will ordinarily be the place of its enforcement. It will be seen, therefore, that, while the situs of the creditor's right (chose in action) follows the creditor, and corresponds to the legal situs of tangible chattels, the situs of the debtor's obligation follows the actual situs of the debtor, or of his property (in case a pro-

whether the attacking creditor is a resident of the state where the proceedings were instituted, of the state where the property is situated or the insolvent's debtor resides, or of a third state.

In *Barth v. Backus*, 140 N. Y. 230, 23 L. R. A. 47, 37 Am. St. Rep. 545, 35 N. E. 425, where an assignment, voluntarily made under the law of Wisconsin, was held invalid, even as against a Wisconsin creditor, because of its bankruptcy provision, the court said: "In some of the states which refuse to recognize the validity of the title of a foreign assignee, even in case of voluntary assignment, where it comes in conflict with the claims of domestic creditors, a distinction is made; and it is held that, where the domicile of the foreign assignee and the creditor is the same, the latter will be bound by the title of the former, good by the law of the common domicile (*May v. Wannemacher*, 111 Mass. 202; *Sanderson v. Bradford*, 10 N. H. 260; *Moore v. Bonnell*, 31 N. J. L. 90). The principle of comity in these states is held to apply so as to subject nonresidents to the operation of the foreign law, but not so as to prevent domestic creditors from pursuing their remedy in defiance of the foreign assignment. . . . The question is not an open one in this state. We have refused to adopt the distinction made in some of the states, and have placed the right of a creditor coming here from the state of a common domicile upon the same footing as that of a citizen or resident creditor, and have sustained the lien of an attachment issued here at the instance of a foreign creditor, after proceedings in insolvency had been instituted in the state of the common domicile of the insolvent and creditor."

The Minnesota supreme court, in *Jenks v. Ludden*, 34 Minn. 482, 27 N. W. 188, speaking of the effect of insolvency proceedings in one state, upon property in another, said: "Notwithstanding that a contrary doctrine, narrow and provincial as we think, and of questionable constitutionality, has heretofore sometimes obtained, yet we think we may lay it down as now reasonably well settled that, when once in court and accepted as a suitor, neither the law, nor the court administering it, will make any 65 L. R. A.

distinction between citizens of their own state and those of another, but that a citizen of one state, rightfully in court, pursuing a remedy given by the laws of another state, may enforce that remedy to the same extent and in the same manner, and with the same priority of lien, as a citizen of the forum."

The court had particular reference to a citizen of a third state, but it did not refer to any distinction between such a person and a citizen of the state in which the insolvency proceedings are pending.

It will be observed from the two cases next cited that the courts of Illinois, which recognize the distinction based on residence as applied to voluntary assignments, repudiate it as applied to assignments *in invitum*.

An indebtedness due from a resident of Illinois to a resident of Pennsylvania does not pass to trustees in insolvency of the latter appointed under and pursuant to a statute of Pennsylvania, even as against a Pennsylvania creditor who garnishes the debt in Illinois. *Rhawn v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691. The decision in this case rests upon the distinction between voluntary assignments by acts of parties, and involuntary assignments by acts of law. The court disapproved of the decision in *Elner v. Beste*, 32 Mo. 240, 82 Am. Dec. 129.

If an assignment for creditors is not voluntary on the part of the debtor, but statutory, the conveyance will be treated as made by operation of law and as inoperative in this state as against either foreign or domestic creditors. *Townsend v. Cox*, 151 Ill. 62, 37 N. E. 689. Real property only was involved in this case.

See also *Franzen v. Hutchinson*, 94 Iowa, 95, 62 N. W. 698, 1. b. *supra*.

d. Right of assignee to sue in other state.

For earlier cases, see note to *Long v. Forrest*, 23 L. R. A. 33, 42, 1. b. 6.

An assignee of an insolvent debtor under the laws of Wisconsin cannot bring a suit in his own name in the courts of Illinois upon a non-assignable chose in action. The *lex fori* governs. *Barth v. Iroquois Furnace Co.* 63 Ill. App. 323.

G. H. P.

ceeding *in rem* to enforce it), and corresponds to the actual situs of tangible chattels. . . . The analogy between the situs of tangible chattels and the situs of debts is complete at every point. The legal situs of a debt, as in case of chattels, is the actual or legal situs of the owner (the creditor), according as the particular transaction in question involves the creditor's voluntary or involuntary participation therein. The actual situs of the debt at a particular moment is the place where payment thereof may at that moment be enforced, whether by proceeding *in rem* or by proceeding *in personam*. If the former procedure is used, the actual situs of the debt will be the actual situs of the *res* subjected to its payment; if the latter, it will be the domicile of the debtor, or some other state, according as he is sued in his own state, or in the courts of another, which have acquired jurisdiction over him by due process of law." Minor, Conf. L. § 121; Waples, Debtor & Creditor, §§ 31, 41, 46, 67, 72, 80, 81, 83, 89, 148, 180, 278.

We now apply the law as hereinbefore stated to the facts in this case. The deeds of trust and assignment were executed in the state of Missouri. The J. F. Crawford Lumber Company, which executed both the deeds, was a corporation organized under the laws of Missouri, and had its domicile in that state. Frank E. Gates, the trustee in one of the deeds, and William E. Hill, the assignee in the other, were citizens and residents of said state. On the 1st day of July, 1897, the J. F. Crawford Lumber Company, while in full dominion and control of its property, conveyed the same, real and personal, to Frank E. Gates, in trust, to secure the payment of certain debts, on condition that when these debts were paid the conveyance should be void, and therein provided that the trustee should take immediate possession of all the property, and make an inventory of the personal assets, and proceed at once to collect the choses in action and judgments thereby transferred, and sell the remainder of said property, and hold the proceeds of the collections and sales until all of the debts secured should become due and payable, and then, if said debts were not paid, appropriate the same to the payment of the expenses of the trust and the debts secured, so far as the same would extend, and then pay the surplus, if any, to the J. F. Crawford Lumber Company. The majority of the debts secured became due and payable after the execution of the deed of trust; the last one falling due on the 28th day of October, 1897. Many of these debts were evidenced by promissory notes or bills of exchange, upon which one or more of the directors of the Crawford Lumber

Company were individually indorsers or sureties.

The statute of Missouri which was read as evidence in this case provides: "Every voluntary assignment of lands, tenements, goods, chattels, effects, and credits made by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor in proportion to their respective claims; and every provision in any assignment providing for the payment of one debt or liability in preference to another shall be void, and all debts and liabilities (including judgments entered by confession thirty days previous to such assignment) shall be paid *pro rata* from the assets thereof," etc. Rev. Stat. 1889, p. 198, § 424.

In *Jaffrey v. Mathews*, 120 Mo. 317, 329, 25 S. W. 187, the opinion of the court in which was, by agreement of parties, read as evidence in this case of the laws of Missouri, the instrument in question was in substance the same as the deed of trust in the case at bar; and the property thereby transferred was all the property that Mathews, who executed it, owned. The court held that "an insolvent debtor can mortgage or pledge all or any part of his property for the benefit of one or more of his creditors," that such privilege was not abridged by the statute copied in this opinion; and that "the fact that a chattel deed of trust given to secure notes payable to part only of the grantor's creditors empowers the trustee to take possession of the property and sell it at private sale, and hold the proceeds until the maturity of all notes secured, does not change its character as a security, and make it a general assignment."

In *Waggoner-Gates Mill. Co. v. Ziegler-Zaiss Commission Co.* 128 Mo. 473, 31 S. W. 28, the opinion of the court in which was also read, by agreement of parties, as evidence of the laws of Missouri, the court held that "an insolvent corporation, having possession and control of its property, may, in the absence of fraud or statutory restriction, prefer a bona fide creditor by a deed of trust on its property, and that the execution of a general assignment of the same property immediately thereafter, and on the same day, will not invalidate the preference," and "that bona fide creditors of such corporation, who are not stockholders or directors, are not precluded from taking security for their claims," although some of the directors are individually indorsers or sureties on the notes by which the same (claims) are evidenced.

The deeds of trust and assignment involved in the case at bar were unquestionably governed by the laws of Missouri as to their nature, character, and interpretation.

According to these laws the former was a valid deed of trust. It was intended to be a mortgage to secure the payment of debts. The J. F. Crawford Lumber Company had, by its terms, until the 28th day of October, 1897, to redeem the property conveyed, or the proceeds of the collection or sale thereof.

According to the test fixed by this court to distinguish a mortgage from an assignment for the benefit of creditors, it was a mortgage, in this state. That test is, Was it the intention of the parties, at the time the instrument was executed, to divest the debtor of the title, and so make an appropriation of the property affected to the raising of a fund to pay debts? If it was not, it is not an assignment, but a mortgage, if its object was to secure the payment of debts, as in this case. *Robson v. Tomlinson*, 54 Ark. 229, 15 S. W. 456; *Richmond v. Mississippi Mills*, 52 Ark. 30, 4 L. R. A. 413, 11 S. W. 960; *Fecheimer v. Robertson*, 53 Ark. 101, 13 S. W. 423; *Bow v. Goodbar*, 54 Ark. 6, 14 S. W. 925; *Penzel Co. v. Jett*, 54 Ark. 428, 16 S. W. 120; *Wood v. Adler-Goldman Commission Co.* 59 Ark. 270, 27 S. W. 490; *Marquese v. Felsenthal*, 58 Ark. 293, 24 S. W. 493; *Smith v. Empire Lumber Co.* 57 Ark. 222, 21 S. W. 225; *Adler-Goldman Commission Co. v. Phillips*, 63 Ark. 40, 37 S. W. 297.

But it is contended by appellees that the act of the general assembly of this state entitled "An Act to Prevent Preference among the Creditors of Insolvent Corporations," approved April 14, 1893 (Acts 1893, p. 345), provides that no preferences shall be allowed among creditors of insolvent corporations, except for the wages of laborers and employees, and that therefore the deed of trust executed by the Crawford Lumber Company cannot be enforced by the courts of Arkansas against its citizens. But such preferences are not void, according to the act, and could not "be set aside unless complaint thereof be made within ninety days after the same is given or sought to be obtained." The act provides that "every preference obtained, or sought to be obtained, by any creditor of such corporation, whether by attachments, confession of judgment, or otherwise, and every preference sought to be given by such corporation to any of its creditors, in contemplation of insolvency, shall be set aside by the chancery court, and such creditor shall be required to relinquish his preference and accept his *pro rata* share in the distribution of the assets of such corporation." But can this be done in any manner, except by proceedings instituted by a creditor or stockholder in a chancery court "for the winding up of the affairs of the corporation?" Does the act apply to for-

eign corporations? See *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, 37 Am. St. Rep. 601, 35 N. E. 932. But the decision of these questions is not necessary in this case.

As before stated, a part of the property mortgaged by the deed of trust was a debt of the Creel Lumber Company. That debt was garnished by appellees, and was afterwards converted into money, which is now held subject to the order of the court in this action, and is the subject-matter in controversy.

The actual situs of the debt was Columbia county, in this state. For the debtor did business in that county, and, under the laws of this state, could be sued and garnished there. Was it (the debt) subject to control of the laws regulating mortgages in this state? It was, if such laws apply to mortgages of choses in action. *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Denny v. Faulkner*, 22 Kan. 89, 98.

For the protection of creditors and subsequent purchasers, the statutes of this state provide: "Sec. 5090. All mortgages, whether for real or personal estate, shall be proven and acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proven or acknowledged; and when so proven or acknowledged shall be recorded, if for lands in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides. Provided, if the mortgagor is a nonresident of this state, the mortgage shall be recorded in the county in which the property is situated at the time the mortgage is executed. Sec. 5091. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage." *Sandels & Hill's Digest*, §§ 5090, 5091.

The deed of trust in question is a mortgage, within the meaning of these statutes. *Cross v. Fombey*, 54 Ark. 179, 15 S. W. 461. Do they apply to choses in action?

Decisions of similar questions by courts of other states, as a rule, rest upon the words of their statutes. As proof of this fact, we cite a few cases. A statute of Michigan provided that "every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels . . . which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession, of the thing mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, un-

less the mortgage, or a true copy thereof," shall be filed for record. In *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.* 84 Mich. 364, 388, 47 N. W. 502, the court held that this statute applied only to goods and chattels which are capable of delivery, and not to accounts; that an account was not capable of delivery.

The New York court of appeals, in *Booth v. Kehoe*, 71 N. Y. 341, held that a similar statute related "to goods and chattels which can be removed from one place to another, and the possession thereof changed, and not to chattels real, or a chose in action."

Section 5, chap. 74, of the Revised Statutes of 1836 of Massachusetts is as follows: "No mortgage of personal property, hereafter made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides." In construing this statute in *Marsh v. Woodbury*, 1 Met. 436, the court said: "The court are of opinion that the language of the statute, taken with the context and subject-matter, applies only to goods and chattels capable of delivery, and not to the defeasible or conditional assignment of a chose in action."

The courts of other states have held that similar statutes did not apply to choses in action, holding that the words of such statutes excluded them from their operation. *Williamson v. New Jersey Southern R. Co.* 26 N. J. Eq. 398; *Monroe v. Hamilton*, 60 Ala. 226, 233; *Bank of United States v. Huth*, 4 B. Mon. 423, 448; *Kirkland v. Brune*, 31 Gratt. 126, 127; *Tingle v. Fisher*, 20 W. Va. 497.

Section 5090 of the statutes of this state was enacted without the proviso which now appears as a part of it. There were no words in it or any other section which limited its application to any particular personal property. The words used apply to

and include all personal property of every description, including choses in action, such as accounts. After this court held, in *Watson v. Thompson Lumber Co.* 49 Ark. 83, 4 S. W. 62, that there was no authority for filing or recording a mortgage that was executed by a nonresident of this state, the proviso was added, presumably, for the sole purpose of authorizing such mortgages to be recorded, and fixing the place of record.

In construing § 5090 and the section following, this court has repeatedly and uniformly held that "a mortgage is good between the parties though not acknowledged and recorded, but . . . constitutes no lien upon the mortgaged property as against strangers, . . . even though they may have actual notice of its existence." *Main v. Alexander*, 9 Ark. 112, 47 Am. Dec. 732; *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Hannah v. Carrington*, 18 Ark. 105; *Watson v. Thompson Lumber Co.* 49 Ark. 83, 4 S. W. 62; *Ringo v. Wing*, 49 Ark. 457, 5 S. W. 787. According to this construction, the filing for record is a prerequisite to the creation of a lien on any property by mortgage as against third parties.

The debt in controversy in this action was an account of the Creel Lumber Company with the Crawford Lumber Company. It had been delivered to Smead & Powell, attorneys, for collection. They instituted suit for that purpose. After the deed of trust was executed, the parties to the suit were not changed. It was never reduced to possession by the trustee, and the deed of trust was not filed for record until after the garnishment of the debt. The result is, the lien of the appellees is prior and superior to that acquired by the deed of trust; the law of the forum and the situs of the debt governing. *Warner v. Jaffray*, 96 N. Y. 248, 254, 257, 48 Am. Rep. 616; *Denny v. Faulkner*, 22 Kan. 98.

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

Lottie F. POWERS, *Plff. in Err.*,
v.

MASSACHUSETTS HOMŒOPATHIC HOSPITAL.

(47 C. C. A. 122, 109 Fed. 294.)

A hospital organized exclusively for charity is not liable for injury to a

patient caused by the negligence of its carefully selected nurse, even though a charge is made and paid for the services rendered to the patient injured,—at least if the amount paid does not make full pecuniary compensation for the services rendered; since an agreement to hold the hospital harmless for the acts of its servants arises, by necessary implication, from the relation of the parties.

(May 27, 1901.)

NOTE.—As to liability of charitable institutions or hospitals for negligence, see also, in this series, *note* to *Williamson v. Louisville Industrial School of Reform*, 23 L. R. A. 200; also *Union P. R. Co. v. Artist*, 23 L. R. A. 581; 63 L. R. A.

Downs v. Harper Hospital, 25 L. R. A. 602; *Elghmy v. Union P. R. Co.* 27 L. R. A. 296; and *Hearns v. Waterbury Hospital*, 31 L. R. A. 224.

ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of defendant in an action brought to recover damages for negligent injuries inflicted upon plaintiff, for which defendant was alleged to have been responsible. *Affirmed.*

The facts are stated in the opinion.

Argued before *Colt*, Circuit Judge, and *Brown* and *Lowell*, District Judges.

Messrs. Thomas H. Russell and Arthur H. Russell, for plaintiff in error:

Calling a corporation a charitable institution does not necessarily make it so. What is a charity, and what is not, depend on the acts and doings of the corporation seeking to protect itself when sued for alleged negligent acts by covering itself with a mantle and marking it charity.

Donnelly v. Boston Catholic Cemetery Asso. 146 Mass. 163, 15 N. E. 505.

The fact that the funds received were actually applied, to a considerable extent, to charity is no more material than evidence of a similar application of a part of his income by a private citizen would be in a suit against him.

Chapin v. Holyoke Y. M. C. A. 165 Mass. 280, 42 N. E. 1130; *Newcomb v. Boston Protective Department*, 151 Mass. 215, 6 L. R. A. 778, 24 N. E. 39; *Coe v. Washington Mills*, 149 Mass. 543, 21 N. E. 966.

In the case at bar the admission of any free patients was a matter of courtesy, and not of right, except as to twenty free beds, which were required to be maintained under § 2 of the act of 1890. This particular purpose could not change the general scheme of the corporation.

Atty. Gen. v. Federal Street Meeting-House, 3 Gray, 1.

Should the court consider that the defendant corporation is a public charitable institution, nevertheless it is responsible if it lays aside the protection of its charitable nature, and enters into contracts to render service.

Ward v. St. Vincent's Hospital, 39 App. Div. 624, 57 N. Y. Supp. 784; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675.

It is a question for the jury whether reasonable care has been used in selecting and obtaining skilful and careful attendants.

Union P. R. Co. v. Artist, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Van Tassel v. Manhattan Eye & Ear Hospital*, 39 N. Y. S. R. 781, 15 N. Y. Supp. 620; *Secord v. St. Paul, M. & M. R. Co.* 5 McCrary, 515, 18 Fed. 221.

The case last cited holds that a corporate body authorized to perform a work and receive tolls, although obtaining no profit for itself from such works, but collecting for the

maintenance of the work and the future benefit of the public, is responsible for injuries from improper performance of the work; and the funds held by the body must be used to discharge and satisfy any judgment obtained.

Mersey Docks & Harbour Board v. Gibbs, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, L. R. 1 H. L. 93, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872; *Coe v. Wise*, L. R. 1 Q. B. 711, 7 Best & S. 831, 35 L. J. Q. B. N. S. 262, 14 L. T. N. S. 891, 14 Week. Rep. 865; *Levingston v. Lurgan Union*, Ir. Rep. 2 C. L. 202, 18 L. T. N. S. 338; *Foreman v. Canterbury*, L. R. 6 Q. B. 214, 40 L. J. Q. B. N. S. 138, 24 L. T. N. S. 385, 19 Week. Rep. 719; *Donaldson v. General Public Hospital*, 30 N. B. 279.

The fact that the corporation had no capital stock, no provisions for making dividends or profits, and was carried on without any expectation of ultimate profit on the part of those interested, or of receiving compensation for their own benefit, is of no avail.

Donnelly v. Boston Catholic Cemetery Asso. 146 Mass. 163, 15 N. E. 505; *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280, 42 N. E. 1130; *Newcomb v. Boston Protective Department*, 151 Mass. 215, 6 L. R. A. 778, 24 N. E. 39.

Messrs. Charles P. Greenough and Julian Codman, for defendant in error:

The defendant is a charitable corporation.

Acts 1855, chap. 411; Acts 1890, chap. 358; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Jackson v. Phillips*, 14 Allen, 556; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L. R. A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; *Hearn v. Waterbury Hospital*, 66 Conn. 99, 31 L. R. A. 224, 33 Atl. 595; *Union P. R. Co. v. Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Heriot's Hospital v. Ross*, 12 Clark & F. 507.

The fact that the plaintiff agreed to pay for her room at the hospital does not affect the status of the defendant corporation as a charitable corporation.

McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; *Gooch v. Association for Relief of Aged Indigent Females*, 109 Mass. 558; *Union P. R. Co. v. Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365.

In England no action for the negligence of its agents or servants can be maintained against a charitable institution of this character.

Heriot's Hospital v. Ross, 12 Clark & F. 507; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Benton v. City Hospital*, 140 Mass. 13,

54 Am. Rep. 436, 1 N. E. 836; *Hill v. Boston*, 122 Mass. 368, 23 Am. Rep. 332.

At most, such corporation can be held responsible for the negligence of the directors or trustees in failing to select proper servants, or to make suitable regulations for the management of their trust. The defendants are not responsible for the negligence of their nurses or servants provided due care has been used in their selection.

Union P. R. Co. v. Artist, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Pierce v. Union P. R. Co.* 13 C. C. A. 323, 32 U. S. App. 48, 66 Fed. 44; *Secord v. St. Paul, M. & M. R. Co.* 5 McCrary, 515, 18 Fed. 221; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; *O'Brien v. Cunard S. S. Co.* 154 Mass. 272, 13 L. R. A. 329, 28 N. E. 266; *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280, 42 N. E. 1130; *Joel v. Woman's Hospital*, 89 Hun, 73, 35 N. Y. Supp. 37; *Harris v. Woman's Hospital*, 27 Abb. N. C. 37, 14 N. Y. Supp. 881; *Van Tassell v. Manhattan Eye & Ear Hospital*, 39 N. Y. S. R. 781, 15 N. Y. Supp. 620; *Laubheim v. De Koninglyke Nederlandsche S. B. Maatschappy*, 107 N. Y. 228, 1 Am. St. Rep. 815, 13 N. E. 781; *Allan v. State S. S. Co.* 132 N. Y. 91, 15 L. R. A. 166, 28 Am. St. Rep. 556, 30 N. E. 482; *Hass v. Missionary Soc.* 6 Misc. 281, 26 N. Y. Supp. 868; *Hearns v. Waterbury Hospital*, 66 Conn. 99, 31 L. R. A. 224, 33 Atl. 595; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L. R. A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan*, 141 Ind. 83, 27 L. R. A. 840, 50 Am. St. Rep. 313, 40 N. E. 138; *Quinn v. Kansas City, M. & B. R. Co.* 94 Tenn. 713, 28 L. R. A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L. R. A. 200, 44 Am. St. Rep. 243, 24 S. W. 1085.

Lowell, District Judge, delivered the opinion of the court:

This is a suit brought by a patient to recover damages for an injury alleged to have been sustained by the negligence of a nurse in the hospital. There was evidence that the plaintiff had a skin unusually sensitive, and that a rubber bag full of hot water was placed by the nurse against her side, and left there for some time. At the trial in the circuit court the learned judge ruled that the plaintiff could not recover, and directed a verdict for the defendant. 101 Fed. 896. To this ruling the plaintiff duly excepted.

That the defendant is a charitable cor-
65 L. R. A.

poration admits of no doubt. This was expressly recognized by the legislature of Massachusetts in chapter 358 of the Acts of 1890, and was decided in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, the defendant there differing from the defendant here in no respect material to this case.

The plaintiff was what is sometimes called a "paying patient," the rate of her payment being \$14 a week. Upon this ground her counsel has sought to distinguish her case from that of a patient in the hospital who pays nothing. In our opinion, the difference is immaterial. As has been said, the defendant was a charitable corporation; that is, a corporation organized exclusively for charity. That the ministrations of such a hospital should be confined exclusively to the indigent is not usual or desirable. Those of moderate means from necessity, and not a few rich people from choice, resort to great charitable hospitals for treatment,—especially in surgical cases. Throughout the world this is the custom in these institutions, whether they are maintained by individual, religious, or municipal charity. From patients who are not indigent, a payment is commonly permitted or required. Commonly, and in the case at bar quite manifestly, this payment does not make full pecuniary compensation for the services rendered. Those who make a considerable payment not infrequently receive in some respects a more expensive service than do those who make a small payment or none at all; but the payment required is usually calculated upon the patient's ability to pay, rather than upon the whole cost of the treatment he receives. That this was the defendant's rule appears plainly from its printed form of application, which it required all applicants to fill out alike, whether they paid something or nothing. In this form the inquiry concerning payment was stated as follows: "How much per week applicant can pay,"—thus indicating that the amount of the contribution was to be determined, not by the value or cost of the service rendered, but by the ability of the patient to aid the charitable purposes of the hospital. In our opinion, a paying patient in the defendant hospital, as well as a non-paying patient, seeks and receives the services of a public charity.

That such a hospital in its treatment of a rich patient shall be held to a greater degree of care than in its treatment of a pauper is not to be tolerated. Certain luxuries may be given the former which the latter does not get, and this for various reasons; but the degree of protection from unskilled and careless nurses must be the same in both cases. Again, it would be absurd to make

the defendant's liability for an accident, like that here alleged, depend upon the payment of that insignificant proportion of the cost of the service rendered which in some cases may properly be required from a poor man or woman. We are of opinion that this case stands as if the plaintiff had been admitted without any payment whatsoever.

We have to determine, then, if a patient admitted to a hospital maintained for charity can recover judgment against that hospital for injuries caused by the negligence of a nurse employed therein. There is a great weight of authority in favor of the defendant in the case put; but the courts have differed so widely in their reasoning that a somewhat extended examination is necessary, both of the cases decided and of the principles upon which they rest. The liability of the defendant for which the plaintiff contends is the liability of a master for the torts of his servant. "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, 265, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877. At one time it seems that the master's profit was deemed a necessary element. "The maxim of *respondent superior* is bottomed on this principle,—that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." *Hall v. Smith*, 2 Bing. 156, 160, 9 J. B. Moore, 226, 2 L. J. C. P. 113. As is said in Pollock, Torts, 4th ed. pp. 67, 88, this rule belongs wholly to the modern law, and no reason for it, at any rate no satisfying one, is commonly given in our books. It is in some sense an exceptional rule to begin with, and is itself subject to several exceptions. With some of these exceptions we have to concern ourselves.

Many cases hold that public or municipal corporations are not liable for some of the torts of their servants, though committed in the course of their service. Thus, in *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836, it was said: "The trustees are a body created for the performance of a duty which, under the authority of the statute, the city of Boston has assumed for the benefit of the public, and from the performance of which no profit or advantage is derived, either by the trustees or the city." In this case the trustees were held not liable for injury to a patient caused by the negligence of the superintendent. To the same general effect are *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; 65 L. R. A.

Maia v. Eastern State Hospital, 97 Va. 507, 47 L. R. A. 577, 34 S. E. 617; *Sherbourne v. Yuba County*, 21 Cal. 113, 81 Am. Dec. 151; *Murtaugh v. St. Louis*, 44 Mo. 479. The cases just cited all resemble the case at bar, in that the plaintiff there as here sought to recover for negligence or malpractice in a hospital not maintained for profit; but the principle upon which they rest has no essential connection with hospitals or malpractice, but is applicable equally to many other kinds of damage. Thus the leading case in Massachusetts upon the subject is *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, where the action was for damage caused by the defective construction of a schoolhouse, and the case most commonly arising is probably that concerned with damage caused by a defective highway. In different jurisdictions the liability of municipal corporations for the negligence of their employees is variously limited. *Shearm. & Redf. Neg.* §§ 253, 255, 289. See *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012. The liability is determined generally by the laws of the states establishing and regulating the municipal corporations in question. *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012. See *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212. The principle upon which the municipality is excused from liability for certain injuries done by its servants is this: The municipality is acting as an agency of the sovereign, and, thus acting, it enjoys some part of the sovereign's immunity from suit. The cases above referred to, however much they resemble the case at bar in some of their facts, yet have no bearing upon its decision. The defendant here is in no sense an agency of the sovereign. It is a public charity, but is not a political or municipal corporation. Yet, as some of the cases cited have been referred to in discussing the liability of public charities under private management like this defendant, it has seemed best to refer briefly to the cases in order to distinguish them. Certain English cases have been urged even more specifically. In *Dunoon v. Findlater*, 6 Clark & F. 894, 1 Rob. 911, it was held that the trustees appointed under a public-road act were not responsible for damage caused by the negligence of those employed in making or repairing the road. The decision might have been rested upon the principle just referred to regarding municipal and political bodies. In delivering his opinion, however, Lord Cottenham said: "The law is stated to be that the road fund is liable for the misconduct of any person employed by the road trustees. This direction assumes that the act done was an act not

within the provisions of the statute; that it was not done in consequence of those provisions; for otherwise the direction would be in that respect improper, since whatever is done under the authority of the statute gives no right of action. If that was not so, the result would be that all the damages, though not arising from any act done by the immediate authority of the road trustees, would be liable to be compensated out of the trust fund,—a proposition which certainly cannot be supported by the law which regulates the liability of master and servant.”

By this language, and other which need not be quoted, Lord Cottenham was supposed to have held that the action could not be maintained against the road trustees in their corporate capacity, for the reason that the fund in their hands was impressed with a trust incompatible with its distribution among persons damaged by the negligence of their servants. See *Heriot's Hospital v. Ross*, 12 Clark & F. 507, a case which will presently be discussed. While the point actually decided in *Duncan v. Findlater* has never been overruled (indeed, the House of Lords never overrules its own decisions); yet the principle supposed to be laid down by Lord Cottenham has been distinctly repudiated. *Mersey Docks & Harbour Board v. Gibbs*, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872. Whatever may be the limit of the liability of a political or municipal body in Great Britain for the torts of its servants, that limit is now in no way determined by any doctrine concerning the application of a trust fund. The historical origin of the doctrine may probably be found in *Russell v. Devon County*, 2 T. R. 667, 672, 1 Revised Rep. 585, and *Hall v. Smith*, 2 Bing. 156, 9 J. B. Moore, 226, 2 L. J. C. P. 113.

There is another class of cases in which the courts of this country have held that a railroad company, having in its regular employ physicians and surgeons whose duty to the corporation requires them to care for the sick and injured among the corporation's employees, is not liable to those employees for the malpractice or other negligence of these medical men. *Chicago, B. & Q. R. Co. v. Howard*, 45 Neb. 570, 63 N. W. 872; *Clark v. Missouri P. R. Co.* 48 Kan. 654, 29 Pac. 1138; *Quinn v. Kansas City, M. & B. R. Co.* 94 Tenn. 713, 28 L. R. A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036; *South Florida R. Co. v. Price*, 32 Fla. 46, 13 So. 638; *Eighmy v. Union P. R. Co.* 93 Iowa, 538, 27 L. R. A. 296, 61 N. W. 1056; *Union P. R. Co. v. Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365. The ob-

ligation of the railroad has been said to extend no further than the employment of doctors competent to do the work proposed. It has also been said that the doctor is not the servant of the corporation, for the reason that, in treating the patient, he does not take his orders from the corporation, but is guided altogether by his own judgment. “The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or, as it has been put, retains the power of controlling the work; and he who does work on those terms is in law a servant, for whose acts, neglects, and defaults, to the extent to be specified, the master is liable.” Pollock, *Torts*, 4th ed. p. 72.

There is force in the argument that, by the understanding of both railroad and employee, the latter, in permitting himself to be treated by the railroad's doctor, intrusts his person to the skill of the individual doctor, rather than to any supposed skill of the railroad: provided, at any rate, that the doctor selected by the railroad is skilled in his profession. The class of cases just mentioned has a close resemblance to the case at bar, though there are differences. In the cases cited, the negligence was that of the doctor; in the case at bar, that of a nurse. To hold a nurse to be the servant of the corporation is easier than to hold the doctor; and yet in neither case is the relation altogether that of ordinary service. A nurse, in her treatment of the patient, hardly takes her professional orders from the railroad's superintendent or from its ordinary officials, but rather from the doctor in charge. On the other hand, the railroad is not a charitable corporation, and in tendering medical aid to its employees, even when that is not called for by the contract of employment, may perhaps be supposed to act for purposes not purely charitable. So far as is known, there is no case which affirms the liability of the railroad under the circumstances stated. It has been held that the owners of a vessel, though required by statute to provide medical care and medicines for their passengers, are yet not liable for the malpractice of the doctor employed, provided there was no negligence in selecting him. *Allan v. State S. S. Co.* 132 N. Y. 91, 15 L. R. A. 166, 28 Am. St. Rep. 556, 30 N. E. 482. See *Laubheim v. De Koninglyke Nederlandsche S. B. Maatschappij*, 107 N. Y. 228, 1 Am. St. Rep. 816, 13 N. E. 781.

If the railroad and ship cases rest upon the principle that a doctor is not the serv-

ant of the corporation which employs him, they have little bearing on the case at bar. If, on the other hand, they rest upon a principle that those who voluntarily receive medical aid, gratuitously given, cannot recover against the giver except for his negligence in selecting incompetent agents, their bearing is considerable.

We come now to the cases precisely or substantially in point. In *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, it was held that a patient could not recover for damage caused by the negligence or incompetence of a hospital interne or by the negligence of an attending surgeon. In delivering the opinion of the court, Mr. Justice Devens said: "The defendant was a public charitable institution under the laws of the commonwealth. The object for which it was incorporated was to provide a general hospital for sick and insane persons. Stat. 1810, chap. 94. Its funds are derived from grants and donations made by the commonwealth from profits which it is entitled to receive from the Massachusetts Hospital Life Insurance Company and other companies incorporated in the commonwealth, and from the grants, devises, donations, bequests, and subscriptions of benevolent persons, and from the board of paying patients. While the price of board is placed as low as the funds of the hospital will permit, patients who are there received are expected to pay as nearly as possible according to their own circumstances and to the accommodations they receive. In addition to the accommodations provided for such patients, a certain number of free beds are furnished from the general funds of the institution, and from donations made especially for this object, the occupants of which are not expected to pay anything. Regulations of Hospital, chap. 15 §§ 1-4. Of one of these beds the plaintiff was an occupant. The corporation has no capital stock, no provision for making dividends or profits, and whatever it may receive from any source it holds in trust to be devoted to the object of sustaining the hospital and increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public and private charity; its affairs are conducted for a great public purpose,—that of administering to the comfort of the sick, without any expectation, on the part of those immediately interested in the corporation, of receiving any compensation which will enure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity. *Jackson v. Phillips*, 14 Allen, 539. The fact that its funds are supplemented by such amounts as

it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence. *Goock v. Association for Relief of Aged Indigent Females*, 109 Mass. 558. Nor does the fact that the trustees, through their agents, are themselves to determine who are to be the immediate objects of the charity, and that no person has individually a right to demand admission to its benefits, alter its character. All cannot participate in its benefits; the trustees are those to whom is confided the duty of selecting those who shall enjoy them, and prescribing the terms upon which they shall do so. If this trust is abused, the trustees are under the superintending power of this court as a court of equity, by virtue of its authority to correct all such abuse, and the interest of the public therein—that is to say, of the indefinite objects of the charity—may be represented by the attorney general. *Sanderson v. White*, 18 Pick. 328, 29 Am. Dec. 591; *Atty. Gen. v. Old South Soc.* 13 Allen, 474." See also *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836.

In other cases arising in Massachusetts corporations have been held liable for the expressed reason that they were not public charities. *Donnelly v. Boston Catholic Cemetery Asso.* 146 Mass. 163, 15 N. E. 505; *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280, 42 N. E. 1130; *Newcomb v. Boston Protective Department*, 151 Mass. 215, 6 L. R. A. 778, 24 N. E. 39.

Considerations similar to those quoted from *McDonald v. Massachusetts General Hospital* were suggested in *Union P. R. Co. v. Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Haas v. Missionary Soc.* 6 Misc. 281, 26 N. Y. Supp. 868; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L. R. A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; *Maia v. Eastern State Hospital*, 97 Va. 507, 47 L. R. A. 577, 34 S. E. 617; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495. As we understand the reasoning, it amounts to this: All the funds of a public charitable hospital are held in trust for a particular charitable purpose. It is a breach of trust to apply them to any other purpose. The payment of damages recovered for the negligence of the hospital servants is not within the terms of the trust. Hence the funds cannot be employed for that payment, and, if the funds cannot be so employed, a bare judgment against the corporation is nugatory, and should not be permitted.

If this proposition is true, then, as suggested by the learned judge who presided at the trial below, it follows that, if the defendant, by its servants, should negligently permit the staircase of a building from which it derives a profit to fall out of repair, it would not be liable for damage suffered by reason of this negligence. It follows, also, that a person walking along the street, and injured by the fall of a stone cornice negligently maintained above the sidewalk, can or cannot recover for the damage suffered, according as the building from which the stone falls is the property of a private individual or of a public charity. Indeed, the principle extends even further than this. There is no less impropriety in diverting funds impressed with a trust for the benefit of individuals than in diverting those impressed with a trust for a public charity. Yet the effectual, though indirect, liability of a private trust fund for the torts of those concerned in its management is undoubtedly recognized. It is true that a suit cannot be maintained against a trustee, as such, for torts committed in the management of the trust property. The suit is brought against the trustee as an individual. The judgment and execution run against him individually. When these are satisfied, however, the trustee is reimbursed from the trust estate, unless individually at fault. *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475; *Baker v. Tibbetts*, 162 Mass. 468, 39 N. E. 350; *Benett v. Wyndham*, 4 De G. F. & J. 259. The trust fund is protected from immediate levy to satisfy the execution, not because of its complete immunity, but rather from technical reasons connected with the legal estate of the trustee in the property. Its technical immunity affords it no ultimate protection. Indeed, the law on this point is so plain that no case can be found in the Massachusetts Reports expressly sanctioning the payment from a private trust fund of damages for a tort committed in the administration of the trust property, though the practice must be of weekly occurrence in this city of Boston. Practically the trustee generally satisfies the judgment by a payment directly from the trust fund, or compromises the claim without any judgment at all. The merely technical immunity of a private trust fund from execution upon a judgment recovered in an action of tort affords no reason for the real immunity of the funds of a charitable corporation where the technical considerations do not apply. That the funds of a public charity may be diverted to pay for some torts committed in the administration of the fund has often been decided. *Stewart v. Harvard College*, 12 Allen, 58; *Bishop v. Bedford Char-* 65 L. R. A.

ity, 1 El. & El. 697, 29 L. J. Q. B. N. S. 53, 6 Jur. N. S. 220, 1 L. T. N. S. 214, 8 Week. Rep. 115; *Blaechinska v. Howard Mission*, 56 Hun, 322, 9 N. Y. Supp. 679. See *Davis v. Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368; *Gilbert v. Trinity House*, L. R. 17 Q. B. Div. 795, 56 L. J. Q. B. N. S. 85, 35 Week. Rep. 30. If those in charge of a hospital unlawfully permit the escape of filth upon neighboring land, or close a right of way across the premises of the hospital, may not the corporation, in some cases at least, be sued in tort? We think the question answers itself.

If it be sought to charge a trust fund with payment for a tort committed by the trustee and unconnected with the trust property, doubtless the argument just quoted would be unanswerable. For example, if the trustees of the Massachusetts General Hospital hold a separate fund devised for the support and care of the insane at Waverly, that fund cannot be levied upon to satisfy a judgment recovered for an injury committed in the hospital maintained in Boston for medical and surgical cases, and *vice versa*; but, where a charitable corporation is otherwise liable for a tort committed in the administration of its trust, we see no sufficient reason why the trust fund may not be levied upon in satisfaction of the execution. We are unable, therefore, to agree with the proposition which altogether exempts a trust fund from liability for the torts of those concerned in its administration.

It remains to notice the case of *Heriot's Hospital v. Ross*, 12 Clark & F. 507, often cited in the reports of this country, though, strangely, little noticed by the courts of Great Britain. That was a suit against the trustees of a public charitable boarding school in their corporate capacity, for improper failure to admit an applicant to the benefit of the school. Lord Cottenham said: "The question then comes to this,—whether, by the law of Scotland, a person who claims damages from those who are managers of a trust fund, in respect of their management of that fund, can make it liable in payment. It is obvious that it would be a direct violation, in all cases, of the purposes of a trust, if this could be done; for there is not any person who ever created a trust fund that provided for the payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be

to divert it to a completely different purpose." P. 513.

The pursuer was seeking the benefit of the trust fund as one who had been entitled thereto under the deed of trust (though no longer entitled when the case was finally decided), and had been deprived of his rights by the trustees. In such case it may be that the doctrine of the inviolability of the trust fund is applicable, and that one who sues because of a diversion of trust funds cannot himself enforce a diversion. It must be admitted that the language of the opinions delivered by the law lords is not convincing, and that much reliance was placed upon those dicta in *Duncan v. Findlater* which were denied in *Mersey Docks & Harbour Board v. Gibbs*. If the case is rested upon a doctrine that, under no circumstances, can a trust fund be held liable for torts committed in its management, it stands alone in Great Britain.

In *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L. R. A. 224, 33 Atl. 595, a case like that at bar, the defendant was held not liable. There was much discussion of the English cases. In dealing with *Mersey Docks & Harbour Board v. Gibbs* and similar cases, we think the court did not distinguish clearly between public bodies and private corporations established for public charitable purposes. The exemption from liability declared in the Connecticut case was based upon the theory that "a charitable corporation like the defendant, whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty, is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong." P. 126, 66 Conn. p. 233, 31 L. R. A., and p. 604, 33 Atl. With the principle laid down thus broadly, we need not agree, in order to decide this case. If a servant of the defendant engaged in the care of Beck Hall, for example, injures a tenant by his negligence, and the act of negligence would render liable an ordinary landlord, it may well be that this defendant would be liable, as suggested by the learned judge before whom the trial was had below.

In *McDonald v. Massachusetts General Hospital* it was also said: "It might well be questioned whether any contract could be inferred between the plaintiff and defendant. It has offered to him freely those ministrations which, as the dispenser of a public charity, it has been able to provide for his comfort, and he has accepted them."

The plaintiff's action is an action of tort, and no contract as such need be proved. If a

person "once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards." *Osborne v. Morgan*, 130 Mass. 102, 103, 39 Am. Rep. 437.

We assume that there was evidence competent to establish a tort on the part of the nurse for which the plaintiff could recover against the nurse. We assume that there was evidence that the nurse was the servant of the defendant, and that her tort was committed in the course of the defendant's service. If this be true, it is hard to see that the plaintiff need allege or prove any contract in order to recover against the defendant. The first and third counts of the declaration allege a contract, it is true, and we are inclined to agree with the supreme court of Massachusetts that the contract there alleged is not proved; but the second count has no such allegations, and we do not wish to dispose of this case upon the ground that the plaintiff has erred in pleading by making an allegation which she has failed to prove, but which she might have omitted altogether. Doubtless there are many torts in which a contract or undertaking by the defendant is a necessary element. "For mere omission a man is not, generally speaking, held answerable. Not that the consequences or the moral gravity of an omission are necessarily less. One who refrains from stirring to help another may be, according to the circumstances, a man of common, though no more than common, good will and courage, a fool, a churl, a coward, or little better than a murderer. But, unless he is under some specific duty of action, his omission will not in any case be either an offence or a civil wrong. The law does not and cannot undertake to make men render active service to their neighbors at all times when a good or a brave man would do so. Some already existing relation of duty must be established, which relation will be found in most cases, though not in all, to depend on a foregoing voluntary act of the party held liable. He was not in the first instance bound to do anything at all, but by some independent motion of his own he has given hostages, so to speak, to the law." Pollock, *Torts*, 4th ed. p. 389. But here the defendant has moved; it has established a hospital, and has employed servants. If a person "once actually undertakes and enters upon the execution of a particular work, it is his

duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts." *Osborne v. Morgan*, 130 Mass. 102, 103, 39 Am. Rep. 437.

As Sir Frederick Pollock has said in the sentence immediately following the quotation given above: "Thus, I am not compelled to be a parent; but, if I am one, I must maintain my children. I am not compelled to employ servants; but, if I do, I must answer for their conduct in the course of their employment." The absence of a contract made with the defendant does not exempt it from liability. If, indeed, there can be shown an agreement by the plaintiff to hold the defendant harmless for the acts of its servants, then it follows that this action cannot be maintained, and we agree with the learned judge of the court below that this agreement arises by necessary implication from the relation of the parties. That a man is sometimes deemed to assume a risk of negligence, so that he cannot sue for damages caused by the negligence is familiar law. Such is the case of common employment, and such are the cases of athletic sports and the like, put by Pollock on page 160 *et seq.* Such is the case at bar. One who accepts the benefit either of a public or a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. We cannot perceive that the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans, perhaps giving less of personal devotion than did he, but, by combining their liberality, thus enabled to deal with suffering on a larger scale. If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or by their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other in-

dividual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected.

We have thus indicated the grounds upon which rests, in our opinion, the defendant's exemption from liability in this case. Though we feel constrained to differ from the reasoning followed by some other courts in reaching the same conclusion, we are not unmindful that the identity of conclusion reached, though by different roads, is a strong proof of its correctness. Doubtless a weight of authority is more overwhelming if it is identical in reasoning as well as in result, but identity of result is in itself no mean argument for its justice.

We come now to the few cases opposed to the weight of authority just referred to. The most important of these is *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675. There the declaration alleged that, in consideration of the plaintiff's promise to pay reasonable compensation, the defendant promised to supply him with such surgical and medical attention as were necessary for the care and cure of his injuries, but that the defendant's servants neglected properly to care for the plaintiff, or to supply proper surgical treatment to him, and "conducted" so carelessly and improperly and unskillfully that his arm had to be amputated. The declaration further alleged that the defendant, regardless of the obligation incumbent upon it, neglected to provide competent officers and servants to treat the plaintiff. Upon the evidence, the plaintiff's case was that he had been injured by the malpractice of an interne before the arrival of an experienced surgeon, who should have been summoned at once. There seems to have been some evidence that the interne was carelessly selected by the defendant, though this evidence is not stated in the report. The defendant was a public charitable institution, like the defendant in this case. The court held that the plaintiff could recover. Chief Justice Durfee, who delivered what appears to have been the opinion of the court, first discussed *Holliday v. St. Leonard*, 11 C. B. N. S. 192, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. Rep. 694, and showed that it had been overruled, and so afforded no support to *McDonald v. Massachusetts General Hospital*, which last case had been followed by the trial judge in *Glavin v. Rhode Island Hospital*. He next stated that a surgeon is not ordinarily the servant of a hospital, though the hospital may be liable for the torts of a surgeon carelessly appointed by it. So far as the

interne acted as a surgeon, the learned chief justice said that he also was not the defendant's servant, but that, in summoning or neglecting to summon a surgeon to treat the plaintiff, he did act as the defendant's servant. The defendant was liable for his malpractice if he was improperly appointed, and, in any case, for his neglect to summon a competent surgeon. The learned judge then pointed out that the defendant was not a public or municipal corporation, and denied the doctrine of the inviolability of trust funds, which we have already dealt with. With much of the reasoning of the court we agree, and we do not find it necessary to dissent from the result so far as concerns the liability of a corporation like this defendant for the consequences of its negligent selection of agents and servants. Our difference of conclusion regarding its liability for the torts of its properly chosen servants in the treatment of patients has already been shown to rest upon reasoning which was not brought to the attention of the supreme court of Rhode Island.

Although the decision in *Glavin v. Rhode Island Hospital* is to-day the law in Rhode Island, so far as the matter is unaffected by statute, yet it is to be noticed that the legislature promptly changed the law in reference to all institutions like the defendant. We do not deem this fact to have an important bearing upon the case at bar, though it indicates that the sense of the community is shocked by holding a public charitable hospital liable for a servant's negligence in caring for a patient.

In *Ward v. St. Vincent's Hospital*, 39 App. Div. 624, 57 N. Y. Supp. 784, the action was for a breach of an express contract by the defendant to furnish the plaintiff with a skilful, competent, and trained nurse. If this contract was proved, of course the

defendant was liable for the damage resulting from its breach, and that case has no bearing upon this. In *Donaldson v. General Public Hospital*, 30 N. B. 279, the declaration alleged damage caused by malpractice in letting the disease of a patient's eye progress to the destruction of the eye. The defendant demurred, and the majority of the court overruled the demurrer. One judge, in his opinion relied upon an express contract which, so far as can be learned from the report, was not alleged in the declaration. The physicians were considered the servants of the defendant. The ground of the decision appears to have been that the defendant could escape its liability only by maintaining successfully the principle supposed to be laid down by the *dicta* in *Duncan v. Findlater*. As those *dicta* had been denied by the highest authority, the plaintiff prevailed.

For the reasons above given, and in spite of the cases of *Glavin v. Rhode Island Hospital* and *Donaldson v. General Public Hospital*, we are of opinion that the defendant here was not liable to the plaintiff, and that the instructions given at the trial were correct. We are not called upon to decide if the defendant would have been liable upon allegation and proof that the nurse was incompetent, and that this incompetence was, or ought to have been, known to the defendant. As our conclusion agrees with that reached by the supreme court of Massachusetts, we need not consider how far we are bound by its decisions.

The judgment of the Circuit Court is affirmed, with costs.

Petition for writ of certiorari denied October 21, 1901.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

George A. FULLER, *Appt.*,
v.

Paul E. BERGER *et al.*

(56 C. C. A. 588, 120 Fed. 274.)

1. A patent on a bogus-coin detector for use on self-operating vending machines is not void for want of utility in the device because it has been used

only in connection with gambling appliances, where it is equally capable of use on machines used for legitimate purposes.

2. Equity will not refuse to grant relief against the infringement of a patent because the owner has devoted it wholly to an immoral use.

(*Grosscup, Circuit Judge, dissents.*)

(February 5, 1903.)

NOTE.—For a case in this series holding that a machine used only for gambling purposes cannot be patented, see *National Automatic Device Co. v. Lloyd*, 5 L. R. A. 784, with footnote as to necessity that invention be useful, to entitle inventor to patent.

As to when the courts will enforce gambling contracts, see, in this series, *Sprague v. War-*
65 L. R. A.

ren, 3 L. R. A. 679, and *note*; *Harvey v. Merrill*, 5 L. R. A. 200; *Snoddy v. American Nat. Bank*, 7 L. R. A. 705; *Jackson v. City Nat. Bank*, 9 L. R. A. 657; *White v. Wilson*, 37 L. R. A. 197; *Olson v. Sawyer Goodman Co.* 53 L. R. A. 648; *Appleton v. Maxwell*, 55 L. R. A. 93; and *Ullman v. St. Louis Fair Asso.* 56 L. R. A. 606.

APPEAL by plaintiff from a judgment of the Circuit Court of the United States for the Northern Division of the Northern District of Illinois in favor of defendants in an action brought to enjoin the alleged infringement of a patent. *Reversed.*

The facts are stated in the opinions.

Argued before *Jenkins*, *Grosscup*, and *Baker*, Circuit Judges.

Messrs. Dyrenforth, Dyrenforth, & Lee, for appellant:

A patented device must possess legal utility; that is, be capable of subserving some beneficial purpose as distinguished from a harmful or pernicious purpose.

Bedford v. Hunt, 1 Mason, 302, Fed. Cas. No. 1,217; *National Automatic Device Co. v. Lloyd*, 5 L. R. A. 784, 40 Fed. 89; *Reliance Novelty Co. v. Dworzek*, 80 Fed. 902; *Schultze v. Holtz*, 82 Fed. 448; *Walker, Patents*, p. 54, § 82.

A similar requirement has been made as to the subject-matter of a copyright.

Egbert v. Greenberg, 100 Fed. 447.

A patentee is under no obligation to place the patented device on the market.

Campbell Printing-Press & Mfg. Co. v. Manhattan R. Co. 49 Fed. 930; *Masseth v. Johnston*, 59 Fed. 613.

An infringer who applies a patented invention to a gambling machine may raise the issue of a legal utility, but cannot take advantage of his own wrong to compel the patentee to put the invention to actual beneficial use for the purpose of establishing utility.

Neilson v. Harford, 1 Webster, Pat. Cas. 295; 3 Brodix, 215.

Courts will not defeat a patent even though the patented device may be injurious, harmful, or pernicious under some circumstances. It is sufficient that it is capable of subserving a useful purpose.

Eppinger v. Richey, 14 Blatchf. 307, Fed. Cas. No. 4,505; *Miller & P. Mfg. Co. v. Du Brul*, 2 Bann. & Ard. 618, Fed. Cas. No. 9,597; *Robinson v. Sutter*, 11 Fed. 798; *Lorillard v. Dohan*, 20 Blatchf. 63, 9 Fed. 509; *Bonsack Mach. Co. v. Smith*, 70 Fed. 383; *Forehand v. Porter*, 15 Fed. 256; *Union Metallic Cartridge Co. v. United States Cartridge Co.* 7 Fed. 344; *White v. Allen*, 2 Cliff. 224, Fed. Cas. No. 17,535; *Smith v. Sharp's Rifle Mfg. Co.* 3 Blatchf. 545, Fed. Cas. No. 13,108; *White v. Boker*, 3 Fisher, Pat. Cas. 66, Fed. Cas. No. 17,537; *Smith v. Allen*, 2 Fisher, Pat. Cas. 572, Fed. Cas. No. 12,999; *Atlantic Dynamite Co. v. Climax Powder Mfg. Co.* 72 Fed. 925; *Atlantic Giant Powder Co. v. Dittmar Powder Mfg. Co.* 17 Blatchf. 531, 1 Fed. 328; *Collender v. Bailey*, 3 Bann. & Ard. 217, Fed. Cas. No. 2,998; *Brunswick-Balke-Collender Co. v. Brunswick*, 47 Fed. 218; *Frankfort Whiskey* 65 L. R. A.

Process Co. v. Mill Creek Distilling Co. 37 Fed. 533.

The degree of utility is immaterial so long as the invention is useful at all.

Gibbs v. Hoefner, 22 Blatchf. 36, 19 Fed. 323; *Hoffheins v. Brandt*, 3 Fisher, Pat. Cas. 218, Fed. Cas. No. 6,575; *Whitney v. Mowry*, 2 Bond, 45, 3 Fisher, Pat. Cas. 157, Fed. Cas. No. 17,592; *Tilghman v. Werk*, 1 Bond, 511, 2 Fisher, Pat. Cas. 229, Fed. Cas. No. 14,046; *Cook v. Ernest*, 5 Fisher, Pat. Cas. 396, Fed. Cas. No. 3,155; *Johnson v. Root*, 1 Fisher, Pat. Cas. 351, Fed. Cas. No. 7,411; *Wintermute v. Redington*, 1 Fisher, Pat. Cas. 239, Fed. Cas. No. 17,896; *Vance v. Campbell*, 1 Fisher, Pat. Cas. 483, Fed. Cas. No. 16,837; *Bell v. Daniels*, 1 Bond, 212, 1 Fisher, Pat. Cas. 372, Fed. Cas. No. 1,247; *Cox v. Griggs*, 1 Biss. 362, Fed. Cas. No. 3,302; *Wilbur v. Beecher*, 2 Blatchf. 132, Fed. Cas. No. 17,634; *Many v. Jagger*, 1 Blatchf. 372, Fed. Cas. No. 9,055; *Earle v. Sawyer*, 4 Mason, 1, Fed. Cas. No. 4,247; *Lowell v. Lewis*, 1 Mason, 182, Fed. Cas. No. 8,568; *Bedford v. Hunt*, 1 Mason, 302, Fed. Cas. No. 1,217; *Crouch v. Speer*, 1 Bann. & Ard. 145, Fed. Cas. No. 3,438; *Crompton v. Belknap Mills*, 3 Fisher, Pat. Cas. 536, Fed. Cas. No. 3,406; *Westlake v. Cartter* 6 Fisher, Pat. Cas. 519, Fed. Cas. No. 17,451.

A patentee who has himself applied the invention to a gambling device can, nevertheless, maintain a suit on his patent by proving that the invention possesses legal utility. The doctrine of unclean hands would not apply in such case, because a court of equity will not concern itself with matters *aliunde*, the real question at issue being the infringement of the patent, and not the general morals of the complainant.

Brown Saddle Co. v. Troxel, 98 Fed. 620; *National Folding-Box & Paper Co. v. Robertson*, 99 Fed. 985; *American Soda-Fountain Co. v. Green*, 69 Fed. 333; *Bonsack Mach. Co. v. Smith*, 70 Fed. 383; *Strait v. National Harrow Co.* 51 Fed. 819.

Messrs. Pierce & Fisher, for appellees:

Gambling apparatus lacks legal utility.

National Automatic Device Co. v. Lloyd, 5 L. R. A. 784, 40 Fed. 89; *Schultze v. Holtz*, 82 Fed. 448; *Reliance Novelty Co. v. Dworzek*, 80 Fed. 902.

A theoretic and wholly barren use of the coin detector on innocent machines cannot suffice to conceal its actual and substantial use as a part of the gambling outfit.

National Automatic Device Co. v. Lloyd, 5 L. R. A. 784, 40 Fed. 89; *Reliance Novelty Co. v. Dworzek*, 80 Fed. 902; *Egbert v. Greenberg*, 100 Fed. 447.

Under the statute, utility is made up of two components, *viz.*, (1) mechanical utility, and (2) moral utility.

National Automatic Device Co. v. Lloyd, 5 L. R. A. 784, 40 Fed. 89.

Baker, Circuit Judge, delivered the opinion of the court:

Appellant, complainant below, unsuccessfully sought to enjoin appellees from infringing letters patent, No. 613,844, on a bogus-coin detector for coin-operating vending machines. The letters were granted November 8, 1898, to the Mills Novelty Company, assignee of the inventor. While that company was the owner, the only practical use to which the detectors were put was to guard gambling machines, made and controlled by the company, from being operated by means of bogus coins. On December 8, 1899, the company assigned the patent to appellant, and, as a part of the same transaction, took from him a license to make and use the device. No one else used it by authority. Appellees, without license, applied it to gambling machines of their make. This suit was begun about a month after the assignment. The circumstances surrounding the assignment and attending the conduct of this litigation warranted the trial court in finding that the equities of the case should be determined as if the Mills Novelty Company had been complainant.

The defenses are two: That the patent is void for want of utility; and that, even if it is found not to be void, complainant has no standing because he comes into court with unclean hands, in this, that his suit is brought to enable the Mills Novelty Company to prevent another gambler from interfering with its illegal enterprises.

In support of their first contention, appellees cite *National Automatic Device Co. v. Lloyd*, 5 L. R. A. 784, 40 Fed. 89; *Reliance Novelty Co. v. Duorack*, 80 Fed. 902; *Schultze v. Holtz*, 82 Fed. 448; *Rickard v. Du Bon*, 43 C. C. A. 360, 103 Fed. 868; and *Mahler v. Animarium Co.* 49 C. C. A. 431, 111 Fed. 530. In the *Rickard Case*, involving a process for spotting tobacco leaves, and in the *Mahler Case*, concerning a cure-all device, the clear purpose and the sole use of the respective inventions were found to be to deceive and defraud the public. In the *Schultze Case* the fact that the invention had been used solely for gambling, and could not be put to any other use, was held to avoid the patent. In the two other cases, applications for injunctions were denied on showings that the devices had been used only for gambling purposes. But the court, in each case, went further and held the device to be wanting in utility, saying: "The patent has been very recently issued, and it is possible that a useful application may yet be found for it; but, as the case now stands, the only use to which the invention has been

put being for gambling purposes, I must hold that it is not a useful device within the meaning of the patent law." It may be doubted whether, in the latter holding, useableness (utility) and use (application) were not confounded; but, at all events, the courts in those cases came to the same end as the others in deciding that the respective patents were not for useful devices within the meaning of the patent law.

With regard to the defense of no utility (available equally at law and in equity), we hold that the true inquiry is, Was the government improvident in making the grant? Does the opposing evidence, the grant itself being prima facie proof of utility, go to the extent of establishing, not merely that the device has been used for pernicious purposes, but that it is incapable of serving any beneficial end? As the just criterion, we approve and adopt Mr. Walker's conclusion (Patents, 3d ed. § 82), with the additions to his text which we note by parentheses: "An important question, relevant to utility in this aspect, may hereafter arise and call for judicial decision. It is perhaps true, for example, that the invention of Colt's revolver was injurious to the morals and injurious to the health, and injurious to the good order of society. That instrument of death may have been injurious to morals, in tending to tempt and to promote the gratification of private revenge. It may have been injurious to health, in that it is very liable to accidental discharge, and to thereby cause wounds, and even homicide. It may also have been injurious to good order, especially in the newer parts of the country, because it facilitates and increases private warfare among frontiersmen. On the other hand, the revolver, by furnishing a ready means of self-defense, may sometimes have promoted morals and health and good order. By what test, therefore, is utility to be determined in such cases? Is it to be done by balancing the good functions with the evil functions? Or is everything useful within the meaning of the law, if it is used (or is designed and adapted to be used) to accomplish a good result, though in fact it is oftener used (or is as well or even better adapted to be used) to accomplish a bad one? Or is utility negated by the mere fact that the thing in question is sometimes injurious to morals, or to health, or to good order? The third hypothesis cannot stand, because if it could, it would be fatal to patents for steam engines, dynamos, electric railroads, and, indeed, many of the noblest inventions of the nineteenth century. The first hypothesis cannot stand, because, if it could it would make the validity of the patents to depend on a question of fact to which it would often be impossible

to give a reliable answer. The second hypothesis is the only one which is consistent with the reason of the case, and with the practical construction which the courts have given to the statutory requirement of utility."

We deem the additions to the second hypothesis necessary to a complete statement of the acceptable test, for, to continue with Colt's revolver as an example, if at the time of a suit for infringement the defendant should prove that the only uses to which "that instrument of death" had been put were vicious, the patent should not be held void for want of utility, if the court for itself should see, or be convinced by experts, that the instrument was susceptible of good uses, though in fact never put to such before the suit was begun. And, if utility is found, the cases seem to be uniform that courts will not set up a measure of utility which must be filled.

If the device here in question should be found insusceptible of other use than to guard gambling machines from being operated by means of bogus coins, we would be led to an outlook from which two interesting queries appear in view: (1) The statutes of Illinois, it is said, prohibit the use of coin-operated gambling machines, but not the manufacture or sale thereof. We are referred to statutes of other states, which, it is claimed, legitimate the use of such machines. Should a circuit court of the United States, sitting in Illinois, hold invalid a patent on such a machine, and thereby destroy the monopoly of its manufacture and sale, because its use is forbidden in Illinois, though its manufacture and sale in Illinois and its use in certain other states are lawful? And (2) if the Federal courts may properly hold patents on gambling machines void for lack of utility, because immoral, though countenanced by the legislation of particular states, is a device attached to such a machine likewise inimical to good morals, which prevents a gambler from being also a cheat?

But, returning to the main road, we have no difficulty, under the principles hereinabove asserted, in finding some degree of utility in this invention. In the specifications and claims the device is called a bogus-coin detector for coin-operating vending machines. The inventor's attention to the need of such a mechanism was not directed by the Mills Novelty Company or other maker of chance machines. A manufacturer of coin-operated banjo-playing instruments expressed a want for a bogus-coin detector. The invention in suit resulted. The parties failed to come to terms, not because the detector would not supply the need for which it was designed, but because the inventor

asked more than the banjo manufacturer was willing to pay. Afterwards the application was assigned to the Mills Novelty Company, and by it the device was applied to gambling machines. There is no element of chance, however, in the operation of the detector. Its mechanism has no connection with that of the machine to which it is attached. The outlets of its coin chutes are placed in registration with the inlets of the chutes of the coin-operating machine. "The object of the invention," says the specification, "is to provide, as an attachment for use with coin-operated vending-machines generally, a device through which the coin for paying the purchase price of the article to be delivered, and for rendering the machine operative to produce the delivery, must be passed in view, and shall remain in view until the machine has been operated one or more times by another inserted coin or other such coins. . . . When the machine . . . is adapted to vend two or more articles, . . . the arrangement of the detector is such as to permit the coin or token last inserted previous to operating the machine to occupy a higher plane in its chute in the detector than the uppermost coin in the other detector chute or chutes, thereby to make it indisputably clear which of the array of coins or tokens was last inserted, so that the fraud, if any occurs, may be fastened with certainty upon the guilty person." The testimony of the experts was not needed to show that the detector would perform its functions without regard to the character of the machine below its outlet. It is doubtless true that the detector would be more efficacious if an attendant were constantly beside it; but, without an attendant, the fact that coin, instead of being dropped directly within the opaque case of the machine, remains in view during several subsequent operations, to reproach the cheat and expose him to the owner or other customers, would tend to act in some degree as a deterrent. And the facts that the inventor put the price beyond the willingness of good users to pay, that he assigned his invention to an evil user, and that appellant's suit is prosecuted with the ulterior aim of aiding the evil user, his sole licensee, go to the standing of appellant in equity, not to the legality of the grant. Colt's revolver is not in fault whether it comes to the hand of a policeman or a burglar.

The second defense amounts to this: The holder of a legal patent, who refuses to use, or permit others to use, his device for good purposes, and who prostitutes his invention in practice, will be given no relief in equity, though on the facts shown he could successfully maintain an action at law against the infringer. As counsel states it: "The court

wholly disapproves of the complainant suit-or, and declines to aid him, though the patent still retains its life. With that, the court's decree does not attempt to meddle. . . . There is ample chance ahead to efface the stain if the invention is really capable of worthy use and the patent owner seriously lends himself to accomplish the reform."

It seems clear that one who practises his invention in a noxious way only has no better standing in equity than one who declines to use the device for good purposes or to permit others to use it. And in *Hoe v. Knap*, 27 Fed. 204, 212, there is a statement that "under a patent which gives a patentee a monopoly, he is bound to use the patent himself, or allow others to use it on reasonable terms." But this doctrine has been vigorously denied, and rightly, we think in subsequent cases. *Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. 803; *Campbell Printing Press & Mfg. Co. v. Manhattan R. Co.* 49 Fed. 935; *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.* 35 L. R. A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 294. An extract from the last-cited case, quoted in *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 90, 46 L. ed. 1058, 1068, 22 Sup. Ct. Rep. 747, will sufficiently indicate the general attitude: "If he sees fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use, or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based, alone, upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The *dictum* found in *Hoe v. Knap*, 27 Fed. 204, is not supported by reason or authority."

So, nonuse is not a defense in equity. Is misuse? Equity is not concerned with the general morals of a complainant; the taint that is regarded must affect the particular rights asserted in his suit. *Brown Saddle Co. v. Tromel*, 98 Fed. 620; *National Folding-Box & Paper Co. v. Robertson*, 99 Fed. 985, and cases therein collated. A complainant asserts the validity of his patent (a

question of law on the facts), and infringement by defendant (a question of law on the facts), and asks an injunction on account of continued and threatened trespasses (an equitable remedy to make up for the inadequacy of the legal). Though the defendant may not be able to deny the validity of the patent or the fact of infringement, he may defeat the application for an injunction if he can show that the complainant, in his dealings with or conduct towards the defendant in relation to the subject-matter of the litigation, has acted unfairly or oppressively, or has misled the defendant with respect to the validity of the patent or the fact of infringement, or if the complainant, to make his case, is compelled to bring forward and count upon his own wrong. But if the defendant can do no more than show that the complainant has committed some legal or moral offense, which affects the defendant only as it does the public at large, the court must grant the equitable remedy and leave the punishment of the offender to other forums. In the present case, there have been no dealings between the parties. Nothing has been done to mislead appellees. And appellant, to make his case, simply brings forward his patent and proves the continued and threatened infringement. Against this, appellees establish that appellant has been misusing the patented device. But how does this concern appellees more or differently than it does others? Equity will aid the owner of a lawful patent if he puts the device to good uses, but will deny relief if he puts it to bad uses. The "reform," for the lack of which appellees contend that appellant must be kept out of a court of equity for the present and until the reform is accomplished, is the reform of the man.

The conclusion follows from the foregoing premises that appellant is entitled to injunctive relief. But another consideration leads more strongly to the same result. The inventor's right to make, vend, and use his device does not come from the patent law; it is his natural right. The government's grant to the patentee and his assigns is the right to exclude others from practising the invention. As Mr. Chief Justice Taney said in *Bloomer v. McQuewan*, 14 How. 539, 548, 14 L. ed. 532, 536: "The franchise which the patent grants consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent." And on this basis rests the decision in *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, that a state law which prohibits the use of a certain article, which is patented, is not in derogation of the inventor's grant under the patent law. That is, the state law oper-

ates wholly upon the inventor's natural right to the use of his property, and not at all upon the franchise which the patent grants, which consists altogether in the right to exclude. His right to use his property is destroyed, but his right to exclude others stands unimpaired. Now, if the complainant in a patent suit is seeking merely to enforce his right to exclude, according to the terms of the government's grant, an inquiry into what use (or lack of use) the inventor is making of his natural right would seem to be clearly collateral and irrelevant. And if the right to exclude is the substance of the grant, it is a legal right. And in determining legal rights, equity follows the law. And if a legal right is established beyond every defense, legal or equitable, available to the defendant or to the court on its own motion, equity must grant appropriate relief if there is no adequate remedy at law. Injunction, it is evident, is the only means equal to enforcing the right to exclude.

It is sometimes said that the granting of an injunction is a matter of discretion. But courts of equity may not exercise a mere arbitrary discretion. They must act within and according to definite and certain principles. The conscience of equity is not the conscience of the particular chancellor. But if the conscience of equity were the conscience of the individual chancellors of this court, who, for example, may think that the public sentiment against the liquor traffic would be vindicated by denying the writ of injunction to an habitual drunkard whose property by repeated trespasses was being illegally confiscated, the appeal made in this case to deny the writ of injunction, on the ground that its issuance would end crime and abet practices universally denounced, exhibits a misapprehension of the scope of this litigation. It is obvious that a denial of the writ would leave the defendants and all others perfectly free, so far as the power of this court is concerned, to follow the practices that are repugnant to the individual chancellors, while the maintenance of the complainant's right to exclude the defendants and all others would, to the extent that the patented device might otherwise be used by them to promote gambling, be a vindication of the public sentiment against gambling. It is equally obvious that, however the court may act upon complainant's asserted right to exclude, neither the grant nor the denial of the writ of injunction would operate upon complainant's practices or habits (which he did not acquire from the patent laws), and that the gambler, like the drunkard, is amenable to the municipal authorities alone for violations of the municipal law.

65 L. R. A.

The decree is reversed, with the direction to enter a decree in appellant's favor for an injunction and an accounting.

Grosscup, Circuit Judge, dissenting:

Gambling and gambling devices are condemned by the laws of every state and territory, except, perhaps, New Mexico. Upon this it can be safely predicated that the conscience of the people of the state in which this court sits; of the people of the three states that constitute this circuit; indeed, of the people of every state and territory, except a little territory bordering on Mexico, condemns the practice of gambling. Gambling and gambling devices are condemned, also, by the enactments of Congress, in the statutes forbidding the use of the mails in aid of lotteries and other gambling purposes. Thus the national conscience is seen to be outspoken against the practice. Nothing could be conceived more conclusively showing a general conscience, and a general conception of policy. Unless a moral sense, thus widespread and unanimous may be accepted as the conscience, not simply of the chancellor, but the judicial conscience, I am at a loss to know where to look for any authority for judicial conscience.

In the opinion from which I am compelled to dissent, it is assumed—and the record fully justifies the assumption—that the equities of the case under consideration should be determined as if the Mills Novelty Company were the complainant. The Mills Novelty Company has used the invention solely as an adjunct to a gambling machine. So far as the record discloses, its sole purpose for the future is to use the invention in connection with gambling devices. The patentee shows no other purpose or practical use. The practical purpose of the writ of injunction asked for, therefore, is to aid them in their business of manufacturing and selling gambling machines; and such, and such alone, will be the practical effect of the writ when issued by this court.

In my judgment, on this state of facts, the writ should not be issued. But because it is possible to apply the patent mechanically to a use not pernicious,—though practically no such application is in mind,—the majority of the court seem to think that the writ asked for cannot rightly be withheld. The majority are impressed with the cases that hold that, irrespective of whether the patentee actually uses his patent or not, the right to exclude others from its use is retained; and upon this postulate is based their judgment that, irrespective of the pernicious use of the patent by complainant, he may successfully invoke the aid of a court of equity to exclude others from its use. The ma-

jority hold that, because the invention is mechanically capable of a moral use, there is created, at least, technically, in the patentee, a valid property right,—a property right they feel themselves bound to protect, no matter what complainant is actually doing, or intends to do, with his invention.

I can assent to no such limitation upon the moral discretion of a court of equity. The bare existence of legal title does not leave the chancellor without discretion to issue, or withhold his writ. Whence comes, it may be pertinently asked, the right to withhold the writ where complainant comes into court with a clear title, but without clean hands; or is guilty of laches; or bears in some other respect toward the party proceeded against an unconscionable attitude?

If a court may withhold the writ, though asked in aid of clear title, under one set of unconscionable circumstances, why may it not under another? Why is not the power to control its writ in the instances named applicable to any other instance where expediency, public policy, or substantial consideration of morals and conscience, are equally commanding? The chancellor, in my judgment, is master of his own writ, and, though the claimant hold a legal title, is under no compulsion of law to issue the writ, so long as sound consideration of public morals and conscience forbid.

The majority of the court is misled, I fear, by the seeming analogy of the cases that hold that a patentee, though declining to use his invention, may forbid its use by others. Nonuse and pernicious use must not be confounded. The inventor who declines to put his patent into use occupies toward society an attitude entirely distinct from the inventor who is using his invention in a way that injuriously affects society. I am not sure that an inventor is not bound either to use his invention, or permit others to use it. The Supreme Court has not yet passed upon that question. But, however that may be, the doctrine cannot be invoked in aid of a pernicious use. Nonuse is not, in itself, pernicious, and inflicts no moral injury on society. At most, it is the withholding only

of what society, but for the invention, would possibly never have had. But pernicious use is something different. It does not deny simply to society the present benefit of an invention; it visits upon society an affirmative moral harm. Pernicious use injures where nonuse only withholds; wounds, where nonuse only declines to help.

It may be doubted if complainant comes into equity with clean hands, even under the limitation that unclean hands is not a disability to be extended to any misconduct unconnected with the matter in litigation, or with anything with which the opposite party has no concern. A patent is not a private contract, nor transaction between private individuals. It is a contract between the patentee and the public; and to every suit brought to enforce the patent, the public is beneficially a party. How a patentee, has used his contract right, and how he intended to use it in the future, is a matter not unconnected with the public's interest in the litigation, and comes, therefore, to be a pertinent inquiry when an enforcement of his contract rights is asked for.

I would not, in the case under consideration, have the court, upon the facts presented, pass upon the validity or invalidity of the patent. The court should stand aloof from the whole transaction, not because the pernicious use is a defense that lies in appellee's mouth, but because it is a consideration the public may interpose, and because to issue the writ under such circumstances, would be to pollute the writ itself. The issuance of the writ, upon the case presented, will involve the court as an abettor in practices universally denounced and legislated against as harmful to the public morals. It will be an injunction in aid of crime. When the patentee comes into court with some conscionable use for his invention, or even with a nonuse divorced from unconscionable use, it will be time to consider his claim for a writ; until that time, he should be shown the chancellor's back.

Petition for writ of certiorari denied February 23, 1904.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

DELAWARE INSURANCE COMPANY OF
PHILADELPHIA, *Appt.*,

v.

S. S. WHITE DENTAL MANUFACTURING COMPANY.

(48 C. C. A. 382, 109 Fed. 334.)

1. A marine policy providing that no

risk shall attach to it until the amount and description of the same shall be approved and indorsed thereon by the insurer is not changed into an open and unrestricted policy covering all property which the assured elects to report, even after notice of loss, by the adoption of an agreement fixing a uniform premium, the supplying of the assured with blanks on which to

. NOTE.—As to effect of custom of insurance agent to extend credit for premiums, see, in this series, *McCabe v. Aetna Ins. Co.* 47 L. R. A. 641. 65 L. R. A.

For custom as part of contract generally, see *notes to Newhall v. Appleton*, 3 L. R. A. 859; *Smith v. Clews*, 4 L. R. A. 392; *MacClusky v.*

report risks, and the custom, extending over a long period of years, of reporting risks by the assured, when convenient, in due course of business after departure of the vessel, and the uniform acceptance of the risks by the insurer.

2. The indorsement by the clerk of an insurance company of a slip of paper notifying the company of a shipment to be covered by an open marine policy in the usual way with the amount of the premium and the check mark indicating its readiness for entry in the books, will not show an acceptance of the risk in the face of its positive rejection by the officers of the company as soon as they learned that it was on property already lost, of which the assured is notified without delay.

(May 22, 1901.)

A PPEAL by defendant from a decree of the District Court of the United States for the Eastern District of Pennsylvania in favor of plaintiff in an admiralty proceeding to recover the amount alleged to be due on a policy of marine insurance. *Reversed.*

The facts are stated in the opinion.

Argued before *Acheson, Dallas, and Gray*, Circuit Judges.

Messrs. Edward S. Sayres and John G. Johnson, for appellant:

Several distinct requirements were imposed by the policy before the same could attach upon any shipment. The requirement of acceptance or approval by the appellant was one never waived.

Shipments were covered by the policy only to such extent as the appellee elected to notify the same, and as the appellant accepted the notification. The appellee had no right to exercise its election to request insurance after destruction of the vessel.

Nothing done by the appellant after receipt of the notice of July 6 amounted to an acceptance of the *La Bourgogne* risk.

Mr. Theodore M. Etting, also for appellant:

The policy provided that risk should attach to it until the amount and description of the same should be approved and indorsed thereon by the company, and should be valued at the sum so indorsed. The right of approval, to be exercised by the company, includes the determination by the company of the value of the goods for the purposes of insurance.

An open policy, when so phrased, creates no contract with respect to any particular risk until after such risk has been first submitted for approval, valued, and indorsed.

Schaefer v. Baltimore Marine Ins. Co. 33 Md. 109; *Douville v. Sun Mut. Ins. Co.* 12

La. Ann. 259; *Hartshorn v. Shoe & Leather Dealers' Ins. Co.* 15 Gray, 247.

The open policy, if a contract at all, was in no sense made complete by the insertion of the agreement as to rates.

Douville v. Sun Mut. Ins. Co. 12 *La. Ann.* 259; *Orient Mut. Ins. Co. v. Wright*, 23 How. 406, 16 L. ed. 527; *Schaefer v. Baltimore Marine Ins. Co.* 33 Md. 109; *Hartshorn v. Shoe & Leather Dealers' Ins. Co.* 15 Gray, 247.

If the insured is not bound to pay a premium on every risk, the underwriter cannot, by a mere notice, be liable for every loss.

The insurance company was lawfully entitled to receive the full premium if it undertook to insure the goods at any time before the risk terminated. The rule is that, as the risk is not severable, the premium is not divisible.

Parsons; Marine Ins. 508; 2 *Arnould, Marine Ins.* 2d ed. p. 1226.

Under any interpretation of the policy in suit, the dental company, by its delay in reporting and requesting insurance on the goods, lost its right to look to the insurance company for indemnity.

Davies v. National F. & M. Ins. Co. 60 L. J. P. C. N. S. 73 [1891] A. C. 485, 65 L. T. N. S. 560; *E. Carver Co. v. Manufacturers' Ins. Co.* 6 Gray, 214.

The dental company is not helped by the circumstance that the policy contains the words "lost or not lost." The phrase is simply indicative of a general purpose on the part of the contracting parties that the policy is to have a retroactive effect.

Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827.

If the policy never attached, the dental company is in no better position with the words inserted in the policy than it would be without such insertion.

Orient Mut. Ins. Co. v. Wright, 23 How. 401, 16 L. ed. 524; *Platho v. Merchants' & Mfrs. Ins. Co.* 38 Mo. 257; *Schaefer v. Baltimore Marine Ins. Co.* 33 Md. 109.

The words "lost or not lost" provide for the case of a ship or cargo lost, if such fact be then unknown to either party.

Lowndes, Marine Ins. § 76.

The insured, if cognizant of the loss, must disclose it.

Moses v. Delaware Ins. Co. 1 Wash. C. C. 385, Fed. Cas. No. 9,872; *Vale v. Phoenix Ins. Co.* 1 Wash. C. C. 283, Fed. Cas. No. 16,811.

The underwriter must be presumed to act upon the belief that the party procuring the

Klosterman, 10 L. R. A. 785; and *Conestoga Cigar Co. v. Finke*, 13 L. R. A. 438; also *Connelly v. Masonic Mut. Ben. Asso.* 9 L. R. A. 428, and *German American Ins. Co. v. Commercial F. Ins. Co.* 16 L. R. A. 291. 65 L. R. A.

As to marine insurance generally, see *Kratz-enstein v. Western Assur. Co.* 5 L. R. A. 799; *Mayo v. India Mut. Ins. Co.* 9 L. R. A. 831; and *Jackson v. British American Assur. Co.* 30 L. R. A. 636.

insurance is not in possession of any fact material to the risk which he has not disclosed, that no known loss had occurred which, by reasonable diligence, might have been communicated to him.

M'Lanahan v. Universal Ins. Co. 1 Pet. 184, 7 L. ed. 104.

Messrs. Henry N. Paul and R. C. Dale for appellee.

Gray, Circuit Judge, delivered the opinion of the court:

This action was instituted by a libel in admiralty brought in the district court by the S. S. White Dental Manufacturing Company, a Pennsylvania corporation, against the Delaware Insurance Company of Philadelphia, also a Pennsylvania corporation, to recover \$17,065.65, with interest from October 1, 1898; this being the value of certain goods belonging to the libellant which were lost by the sinking of the steamship *La Bourgogne* on July 4, 1898, and which are claimed to have been insured with the insurance company by reason of an open policy of marine insurance issued by the insurance company to libellant. The appellee exports to foreign countries large quantities of dental goods of its own manufacture. Such of its foreign shipments as it insured have been insured for a long period of years with the appellant; the insurance having been effected under a policy that was in force prior to 1867, and has been continuously renewed since that time. The last renewal was on January 1, 1895. This policy is what is called an "open policy of marine insurance," and is attached to the front page of a blank book furnished by the appellant, having printed on the outside thereof: "The S. S. White Dental Manufacturing Co., Open Policy with the Delaware Insurance Co. of Philadelphia." This book has its pages divided into 10 columns, headed respectively as follows: "Date," "Name of Vessel," "Place of Shipment," "Place of Destination," "Description of Goods, and for Whose Account Insured," "Amount to be Insured," "Rate of Premium," "Amount of Premium," "Date of Approval," "Signature." This policy contained the following clause: "No risk to attach to the policy until the amount and description of the same shall be proved and indorsed thereon by the company, and to be valued at the sum so indorsed." For a number of years the appellant had printed, and furnished to the appellee, blanks or slips, which were invariably used by the appellee after invoices had been received, to inform the appellant of the amount and description of the risk, and to request insurance thereon. On the 6th day of July, 1898, the appellee filled up one of 65 L. R. A.

these blank slips as follows (the parts written in by appellee being italicized):

"Philadelphia, 7/6, 1898.

The Delaware Insurance Company of Philadelphia: Insure, under open policy No. —, \$17,108 on *Mdse.* valued at \$—, per *S. S. La Bourgogne* at and from *New York to Le Havre, France, thence R. R. to Zurich, Switzerland, a/o J. M. Ravel.*
\$— at —%.

The S. S. W. D. M. Co.

This notice, together with several others, covering appellee's shipments by other vessels, in due course of mail reached the appellant on the day of its date. It was received at the postoffice, as shown by the stamp on the envelope, at 12:30 P. M., and was received at the office of the appellant at about 2 P. M. on the same day. Both companies at that time were aware that there had been a total loss of the goods. About the time that the notice was received, and while the clerk who attended to such matters had it in his hand, a clerk from the appellee came into the appellant's office and asked if the notice had been received; stating that it had been sent in due course of business, and that as the *Bourgogne* was lost, and there was a large amount involved, they were anxious to know if it were all right. He was told by this clerk that he would have to wait until he consulted the officers of the insurance company, and that he would telephone him later in regard to the matter. It appears that this clerk marked this slip, as he did others, with the amount of the premium, checked it, and, by the advice of the vice president of the appellant company crossed over to the agency of the British-American Insurance Company, with whom the appellant had a contract for reinsurance, to consult him in regard to the same. He was there advised not to accept the insurance. On the day following, the president of the insurance company informed the president of the dental company, the appellee, that the insurance was declined, and on account of this refusal by the appellant this suit was brought in the court below.

To the obvious defense growing out of the stipulation already quoted from the policy, that no risk should attach to the policy until the amount and description of the same were approved and indorsed thereon by the company, the appellee, libellant below, interposes the following proposition, upon which it claims to be entitled to recover. This proposition is as follows:

"(1) The written policy was not at the time of this loss, the actual contract between the parties. The real contract, as is

evidenced by a course of dealing established for many years, did not require acceptance, fixing of premiums, and indorsement of each special risk as a condition precedent to insurance, but was similar to an ordinary open policy, by which all of libellant's foreign shipments of the class subject to insurance, were insured at a fixed rate, subject to the requirement that such shipment should be reported to the insurance company, in the regular course of business, for subsequent indorsement on the pass book, and computation and collection of the premiums due thereon. In other words, premiums had been agreed upon, acceptance was waived, and indorsement had become a condition subsequent."

The position of the appellee, the libellant below, is that, notwithstanding the express stipulation of the policy which had existed for so many years as the evidence of the contract between the parties, and which had been expressly renewed in 1895, a supplemental contract had been made, in which all the conditions of that stipulation were abrogated, and in lieu thereof the appellant insurance company had undertaken to insure all foreign shipments of the appellee which it (the appellee) should elect to report. The question of varying or contradicting a written instrument is not involved in the position thus taken, by which a new contract is asserted to have been substituted by the parties for the old one. It is not denied that the parties to a written contract may, by express oral agreement, change or alter the terms of such contract, so that the real, subsisting contract as to the matter in hand will be evidenced partly by the written agreement, and partly by the oral agreement. Such changes and modifications may also be evidenced by a course of dealing with regard to the subject-matter of the written contract so clear and unequivocal that no other inference can be drawn therefrom than that such change or modification was intended to be, in respect to the particular matter embraced in the course of dealing, the real agreement of the parties. In such case, however, the burden rests upon the party asserting such change or modification to show that the same has been made, as clearly and satisfactorily as it could be shown by an express oral agreement to that effect. The stipulation of the policy which the contention of the libellant thus disposes of and eliminates therefrom is, as already quoted, as follows: "No risk to attach to the policy until the amount and description of the same shall be approved and indorsed thereon by the company, and to be valued at the sum so indorsed." Further on in the policy, and not directly following the foregoing, is this clause: "Premiums as may be agreed upon

at the time of indorsement to be settled monthly in cash." It is not denied by the libellant and appellee that under the policy, as written, with this stipulation therein, no liability in this case accrued to the appellant. These stipulations, it will be observed, contain three conditions upon which the liability of the insurance company is made to depend: (1) Approval of the amount and character of the risk; (2) an indorsement thereof upon the policy by the company; and (3) agreement as to the premium at the time of indorsement. The first condition is essential and vital to the contracts of insurance evidenced by the policy. It undoubtedly qualifies the usual unrestricted terms of an open policy of insurance upon all shipments made, and gives it its essential restrictive character, by which each shipment must be the subject of a distinct contract. The difference between the contracts of the policy with and without this condition is so vital and far-reaching as not to be lightly regarded. The whole character of the contract of insurance depends upon its presence or absence. The other two conditions, however, are of a different kind, and do not so nearly concern the essential contract of insurance. The indorsement of amount and approval upon the policy by the insurance company is comparatively unimportant, and does not relate to the contract of insurance itself. It may well be either a condition precedent or subsequent; but the stipulation for approval can be nothing but a condition precedent, for without it no risk would be assumed, and no contract of insurance would exist. The third condition of the stipulation, as to premiums, though, of course, vital to the contract and to the assumption of risk, as constituting a condition precedent, would be, in a measure, subsidiary to the first condition. The learned judge of the court below was of opinion that the first condition, requiring an acceptance of the risk by the appellant, in order to complete the contract of insurance as to each shipment, of which it was notified, as expressly stipulated in the policy, had been abrogated by a course of dealing between the parties that he found was wholly inconsistent with the stipulation in question, and that a new agreement was substituted therefor, by which the appellant undertook the risk of every shipment of the appellee from the time it was made, of which the appellee elected to send a notification. He says: "In my opinion, this is the whole case. For many years, with one or two exceptions, the respondent has treated the libellant's outward-bound shipments of which the respondent had notice as covered by the policy, not merely from the time when notice was received, but from the time when the voy-

age began. Premiums to a large amount have been paid, and received upon this understanding, and as long as no losses occurred the respondent was content that the practice should continue; but, as soon as a loss of significant size happens, then, for the first time, the disregarded provision is appealed to, that requires an acceptance of each particular risk before the respondent's liability shall attach. I cannot believe that this appeal should be sustained. In my opinion, the respondent was bound by its course of dealing to accept the risk in controversy. The risk was precisely the same as in hundreds of other instances that had been accepted without question. The goods were like those that had been previously shipped; the vessel was a first-class ocean steamship; the ports of departure and arrival were within the policy; the rate of premium was agreed upon; and nothing remained to be done, except notice to the respondent, and the formal acceptance that had never yet been withheld. As it seems to me, the libellant had acquired a right to rely upon the respondent's acceptance of every such risk as this, and the respondent had disabled itself from the refusal. It could not suddenly depart from the unbroken custom, that had been so long established, without previous notice of its intention so to do."

Was the learned judge correct in this finding of fact, and in conclusion of law deduced therefrom? This question underlies all, or nearly all, of the numerous assignments of error, and its determination will dispose of them, without the necessity for separate consideration. Does the evidence, then, contained in this record, disclose such a course of dealing as makes manifest and clear the abrogation of the first condition of the stipulation of the policy above referred to, *viz.*, approval by the appellant of the amount and character of the risk, and the substitution therefor of a contract of such entirely different character and scope as the insurance by appellant of every shipment which the appellee may elect to report? If such alteration and substitution were made by express contract, written or oral, it would be required that the intent of the parties to that end should clearly and unequivocally appear. Of such abrogation and change, by express contract, we have an example in what was done by the parties in this case in regard to the abrogation of the third condition of the stipulation referred to, namely, agreement as to premium at the time of indorsement; for, as stated in the bill and admitted in the answer, after 1897 the rates of insurance were fixed by a letter written in that year, containing a tariff or schedule of rates, agreed upon by the par-

ties, as to all of the places to which the dental company made shipments. The finding of fact in this regard by the court below is as follows:

"(b) Instead of premiums 'as may be agreed upon at the time of indorsement,' the parties specially agreed by written schedule, upon certain fixed rates to all points to which libellant made shipments. The last of such agreements is embodied in a letter from the respondents dated November 8, 1897. *Inter alia*, this fixed the rates to European ports at one fourth net."

The condition that premiums should be agreed upon at the time of indorsement was therefore waived by the express understanding referred to between the parties. This much must be admitted as a fact in the case, as to which there is no dispute by counsel on either side. But here the supplementary agreement, which waived the condition in regard to premiums, was express and unequivocal. No inference can be drawn from this waiver in support of the existence of an agreement to waive the vital condition that no risk should attach until the appellant had approved its character and amount. In fact, it emphasizes the necessity and importance of requiring that the evidence of a waiver must be clear, beyond doubt or cavil. As there is no direct and express agreement that can be referred to as abrogating this condition, the usage and course of dealing from which we are asked to infer such an agreement between the parties must not only be established by unexceptionable evidence, but must be of such a character as to make such inference an absolutely necessary one. The position of the appellee in this respect is not strengthened by the admission that the unessential requirement of the indorsement of the amount and description of the risk upon the policy was by usage and the course of dealing changed from a condition precedent to a condition subsequent. Whether it were one or the other, it would matter little to the appellant, as in any event the indorsement was to be made by itself after the amount and character of the risk were approved. We cannot agree, therefore, with the contention of the appellee that "the three conditions named are so closely related, both logically and historically, as to render the abrogation of one and the retention of another inherently unlikely and unreasonable." As already seen, an express agreement in regard to the change in the third condition was in evidence, and not disputed. And the waiver of a literal conformity to the second condition was, as we have shown, without importance, and bore no relation to the existence or nonexistence of the first essential and vital condition of approval. A waiver of the essential right

of accepting or not accepting an offered risk is not to be held as established by or as inherent in the disuse of the prescribed form of evidencing an acceptance. We must consider the course of dealing independently of its applicability to the indorsement condition, and it must point, with a clearness and certainty that excludes all doubt, to a new understanding between the parties, if it is to change the character of the contract between them. For a number of years—how many it does not appear—the appellant has printed the blank books, already referred to and described, in which were made by it the entries of the risks assumed, with the particulars of amount and description, instead of indorsing the same upon the policy itself. This was more than a convenience. It had become a necessity, from the amount of business transacted. At first the policy was folded and pasted on the inside of the front cover of the current pass book, in which was written: "It is hereby agreed that all approved indorsements on this book are to apply in all respects to policy No. ———, the same as if indorsed on said policy, and not otherwise."

Afterwards the policy was left pasted in one of the old books, filled with indorsements, and new pass books were issued, without any policy being attached thereto. These pass books were filled up by appellant, under the separate headings, after a risk was reported and accepted, at the convenience of the appellant company. The appellant company also furnished the libellant with blank insurance orders, called in the record "slips," above referred to, and one of which, filled up by the libellant, has already been quoted. The libellant could not, and did not attempt to, fill out these slips until after receipt of information from New York which enabled it to fill in the name of the vessel and the amount of the shipment. The slips thus filled in were sent to the appellant at intervals, often in batches of a half dozen or more, and usually through the mail. By the time these slips reached the appellant company, the vessels containing the shipments reported had often been at sea some days. The appellee has produced a witness who has gone over the files of the New York Herald, and extracted from the shipping news therein the dates of sailing and arrival of steamers carrying shipments of the appellee through a series of years. In quite a large number of instances it appears from these reports that the vessel had arrived before the slips reached the appellant company, but it is not shown that in any of these instances this information had reached the appellant, or that they knew in any other way of such arrival; and in two instances, also, it is shown (one of them in 65 L. R. A.

1888) that where ships had arrived at destination before notification of risk the appellant company had refused to accept the premium, and had so notified the appellee. It does not appear that any comment or criticism was made upon this refusal by either party. It also appears, by a reference to the policy, that the shipments of goods were insured for two days after their arrival in port, and until they were safely landed; and it also appears that it was quite common, as in the case of the shipment on the Bour-gogne, that the insurance extended, not only to the end of the sea voyage, but to the carriage by rail from the port of arrival to an inland destination. Although it is to be inferred from the evidence that for a number of years, and antedating the last policy of 1895, all the foreign shipments of appellee, except those insured by its consignees on their own open policies, were insured with the appellant, it does not appear that it was considered, either by the appellant or the appellee, that appellee was bound to insure all such shipments. On the contrary, there is nothing to controvert the inference, to be drawn from the language of the policy and the mode of doing business, that the appellee had the option to insure as to any of its foreign shipments. The supplementary agreement sought to be set up by the appellee, that the appellant company was obliged to insure each shipment, from the time it was made, which the appellee chose at any time to report, is not, therefore, supported by any reciprocal obligation on the part of the appellee to insure every such shipment. It is true that, for at least a period of ten years prior to the loss of the Bour-gogne, there is no evidence that any risk reported by the libellant had ever been objected to. But if the appellant had the right to approve or reject any risk proposed, as expressly reserved to it in the written contract of insurance between the parties, it could not lose that right by always having theretofore accepted unobjectionable risks. Under the policy, as it was written, there was required a distinct contract of insurance upon every shipment, and therefore it was necessary that there should not only be a report or offer of a shipment for insurance, but an acceptance of the risk on the part of the insuring company. The fact that 100 or 1,000 such contracts were made during a period of one year or ten years cannot create an obligation of indemnity on the part of the appellant in the one instance where no such contract has been made. In other words, because the appellant always accepted in cases where there was no reason not to do so, it cannot be taken to have accepted in the only case where there was reason not to accept. It is true that in this long course of

dealing between the parties a routine practice grew up of sending notifications of shipment oftentimes several days after the sailing of the vessel containing the same, and the notifications so sent were received by the marine clerk, and marked with the amount of premium, and checked for entry in the open-policy book, without any notification of acceptance being sent to the appellee. This somewhat loose practice probably grew out of the uniform acceptability of the risks which in such large numbers were dealt in between the parties, and the mutual confidence which had naturally grown up in a course of business so long and so honorably conducted. We therefore find that no question was ever made as to apportionment of the risk, though several days of the voyage had elapsed before notice of shipment was received. The risk was considered entire, lost or not lost, as long as no information as to loss was possessed by either party. We see, then, nothing inconsistent in this course of dealing with the existence of the right in the insuring company, as reserved in the policy of insurance, to accept or reject a given risk. It is not pretended that prior to the present case any insurance was ever demanded or given upon a shipment after information of the loss had been received. The "lost or not lost" clause was obviously meant to cause the risk to attach to a case where a loss might have occurred at the time of the undertaking, though no information of the same was possessed by either party.

In the present case we are asked to change a policy expressly restricted to risks which the insured should elect to report, and the insurer to accept, to an open and unrestricted one, in which a complete contract of insurance is made beforehand, at the time of the execution and delivery of the policy, as to all shipments made by the assured, and which would manifestly cover a shipment not reported until after it was lost. In such a case the contract is made once for all at the beginning, and the risk as to whether any shipments shall be lost in future is undertaken at that time. It is, then, a real risk, because the loss had not been made at the date of the contract. But here, under the terms of the policy is written, the report of the shipment on the *Bourgogne*, being made after the loss was known, presented no risk, and none had ever attached to such a shipment. We are asked to change this policy, as written, into an open and unrestricted policy, as above described, upon the evidence of dealings that never included such a distinctive transaction as specially characterizes the unrestricted open policy contract sought to be set up. That the appellee understood the difference between the

contracts embodied in the two kinds of policies is evidenced by the fact that for some years previous to July, 1898, it had a policy issued to it by the appellant, with reference to goods coming from abroad, in which the contract was open and unrestricted, and without the condition as to approval contained in the policy as to outward-bound shipments, and by its terms covered all importations from the time of shipment abroad. The insurance company, upon the execution of this open policy, agreed to insure each and every risk thus shipped, up to a certain amount. If the assured made no declaration, the underwriter could claim that the property was covered by the policy, and that a premium was due it for insuring the same. The liability of the underwriter existed whenever notice was given by the assured, provided it was given seasonably or in accord with its undertaking as expressed in the agreement. The existence of this policy taken out by the appellee with reference to inward-bound goods is very significant in its bearing upon the question of what was the real understanding between the parties in regard to the policy on outward-bound goods, with which we are concerned in this case. On the outward policy no premium attached until the risk was offered, accepted, valued, and indorsed. The right was a reciprocal one arising, out of each offer, as and when made, and the dental company elected to insure when it thought fit. It is still more significant, if the testimony of Mr. Smith, the assistant secretary of the appellee, is to be believed, that in 1893 a request was made by the appellant company that such a policy as was held as to inward-bound goods should be taken out as to outward-bound goods by the appellee, and that this request was refused by it. After a careful reading of all the testimony in the case, we have been unable to discover any facts, course of business, or dealings which would justify us in now changing the policy, as written, into the open and unrestricted policy that appellee had taken out as to inward shipments. It must be manifest that the course of dealing from which we are to infer so important a change in a contract as the one in question here must relate particularly and specially to the very matters and things which mark the essential difference between the contract as written and that sought to be thus set up. It is not pretended here that there has ever been, in the whole course of the dealing between the parties to this policy of insurance, any offer or suggestion that a known loss should be covered thereby. Much less has there been any evidence of any consent on the part of the appellant to pay such a loss. The evidence of the routine practice of the parties under the contract of the policy, and

upon which appellees are forced to rely, as it seems to us, only went to the extent of showing that through a series of years none but acceptable risks were offered, and that none were rejected, and that no notice of the acceptance of risks was ever made to the appellee. It would be a violent presumption, we think, that for this reason appellants are to be held to have waived the right to accept, or not, any risk that was offered. The most, it seems to us, that can fairly be inferred from such a course of business, would be that, unless appellant should notify the appellee of the rejection of a risk within a reasonable time after the reception of the notice, it should be held to have accepted it. It is on this point that the case turns, and it is here that the learned judge of the court below seems to us to have misconceived the real character of the dealings, from which he drew the necessarily erroneous conclusion that the parties had intended to make a new agreement. In the passage already quoted he says: "In my opinion, the respondent was bound by its course of dealing to accept the risk in controversy. The risk was precisely the same as in hundreds of other instances that have been accepted without question."

But the risk was not "precisely the same as in hundreds of other instances." It is true, "the goods were like those that had been previously shipped," that "the vessel was a first-class ocean steamship," that "the ports of departure and arrival were within the policy," and that "the rate of premium was agreed upon." But the character of the risk was different from any other that had ever before been accepted or even presented. This is the crucial point in the case. No number, however great, of such previously accepted risks, could have any relation to or bearing upon the right to reject such a risk as this, which in fact was no true risk at all. It was a question of the obligation to accept liability for a loss already ascertained. If the parties were bound by the terms of the contract of insurance, as written in the policy, there can be no question as to the right of appellant to accept or not accept the risk on each particular shipment as made and reported. The contention that this express written contract was changed into a contract by which the insurance was made once for all, at the date of the policy, upon all foreign shipments, whenever reported by the appellee, is sought to be supported by evidence of a course of dealing in which no case like the present had ever occurred, and in the course of which no transaction has ever been testified to that was clearly inconsistent with the continued reservation of that important and vital stipulation as to the right to accept or reject a

given risk. We are compelled to the conclusion that there is no evidence disclosed by the record in this case upon which a waiver of this important condition expressly stipulated for in the policy can be held to have been made; that the real contract between the parties at the time of the shipment here in question was, in this regard, as written in the policy; and that no other and different contract has been substituted therefor, either as evidenced by any express agreement, or by an established course of dealing. Very few decided cases, either in this country or in England, have been cited or found, bearing upon the principles of construction involved in the conclusions we have reached. We think, however, they are supported by the *ratio decidendi* of the following cases: *Douville v. Sun Mut. Ins. Co.* (1857) 12 La. Ann. 259; *Orient Mut. Ins. Co. v. Wright* (1859) 23 How. 401, 16 L. ed. 524; *Hartshorn v. Shoe & Leather Dealers' Ins. Co.* (1860) 15 Gray, 240; *Platho v. Merchants' & Mfrs. Ins. Co.* (1866) 38 Mo. 257; *Schaeffer v. Baltimore Marine Ins. Co.* (1870) 33 Md. 109. We have carefully read and considered the cases cited and printed at length in appellee's brief, and much relied upon by them at the argument, viz.: *E. Carver Co. v. Manufacturers' Ins. Co.* (1856) 6 Gray, 214; *Emery v. Boston Marine Ins. Co.* (1885) 138 Mass. 398. The decisions in these cases must, of course, be read with relation to the particular facts upon which they rest. So reading them, we find nothing at variance with the principles of construction upon which we have so far discussed the present case.

In the case of *E. Carver Co. v. Manufacturers' Ins. Co.*, the policy contained the following clause: "Twenty-five thousand dollars on cotton gins and bandings on board of any steamer or steamers at and from New York to New Orleans. All sums placed at risk under this policy are to be indorsed thereon, and this policy is to be closed in twelve months if not sooner filled. Gins and bandings valued at \$25,000 each, including premiums."

The facts were as follows: On the 25th and 26th of August the defendant shipped 16 gins from New York to New Orleans. A bill of lading therefor was issued by the steamship company on the 26th, and was received by the plaintiff on the 27th. On the evening of the 26th the steamer was burned and the gins destroyed. News of the loss of the steamer was received by the defendant before the plaintiff received the bill of lading, so that the plaintiff could not give notice to the defendant of the shipment or request indorsement before the loss. On the afternoon of the 27th the plaintiff went to the defendant's office and requested indorse-

ment of the gins on the policy. The request was refused. The court held that the underwriter had no right to refuse to indorse, that it was bound by the terms of its contract, and that the plaintiffs had within a reasonable time, and in good faith, given notice of the shipment; that all of the essential incidents to a completed contract were set out in the policy, so that there remained nothing more to be done thereunder; the defendant could not refuse its indorsement, and thereby throw upon the plaintiff a loss which it had contracted to bear. Upon the facts as here stated, there can be no criticism of what was held by the court. A completed contract of insurance was made at the time of the execution of the policy, and no exception can be taken to the reasonableness of the decision that the plaintiffs had within a reasonable time, and in good faith, given notice of the shipment.

In the case of *Hartshorn v. Shoe & Leather Dealers' Ins. Co.* 15 Gray, 240, the words of the policy were: "Property lost or not lost, on board vessel or vessels, steamboat or steamboats, or land carriage, at and from ports or places to ports or places; all sums at risk under this policy to be indorsed hereupon and valued at the sum indorsed;" and the rate of premium, "such per cent, as shall be written against each indorsement."

The court held the contract to be inchoate as to shipments of property ordered after the date of the policy; that a new and separate indorsement of each successive parcel of goods was required; that no risk could be legally indorsed on the policy without the consent of both parties. In the course of his opinion, Dewey, J., in reciting the facts of the case, distinguishes it clearly from *E. Carver Co. v. Manufacturers' Ins. Co.*

The other case cited and printed at length in the brief of the appellee,—*Emery v. Boston Marine Ins. Co.*,—the policy contained the following clause:—"On mahogany and other hard woods . . . at and from Cuba or New Orleans to Boston. . . . No risk to be binding until accepted by the company and indorsed herein."

In an action on an alleged oral agreement to indorse a risk upon said policy, the plaintiff testified that he said to the secretary of the insurance company that he had seen the clerk of the company a few days before, and had told him to enter up a certain sum on a certain cargo, and he would bring in the open policy and have it entered up when the invoice arrived. The secretary said, "All right." Held, that the jury would be warranted in finding from this evidence a waiver of a condition in the policy that no risk is to be binding until indorsed on the policy. It will be observed in this case that the question was as to the propriety of sub-

mitting to a jury the question of fact whether the condition as to indorsement of risk on the policy was waived or not,—a very different question from the one we are called upon to consider here.

We have not deemed it necessary, in the discussion of the question whether the evidence disclosed in the record was sufficient to justify the inference of a change in the contract as to the right to accept or reject a risk, to quote at length the testimony upon which our conclusion has been reached. We have contented ourselves with stating, after a careful reading of that testimony, what it failed to evidence. We may add, however, that the testimony of the marine clerk of the appellant, who received ordinarily the notifications of risk, treated them as applications for insurance, calculated the premiums upon them, and then ticked them for entry upon the policy ledger, and afterwards on the pass books given to the appellee. He testifies that in ordinary cases (which all or a great part of the risks assumed seem to have been) he considered that he accepted them by thus passing upon them, but that he was never authorized in any case of doubt as to the character of the risk, or where there was anything unusual in the circumstances surrounding it, to accept the same without reference to the officers of the company. And he also testifies that he never accepted a risk, and had no authority to accept a risk, upon a steamer that was sunk before the risk was presented to him. To the same effect was the testimony of another witness, who usually made entries in the pass books, that he had no authority of any sort or kind to accept or to enter slips notifying of insurance on vessels that had gone down at the time he received the slips, and that, if he had known of any such fact in regard to shipments notified in the slips, he would not have accepted, or been authorized to accept, the same; that his instructions were, "if there was anything at all in the matter contained in the slips that called for attention, to report it to some officer for his judgment and action."

The president of the appellee also swore as follows:

Q. Did you ever before notify the Delaware Insurance Company, at any time, of an insurance, or the fact of an insurance, or of a shipment to be insured, after the vessel carrying the shipment had been lost?

A. I do not recollect of any such instance.

It is true that the same witness testified that he supposed his policy attached upon goods as they were put on board the steamer, before any notice, but that he did not know that any officer of the insurance com-

pany ever said anything to him to justify any such statement.

The president of the appellant company testified as follows:

Q. Had you any understanding with the S. S. White Dental Company about the outgoing insurance, when it became an insurance,—as to the time when it became an insurance?

A. No understanding other than shown in the contract.

The same witness, without contradiction, also swore as follows:

Q. When, after your communication on the morning of the 7th of July to the S. S. White Dental Company, did you next hear from them?

A. Shortly afterwards, on the same day, the president of the company, Mr. Lewis, called upon me.

Q. Tell us the conversation.

A. I expressed my very great regret that we were placed in the position we were with an old and valued customer, and that the notice had not been received and entered and made fully binding previous to the knowledge of the loss of the vessel, and the necessity for our having to deny liability. Mr. Lewis said to me he felt we were not legally liable under the policy, but he felt there was an equity in the case which he would like to have me consider. I told him I was unable to deal with any question other than the legal liability of the company in the matter, but that if he desired to present a communication to our board of directors, I should be very glad to have him do so, and would see that it went before them with the full knowledge of the facts as they existed.

The same witness swore:

Q. Do you know of any instances occurring during the time you were president of the company where you accepted, or the company, upon your opinion, have accepted, an insurance when notified after the loss of the vessel?

A. No, sir.

Q. Do you know at the time of this loss of any contract in existence covering your insurance of outward-bound shipments, other than the contract of the 1st of January, 1895?

A. No, sir.

Q. Did you know at that time, or did you know at any time during your presidency, of any other understanding, or implied agreement or custom, by which your company bound itself to any risks until it had received notice and accepted the same?

A. Never, on any outward business. I believe there are some policies, or have been

some policies, in force, with that contract as to outside shipments,—some special contracts.

Q. But they were special contracts?

A. They were special contracts.

Q. Did you know of any course of dealing, custom, or anything approaching it, amounting to a waiver by your company of any of the terms of the policy of the 1st of January, 1895, embodied in these words: "No risk to attach to the policy until the amount and description of the same shall be approved and indorsed thereon by the company, and to be valued at the sum so indorsed?"

A. No, sir.

There is other testimony to the same effect, but none at all as to the existence of any course of business inconsistent with the stipulation in the policy that no risk should attach until it was approved by the appellant company. The only testimony as to the existence of an understanding at variance with the policy in this respect is that of the president of the libellant company, already quoted. But this, as we have seen, is directly contradicted by that of the president and officers of the appellant company, and is supported by no facts from which an inference favorable to his testimony can be drawn.

The second general contention of the appellee is as follows: "If the court should be of opinion that, although premiums had been agreed upon, and indorsement as a condition precedent had been waived, nevertheless this did not abrogate the right of the insurance company to accept or reject each risk as reported, then libellant claims that, even under such interpretation, this risk had been actually accepted by the insurance company."

We think that a brief review of the evidence already quoted or referred to on this point will be sufficient to dispose of it. The facts found by the court below, and disclosed by the record, are: That the shipment was made in New York upon the Bourgoigne by agents of the appellee on the 30th of June, 1898. That the libellant's agents in New York who attended to this shipment forwarded the bill of lading to libellant's office in Philadelphia, by mail, on July 1, but, July 2d being a half holiday, July 3d being Sunday, and July 4th a legal holiday, the letter of the agent and the bill of lading were not seen at libellant's Philadelphia office until Tuesday, the 5th day of July. On the morning of July 6th the clerk of appellee, whose duty it was, proceeded to fill out slips, in order to report to the appellant all shipments which had been communicated to appellee, but had not been previously reported. He began his work shortly after 10

o'clock, and in about a quarter of an hour had filled up eight of these slips, one of them relating to the shipment by La Bourgogne. This slip has already been quoted. After eight slips were filled, he placed them on the desk of another clerk for mailing. They were forwarded by mail that morning, and reached the office of the appellant about 2 o'clock. The news of the loss of the Bourgogne had been learned by the appellant about 12 o'clock that morning. It does not appear with certainty at what time the news first reached the office of the appellee. It is not without significance, both in regard to the point we are now considering, and also on the question whether there was a settled understanding between the parties to the effect that all shipments of appellee were insured from the date of such shipment, at its election, that a clerk of the appellee was sent down to the office of the insurance company on the 6th of July, shortly after the notice slips had been mailed. He testifies that he visited the office about 2 o'clock, under instructions from the president of the appellee. He says that he saw the clerk—Mr. Harry Yarnall—who had charge of the marine business, and one or two other clerks; that he asked Mr. Yarnall if he had received an application for insurance by the Bourgogne, and he said that he had, and he had in his hand the slip. "I stated to him that it had been mailed in the usual course of business, and we were very anxious to know whether they had received it in due course. He stated to me that it had come in some little time previous. I stated to him that it was a large amount, and, as the news of the loss of the vessel had been reported, we wanted to feel sure that he had received the application, and we wanted to know where we stood about it. He stated that he thought everything would be all right, although he could not answer for sure, because none of the officers were in. I stated that we would like to know definitely just how everything was, and he said that he would telephone to me,—he would call for me that afternoon. So I left with that understanding." It appears that the appellant com-

pany then consulted with the agents of the insurance company which reinsured all the appellant's marine risks. This agent said he would not reinsure, and advised the representative of the appellant not to accept the risk. The next day the president of the appellant wrote to the appellee, refusing to admit liability for the loss; and on the same day, after the receipt of that notification, the president of the appellee, the libellant below, called upon the president of the insurance company, who testifies in regard to the interview as already quoted. This is the substance of the testimony relevant to this point. We think it shows a clear rejection of the risk by the appellant company, and of such rejection the appellee was informed, not only within a reasonable time, but promptly. The mere fact that the marine clerk indorsed the slip, as he indorsed the other seven in the packages, with the amount of the premium, and the usual check mark, which indicated that it was ready for entry in the ledger, cannot be held to countervail the positive testimony that, as soon as the unusual character of the application was known, it was held up for consideration by the officers of the company, and by them promptly rejected, and the appellee notified without delay. As we have already said, the routine course of business between the parties would seem to go no further than to show an understanding that all requests for insurance were considered as accepted, if notification to the contrary was not sent within a reasonable time. And, as we have before stated, nothing inconsistent with such an understanding has been shown in the dealings between the parties.

We are therefore of opinion that the contention of appellee that the risk was, as a matter of fact, actually accepted, cannot be sustained, and that therefore *the decree of the court below must be reversed*, and the case remanded, with directions that the libel be dismissed.

Petition for writ of certiorari denied by Supreme Court of the United States, January 13, 1902.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BANKERS' MUTUAL CASUALTY COMPANY, *Plff. in Err.*,

v.

MINNEAPOLIS, ST. PAUL, & SAULT SAINTES MARIE RAILWAY COMPANY.

(54 C. C. A. 608, 117 Fed. 434.)

1. A railroad company in the trans-

portation of mail, either under contract with the government or by reason of the general laws and the regulations of the Post-office Department, is an agent of the government, and not liable to individuals for loss of mail through negligence of its subordinate employees, whom it has selected with due care, and whose acts cannot be regarded as the acts of the corporation.

NOTE.—As stated in the opinion of the court in this case, this seems to be the first decision upon the point involved as to the liability of a 65 L. R. A.

railroad company for theft of property while being carried in the mails.

2. Mere proof that a package of mail was stolen while in the possession of a railroad company for transportation is not sufficient to charge the railroad company with liability for the loss in favor of the owner of the package, in the absence of anything to show that the negligence of the railroad company, as contradicting itself from that of its subordinate agents, was the direct cause of the loss.

(July 14, 1902.)

ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in favor of defendant in an action brought to hold defendant liable for loss of a registered package of mail. *Affirmed.*

Statement by **Carland**, District Judge: Plaintiff in error brought an action in the court below against defendant in error, for the purpose of recovering \$3,000 and interest, by reason of the facts alleged in its complaint. The complaint alleged the following facts:

"That the Bankers' Mutual Casualty Company, during all of the year A. D. 1900, and up to the present time, is and was a corporation duly organized under the laws of the state of Iowa, and a citizen of said state, with its principal place of business at Des Moines in said state, engaged in the business of insuring banks against loss from robbery and burglary, including the insurance against loss of packages of money, while in the course of transmission from place to place, while regularly carried in the United States registered mails.

"That defendant, during all of the year A. D. 1900, and up to the present time, is and was a corporation duly organized under the laws of the state of Minnesota, and a citizen of said state, with its principal place of business at Minneapolis in said state, engaged in operating a line of railroad situated in the states of Minnesota and North Dakota.

"That the German State Bank, during all of the year A. D. 1900, and up to the present time, is and was a corporation duly organized under the laws of the state of North Dakota, and a citizen of said state, with its principal place of business at the town of Harvey in said state, engaged in a general banking business at said town.

"That during the whole year A. D. 1900, and up to the present time, defendant is and was engaged in carrying the United States mails between the terminal and intermediate stations located upon and along its said line of railroad, under and by virtue of the statutes and laws of the United States, and the regulations established by 65 L. R. A.

the Postoffice Department of the United States government, and in pursuance of a fixing of the compensation to be paid to defendant by the United States government for carrying said mails and the person in charge thereof, based upon the last preceding reweighing of said mails, and upon notice in writing, in the usual form, from the Second Assistant Postmaster General of the United States, requiring defendant to carry said mails and the person in charge thereof.

"That said depot at or near the town of Harvey was an intermediate station on that part of defendant's said line of railroad within the state of North Dakota which extends from the station at Hankinson to the station at Portal, and the railroad line between said stations at Hankinson and Portal is designated by, and known to the Postoffice Department of the United States as, 'Railroad Route No. 161,018,' being a distance of 344.58 miles, and the compensation fixed by the United States Postoffice Department to be paid annually by the United States to the defendant, during all the period herein referred to, for the carriage of said mails and the person in charge thereof, is and was the sum of sixty-four thousand eight hundred and fifteen and $\frac{4}{100}$ dollars (\$64,815.49) at the rate of \$188.10 per mile.

"That this substituted plaintiff is not in possession of the aforesaid notice to defendant, and is unable to attach to this petition said notice, or a true copy thereof.

"That, during all of the period hereinbefore referred to, there was no contract of any kind between defendant and the United States government concerning or providing for the carriage by defendant of said mails, or any part thereof, or of the person in charge of said mails, upon or along defendant's said line of railway or any part thereof.

"That on or about the 10th day of November, A. D. 1900, the Metropolitan Bank, a corporation organized under the laws of the state of Minnesota, was engaged in transacting a general banking business in the city of Minneapolis in said state, and on or about said date said bank deposited in the United States mails at Minneapolis in said state a package containing lawful money of the United States, commonly known and called 'currency,' of the actual cash value of three thousand dollars (\$3,000.00), in an envelope properly addressed to the German State Bank at Harvey, North Dakota, and prepaid thereon the postage and registration fee, and said package was thereupon duly registered by the postmaster at said postoffice; that, from and after the time of depositing said package in said post-

office at Minneapolis, said package and its contents was the property of said German State Bank.

"That said registered package was covered by insurance and indemnity against loss, while in transit through the United States mails from Minneapolis to said Harvey, under a policy of insurance issued by said Bankers' Mutual Casualty Company, the substituted plaintiff; said insurance being for the use and benefit of said German State Bank; that a true copy of said policy is hereto attached as part hereof, and marked exhibit A.

"That on or about November 10th, A. D. 1900, and while said package was in good safety, and prior to the departure of the train carrying said registered package, said Metropolitan Bank deposited in the United States mails, at the postoffice in said city of Minneapolis, a letter of advice properly addressed to said Bankers' Mutual Casualty Company at Des Moines, Iowa, with postage thereon prepaid; that said letter of advice notified said Bankers' Mutual Casualty Company of the shipment by said Metropolitan Bank of said sum of \$3,000 to said German State Bank of Harvey, and upon said mailing of said letter of advice the contract of insurance and indemnity of said registered package of currency immediately attached thereto, and became a valid and complete contract of insurance and indemnity, by the said Bankers' Mutual Casualty Company, in favor of said German State Bank.

"That, in the regular course of transmission of the United States mails between the said city of Minneapolis and the said town of Harvey, said registered package was duly delivered by the postoffice officials of said city of Minneapolis to the railway mail clerk or other proper postal official, and placed in a railway mail car or other proper car, the property of defendant, then standing upon defendant's said line of railway, and was transported by defendant railway company to defendant's railway depot or station situated in or near said town of Harvey, North Dakota.

"That, prior to the arrival of said registered package at said town of Harvey, the same, together with other registered mail packages and other mail matter, was, by said railway mail clerk in charge of said mails, duly inclosed in a regular United States mail sack or mail pouch, which said mail sack or mail pouch was securely locked or fastened by the official government strap and lock.

"That from and after the time of the depositing of the mail sack containing said currency in defendant's mail car at Minneapolis, Minnesota, for the purpose of transit and transportation for delivery at Harvey, North Dakota, the same was under the

exclusive care, custody, and control of the postal clerks regularly employed by the United States government, and in charge of the mail in said car; that the mail sacks containing said registered package, from and after the time of its delivery in said postal car, to the proper postal clerks therein, up to and including the delivery of said mail sack at Harvey, North Dakota, was in the exclusive care, custody, and control of the said postal clerks or authorities.

"That upon the arrival of defendant's said train and postal car at said town of Harvey, North Dakota, said railway mail clerk or other postal official, between 11 and 12 o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained, to one James Magson, the night station agent or night operator of defendant at said town of Harvey; that said night station agent or night operator was not sworn as an official or employee of the Postoffice Department of the United States government as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of railway at said town of Harvey, including the mail sack or mail pouch containing said package of currency, and to deposit same in defendant's depot at Harvey, North Dakota, and did so receive, take charge of, and deposit said mail sack or mail pouch.

"That defendant was not sworn as an official or employee of the Postoffice Department of the United States government, and had not subscribed or sworn to any oath relating to or concerning the carriage of the United States mails, or the performance of defendant's duties as such carrier of the mails.

"That § 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered postage, is in words and figures as follows, to wit: 'The railroad company will also be required to take the mails from and deliver them into all intermediate post-offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.'

"That said postoffice at Harvey was an intermediate postoffice, and was located not more than 80 rods from defendant's railroad station or depot at or near said town of Harvey.

"That, under said postal regulation, it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while

in its said custody; also to safely care for and guard said mail sack and its contents during the night; also, to safely deliver the same to the postmaster or postmistress at the postoffice in said town of Harvey, North Dakota. But, neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail sack, and further wholly failed to safely care for or guard said mail sack and its contents, and also wholly failed to safely deliver the same at the postoffice, to the postmaster in said town of Harvey; that by reason of defendant's said negligence some person, to this plaintiff unknown, in some manner not known to this plaintiff, obtained access to said mail sack, and opened the same, and abstracted or took therefrom said registered package, whereby the same was wholly lost to said German State Bank.

"That one George A. Soule was then the roadmaster or foreman employed by said defendant at said town of Harvey, or one of defendant's employees or servants, but was not sworn in as an official or employee of the Postoffice Department, as required by law, and was not authorized or employed by defendant to take charge of said mail sack, or to perform any duty in relation thereto, and had no right of access to said mail sack, or to the mail therein contained, by virtue of his said employment by defendant.

"That said Soule had previously unlawfully obtained, and caused to be made, a key to the United States government mail sacks or mail pouches, and personally, or with the aid and assistance of some person or persons to this plaintiff unknown, did enter one of the rooms contained in the said depot building, where said mail sack or mail pouch had been placed by defendant's operator or night agent on the floor or wall of said room, and not in any separate room, closet, or other safe receptacle capable of being securely fastened against any intruder or unauthorized person, by lock and key or otherwise; that said room was not designed for or capable of safely keeping valuable articles or property.

"That said Soule, or other person, had no right of access to said room, or to said mail sack or mail pouch, but through the negligence of defendant and its said night operator or night agent, as set forth in this complaint, did gain entrance to said room, and obtain access to said mail sack or mail pouch, and the mail matter therein contained, and did find said mail sack or mail pouch situated or placed as above set forth, so that the same was readily accessible to any person gaining entrance to said room, and did find said mail sack or mail pouch

wholly unprotected and unguarded by said night operator or otherwise.

"That said Soule, or other person, by reason of the aforesaid negligence of said defendant and its said night agent or night operator, did obtain access to said mail sack or mail pouch, and did unlock the same, and abstract and take therefrom the aforesaid registered package containing said three thousand dollars (\$3,000.00) in currency, and did unlawfully convert the same to his use and benefit, and the same has never been delivered or returned to said German State Bank, or to said Metropolitan Bank of Minneapolis, or to this plaintiff, the Bankers' Mutual Casualty Company, or to anyone for the benefit of any of them.

"That in consequence of the loss of said package, as hereinabove stated, said Bankers' Mutual Casualty Company, substituted plaintiff, became indebted to said German State Bank of Harvey under its said policy of insurance, and was compelled to and did pay said German State Bank the full amount of the loss so sustained by it, to wit, the sum of three thousand dollars (\$3,000.00) in good and lawful money of the United States; the same being the amount of insurance or indemnity held by said German State Bank, and covered by said policy of insurance. That written demand has been made by said German State Bank and said Bankers' Mutual Casualty Company of and from defendant, for repayment to them, or one of them, of said sum of \$3,000, a copy of which written demand is hereto attached as part hereof, and marked exhibit B, which payment defendant has refused, and still refuses, to make.

"That, by reason of the foregoing facts, the said Bankers' Mutual Casualty Company has been and is now subrogated to all rights and remedies which said German State Bank of Harvey had against defendant, to recover the sum of \$3,000 so lost, with interest on said sum from and after the 10th day of November, A. D. 1900.

"That for the purpose of further effectuating the rights of subrogation of this substituted plaintiff, against defendant, and to enable it to recover from defendant the sum so lost, said German State Bank in writing transferred and assigned to the plaintiff all of its rights in and to said money lost, and to sue for the recovery thereof. A true copy of said instrument of assignment is hereto attached as part hereof, and marked exhibit C."

Defendant in error demurred to said complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, and, the plaintiff in error having elected to stand upon its complaint, the ac-

tion was dismissed on the merits. The order sustaining the demurrer was duly excepted to, and this ruling of the court is assigned as error.

Argued before *Sanborn and Thayer*, Circuit Judges, and *Carland*, District Judge.

Messrs. Horatio F. Dale, George W. Bowen, Henry Conlin, and William Connor, for plaintiff in error:

The obligation of railroads to carry the United States mail is fixed by the Constitution and statutes of the United States.

U. S. Const. art. I. § 8, ¶ 7; Rev. Stat. §§ 3964, 3965, 4000, U. S. Comp. Stat. 1901, pp. 2707, 2708, 2719; 20 Stat. at L. 355, chap. 180, 1 Rev. Stat. Supp. p. 246; 24 Stat. at L. 492, chap. 346, U. S. Comp. Stat. 1901, p. 2724, 1 Rev. Stat. Supp. p. 557.

If any liability exists at all, it must be in favor of the owner of the mail matter carried, upon whom the loss falls.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 94, 95, 45 L. ed. 767, 768, 21 Sup. Ct. Rep. 561.

Liability exists in favor of the person injured, for the negligence, default, or misfeasance of a postal official, contractor, or carrier.

Teal v. Felton, 12 How. 284, 13 L. ed. 990; *Dunlop v. Munroe*, 7 Cranch, 242, 268, 3 L. ed. 329, 338; *Clafin v. Houseman*, 93 U. S. 133, 23 L. ed. 837; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; *Philadelphia & R. R. Co. v. Derby*, 14 How. 486, 14 L. ed. 509; *The New World v. King*, 16 How. 469, 14 L. ed. 1019; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535.

The rule of liability exists in favor of the owner of mail matter lost or destroyed through the default, misfeasance, or negligence of the person or officer having the same lawfully in his custody.

Dunlop v. Munroe, 7 Cranch, 268, 3 L. ed. 338; *Raisler v. Oliver*, 97 Ala. 710, 38 Am. St. Rep. 213, 12 So. 238; *Ford v. Parker*, 4 Ohio St. 576; *Christy v. Smith*, 23 Vt. 663; *Fitzgerald v. Burrill*, 106 Mass. 446; *Keenan v. Southworth*, 110 Mass. 474, 14 Am. Rep. 613; *Bishop v. Williamson*, 11 Me. 495; *Schroyer v. Lynch*, 8 Watts, 453; *Maxwell v. McIlvoy*, 2 Bibb, 211; *Bolan v. Williamson*, 2 Bay, 551; *Coleman v. Frazier*, 4 Rich. L. 146, 53 Am. Dec. 727; *Wiggins v. Hathaway*, 6 Barb. 632; *Sawyer v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Concell v. Voorhees*, 13 Ohio, 523, 42 Am. Dec. 206; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248.

A railroad company has been held liable 65 L. R. A.

to a railway mail clerk injured through the negligence of the railroad company or its employees while said railway mail clerk was in the performance of his duties on defendant's train.

Collett v. London & N. W. R. Co. 20 L. J. Q. B. N. S. 411, 16 Q. B. 984, 15 Jur. 1053; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 563, 47 Am. Rep. 75; *Nolton v. Western R. Corp.* 15 N. Y. 444, 69 Am. Dec. 623; *Cleveland, C. C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 19 L. R. A. 339, 36 Am. St. Rep. 550, 33 N. E. 116; *Ohio & M. R. Co. v. Voight*, 122 Ind. 288, 23 N. E. 774; *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371, 11 L. R. A. 486, 23 Am. St. Rep. 345, 15 S. W. 280; *Houston & T. O. R. Co. v. Hampton*, 64 Tex. 427; *Magoffin v. Missouri P. R. Co.* 102 Mo. 540, 22 Am. St. Rep. 798, 15 S. W. 76; *Mellor v. Missouri P. R. Co.* 105 Mo. 455, 10 L. R. A. 36, 16 S. W. 849; *Hammond v. North Eastern R. Co.* 6 S. C. N. S. 130, 24 Am. Rep. 467; *Baltimore & O. R. Co. v. State*, 72 Md. 36, 6 L. R. A. 706, 20 Am. St. Rep. 454, 18 Atl. 1107; *Libby v. Mains C. R. Co.* 85 Me. 34, 20 L. R. A. 812, 26 Atl. 943; *Norfolk & W. R. Co. v. Shott*, 92 Va. 43, 22 S. E. 811; *Louisville & N. R. Co. v. Kingman*, 18 Ky. L. Rep. 82, 35 S. W. 265; *St. Louis, I. M. & S. R. Co. v. Stewart*, 68 Ark. 608, 82 Am. St. Rep. 311, 61 S. W. 169.

A subcontractor for the transfer of the mail between a railroad station and a post-office is liable for the negligence of himself and his employee, whereby injury is caused to a railway mail clerk acting as a transfer clerk, and lawfully riding with the mail on the subcontractor's wagon.

Lawton v. Waite, 103 Wis. 244, 45 L. R. A. 619, 79 N. W. 321.

The doctrine of *respondent superior* has a double effect: First, as to the principal: To make the principal liable for the acts of all of his agents and employees when working for his benefit, within the scope of their employment, whether such agents and employees are employed and directed by himself personally or by an intermediate agent appointed by himself, because all that is done by all of these agents is, in contemplation of law, done by the principal, which is expressed by the legal maxim, *Qui facit per alium facit per se*. Second, as to an intermediate agent: To exempt or relieve an intermediate agent from liability for the acts or omissions of a subordinate agent employed by him or acting under his direction, where the employment of the subordinate was authorized by the principal, because all were acting for the benefit of, and in privity with, one common principal, and the intermediate agent was only the representative of the principal.

• A railroad company carrying the mail upon notification from the Postoffice Department is not exempt from liability under this rule.

Central R. & Bkg. Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334.

This exemption from liability does not apply to all "agents" performing any and every kind of service which is of benefit to the public, or to the government, or to a governmental or quasi governmental corporation, or which is done for the public, or for a government, or governmental or quasi governmental corporation.

A public office is a public position, to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public.

High, Extr. Legal Rem. 3d ed. 1896, § 620; 19 Am. & Eng. Enc. Law, pp. 381, 382, title, *Public officers*; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302.

The discretionary powers conferred upon public agents are in the nature of a trust, and, unless authorized so to do, the "person chosen for their execution cannot delegate them."

1 Am. & Eng. Enc. Law, 2d ed. pp. 974, 981-983, title, *Agency*; 19 Am. & Eng. Enc. Law, pp. 461, 514, title, *Public officers*.

The authorities exempting public agents from liability fail to sustain the contention that defendant railway company, in caring for the mail under the circumstances shown, was entitled to that exemption from liability which the law confers upon public officers in the performance of official duties.

If a grant is for the private advantage of a municipal corporation, or if the function to be performed by a municipal corporation is not strictly governmental, but is partly governmental and partly for pecuniary profit, then the municipal corporation is subject to, and not exempt from, liability, under the rule of *respondeat superior*, for the torts and negligence of its employees.

New York & B. Saurmill & Lumber Co. v. Brooklyn, 71 N. Y. 580; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; 19 Am. & Eng. Enc. Law, p. 514, title, *Public officers*.

Persons acting for their own benefit, or employing others for their own benefit, are not exempt from liability, under the rule of *respondeat superior*.

Story, *Agency*, 9th ed. § 321; *Saucy v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Bank of United States v. Planters' Bank*, 9 Wheat. 907, 6 L. ed. 244. 65 L. R. A.

As a corporation for pecuniary profit is always working for its own benefit in all that is done for it by its agents, a corporation transporting the United States mail is performing such service as one means of increasing its revenues and enhancing its profits, and any benefit the public derives from such service is a mere incidental effect of the industrious efforts of the carrier to increase its revenues and net profits.

A corporation can act only by its agents or servants.

Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440.

It necessarily follows that a corporation, as a distinct entity or legal "person," can exercise no personal care in the selection of its agents, can maintain no personal supervision over their conduct, can personally dismiss no incompetent and negligent employees, cannot personally see that appropriate rooms and appliances are properly furnished and maintained for the care of the mail and the conduct of the postal business. Yet one of the fundamental rules of exemption from liability, under the rule of *respondeat superior*, is that the superior public officer shall personally exercise these functions.

The relation of principal and subordinate public officer must exist to entitle the principal to exemption from liability, under the rule of *respondeat superior*. The principal and subordinate must each qualify as such officer as required by law. A person employed by a superior, whose appointment is not authorized by law, or who has not qualified as required by law, is not a subordinate public officer, so as to entitle the principal to claim this exemption.

Ely v. Parsons, 55 Conn. 83, 10 Atl. 499; *Raisler v. Oliver*, 97 Ala. 710, 38 Am. St. Rep. 213, 12 So. 238; *Dunlop v. Munroe*, 7 Cranch, 268, 3 L. ed. 338; *Bishop v. Williamson*, 11 Me. 495; *Christy v. Smith*, 23 Vt. 663; *Ford v. Parker*, 4 Ohio St. 576; *Saucy v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Rounds v. Mansfield*, 38 Me. 586; *Trainor v. Wayne County*, 89 Mich. 162, 15 L. R. A. 97, 50 N. W. 809.

A government office is different from a government contract.

United States v. Hartwell, 6 Wall. 385, 18 L. ed. 830.

Contractors with the government are subject to the rule of *respondeat superior*.

1 Shearm. & Redf. Neg. 5th ed. 1898, § 325, p. 557; *Harrison v. Hughes*, 110 Fed. 545; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Saucy v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334;

Mechem, Agency, § 594; Wharton, Ev. § 296.

In the modern method evolved for carrying the mail, the government does not have the slightest connection with, or relation to, the ordinary employees of a railroad corporation; and it is impossible for such corporation to hold any personal relation, either towards the government, or towards its employees.

Shaw v. Chicago & G. T. R. Co. 123 Mich. 629, 49 L. R. A. 308, 81 Am. St. Rep. 230, 82 N. W. 618.

The negligence charged in the complaint consists of negligence on the part of defendant in error itself, and negligence on the part of defendant's employee, the night operator at Harvey, North Dakota, for which it is claimed that defendant in error is responsible. The negligence which defendant in error is alleged to have itself committed, is as follows: 1. It failed to furnish any suitable or safe room, place, or receptacle in which the mail could be safely or securely kept, under lock and key or other secure fastening. 2. It failed to place and keep in charge of said mail sack a competent and vigilant employee. 3. In violation of law, it did place in charge of said mail sack one of its employees who had not been sworn into the postal service as required by law.

If defendant in error is held to be exempt from liability, under the rule of *respondeat superior*, as to its employee, the night operator at Harvey, it is nevertheless certain that defendant is responsible for any injury caused by its own negligence.

The liability of the carrier as such ends with the delivery of the goods to the consignee or owner, or with their deposit in a reasonably safe warehouse after the consignee has had a reasonable time in which to call for them and take them away.

5 Am. & Eng. Enc. Law, 2d ed. p. 191.

The statutes of the United States require a delivery of mail to a person entitled to receive it. A mere abandonment, or quitting possession, of the letter, does not amount to the idea of delivery.

Rouning v. Goodchild, 3 Wils. 443, 2 W. Bl. 906; 5 Am. & Eng. Enc. Law, 2d ed. p. 268.

When a carrier is required by law or by special contract to deliver goods at a particular place, its liability as a carrier continues until the goods have been delivered at that place.

Chicago & N. W. R. Co. v. Sawyer, 69 Ill. 285, 18 Am. Rep. 613; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *Moore v. Michigan C. R. Co.* 3 Mich. 23.

The carrier must exercise a proper supervision of its employees, and furnish proper

appliances for the safe conduct of the property carried.

Rouning v. Goodchild, 3 Wils. 443, 2 W. Bl. 906; *Whitfield v. Despencer*, 2 Cowp. 754; *Dunlop v. Munroe*, 7 Cranch, 242, 3 L. ed. 329; *Bishop v. Williamson*, 11 Me. 495; *Schroyer v. Lynch*, 8 Watts, 453; *Conwell v. Voorhees*, 13 Ohio, 523, 42 Am. Dec. 206; *Christy v. Smith*, 23 Vt. 663; *Ford v. Parker*, 4 Ohio St. 576; *Fitzgerald v. Burdill*, 106 Mass. 446; *Shaw v. Chicago & G. T. R. Co.* 123 Mich. 629, 49 L. R. A. 308, 81 Am. St. Rep. 230, 82 N. W. 620; *Hall v. Manson*, 90 Iowa, 590, 58 N. W. 881; 1 Thomp. Neg. 2d ed. 1901, p. 9, § 8; *Story*, Bailments, § 15; *Joslyn v. King*, 27 Neb. 38, 4 L. R. A. 457, 20 Am. St. Rep. 656, 42 N. W. 756.

As a carrier of freight, a railroad company is bound to furnish sufficient facilities for the reasonably prompt transportation of goods tendered for carriage.

5 Am. & Eng. Enc. Law, 2d ed. pp. 167, 175, 192, 258, title, *Carrier of goods*; *Cobb v. Illinois C. R. Co.* 38 Iowa, 623; 5 Am. & Eng. Enc. Law, 2d ed. p. 430, title, *Carrier of live stock*; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 1003, 45 Am. Rep. 428; *Beard v. Illinois C. R. Co.* 79 Iowa, 520, 7 L. R. A. 280, 18 Am. St. Rep. 381, 44 N. W. 800.

If an agent, by his wilful act or by his negligent conduct inflicts an injury upon a third person, he is liable to that third person in the same manner as though he were not an agent. This obligation is not one which grows out of his relation as an agent, but one which the law imposes upon every responsible member of society.

Mechem, Agency, § 540; *Mayer v. Thompson-Hutchison Bldg. Co.* 104 Ala. 611, 28 L. R. A. 433, 53 Am. St. Rep. 88, 16 So. 620; *Baird v. Shipman*, 132 Ill. 16, 7 L. R. A. 128, 22 Am. St. Rep. 504, 23 N. E. 384; *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503.

Public officers having ministerial duties to perform, in which private individuals have a direct interest, are liable to such individuals for any injury sustained by them in consequence of the failure to perform such duties.

Stephenson v. Monmouth Min. & Mfg. Co. 28 C. C. A. 292, 54 U. S. App. 499, 84 Fed. 114.

Where the law absolutely requires a ministerial act to be done by a public officer, which he fails to perform, such public officer is liable to respond in damages.

Amy v. Barkholder, 11 Wall. 136, 20 L. ed. 101; *Farr v. Thomson*, 11 Wall. 139, 20 L. ed. 102; *Sawyer v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Wilson v. New York*, 1 Denio. 599, 43 Am. Dec. 719; *Goetcheus v.*

Matthewson, 61 N. Y. 429; *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352; *Bassett v. Fish*, 12 Hun, 209; *Piercy v. Averill*, 37 Hun, 360; *Bennett v. Whitney*, 94 N. Y. 302; *Jenner v. Joliffe*, 9 Johns. 381; *Adsit v. Brady*, 4 Hill, 630, 40 Am. Dec. 305; *Raynsford v. Phelps*, 43 Mich. 344, 38 Am. Rep. 189, 5 N. W. 403; *Rounds v. Mansfield*, 38 Me. 586; *Macmillan v. Pike*, 2 Me. 8; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 503, 47 Am. Rep. 75; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Nowell v. Wright*, 3 Allen, 169, 80 Am. Dec. 62; *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741; *Horner v. Laurence*, 37 N. J. L. 46; *Harriman v. Stowe*, 57 Mo. 93; *Martin v. Benoit*, 20 Mo. App. 266; *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113; *Greenberg v. Whitcomb Lumber Co.* 90 Wis. 225, 28 L. R. A. 439, 48 Am. St. Rep. 911, 63 N. W. 93.

When a person puts another in his place to do certain acts in his absence, he necessarily leaves him to determine for himself, according to his judgment and discretion, according to circumstances and exigencies that may arise, when and how the act is to be done, and trusts him for its proper execution; consequently he (the master) is answerable for the wrongful execution of the acts either in the manner or occasion of doing it, provided it is done bona fide in the prosecution of his business.

Wood, Mast. & S. § 288; Philadelphia & R. R. Co. v. Derby, 14 How. 484, 14 L. ed. 508; *Bolan v. Williamson*, 2 Bay, 551; *Raisler v. Oliver*, 97 Ala. 710, 38 Am. St. Rep. 213, 12 So. 238.

Mr. Alfred H. Bright, for defendant in error:

The contractor was a public agent, and as such not liable, except for his own neglect.

Convell v. Voorhees, 13 Ohio St. 523, 42 Am. Dec. 206; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Robertson v. Siechel*, 127 U. S. 508, 32 L. ed. 203, 8 Sup. Ct. Rep. 1286.

The postmaster is charged, by reason of his official position, to perform certain duties to the public, and, if he fails through his negligence, and a loss occurs, he is liable.

1 Shearm. & Redf. Neg. § 321; Angell, Carr. § 119; Cooley, Torts, p. 458, 2d ed. 391; *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352, Affirmed in 12 How. 284, 13 L. ed. 990.

But postmasters are not liable for the negligence of assistants and clerks.

Keenan v. Southworth, 110 Mass. 474, 14 Am. Rep. 613; *Wiggins v. Hathaway*, 6 Barb. 632; *Christy v. Smith*, 23 Vt. 663; *Bolan v. Williamson*, 2 Bay, 551. 65 L. R. A.

There is no law requiring this railway company to carry the mail. The duty, therefore, to carry is one arising out of contract, and not one imposed by law.

If it is true that the defendant was not a public agent in the performance of a public duty, answerable only for its own negligence, then it was acting purely in a contract relation with the government, and answerable to the government alone for any breach of that contract,—certainly not to the plaintiff, who stands in no relation of privity to it.

Britton v. Green Bay & Ft. H. Waterworks Co. 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84.

Carland, District Judge, delivered the opinion of the court:

This case presents but one question for our consideration, and that is whether or not the defendant in error is liable to the plaintiff in error upon the facts stated.

No Federal decision is called to our attention, and we are unable to find any, parallel to the case at bar. There are, however, well-settled principles of law which we believe must determine the case. It is claimed by plaintiff in error that it is alleged in the complaint, and admitted by the demurrer, that defendant in error had no contract relation with the United States in pursuance of which it carried the mail between Minneapolis, Minnesota, and Harvey, North Dakota; that the duty to carry the mail safely was imposed upon defendant in error by the Constitution and laws of the United States; and that, this duty being imposed by law, any person injured by a violation thereof would have his remedy. If we correctly understand counsel, it is argued that there was no contract relation between the defendant in error and the United States, in order to avoid the objection that plaintiff in error stands in no such relation to that contract as would enable it to maintain an action for a breach thereof. In the view we take of the case, however, we do not see how it makes any difference whether defendant in error was carrying the mail under and by virtue of a contract with the United States, or whether that duty was imposed by the Constitution and laws thereof; in either event it was a public agent of the United States, and its liability must be determined accordingly. The defendant in error, in regard to its liability for the loss of the money, was in no sense a common carrier. As was said in the case of *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334: "Between a contractor for carrying the public mails and the sender of letters, there is no privity of contract, and the contractor

has no right to and receives no remuneration from the sender. The government undertakes the transmission of the mails, and receives pay therefor by the postage charged. The contractor's contract is with the government, and by it his compensation is paid. He owes a duty, not to the sender of the letters as an individual, but to the integral public, springing from his agreement to carry the mails. The public mail is not the proper subject of a common carrier's charge, and the extraordinary responsibility attached by law to such employment does not attach to a mail contractor. He does not become an insurer of the safe transportation of mail matter; the extent of his liability is the same as that of a bailee for hire. The railroad company was not transformed into a common carrier as to the mails because, being engaged in the regular business of transporting goods for the public, it was, at the same time, carrying the mails by direction and employment of the proper department of the government. The occupation of the company was of a dual character. It was acting in two capacities, created and regulated by separate and distinct contracts and employments. The liability of the defendant cannot, therefore, be determined by the rules governing the responsibility of a common carrier."

It seems clear to us that defendant in error was a public agent of the United States in relation to carrying the mail, for the reason that the Constitution of the United States conferred upon it the power to establish postoffices and postroads, and this power was granted by the people as one of the sovereign powers, to be exercised by the general government exclusively. By virtue of this grant of power, the United States has always, through its Postoffice Department, assumed the exclusive charge of the carriage and delivery of the mail for the benefit of all the people. In doing so, the United States is beyond question engaged in the discharge of a governmental function. All persons or corporations who are engaged in the carriage or delivery of the mail by the authority of the United States, conferred by contract or general laws, are but the instruments used by it to discharge this function. As a practical illustration as to whether the defendant in error was engaged in the discharge of a governmental function, let us suppose that some person had attempted to obstruct the carriage and delivery of this mail sack, which contained the money in controversy, at the postoffice at Harvey, North Dakota, while it was in possession of defendant in error. Would not the person be liable to punishment under the penal laws of the United States? Beyond question he would. From whence

springs the power of the United States to punish such an act? It springs from the authority that all governments possess of punishing the person who obstructs that government in the lawful discharge of its duty. It now becomes necessary to ascertain what the liabilities of public agents are, and upon this question there seems to be little, if any, conflict of authority. A public officer or agent, provided he has exercised ordinary care to select competent subordinates, is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences or omissions of duty, of the subagents or servants, or other persons properly employed by or under him in the discharge of his official duties. *Robertson v. Sichel*, 127 U. S. 507, 32 L. ed. 203, 8 Sup. Ct. Rep. 1286; *Story, Agency*, § 319. In reference to the Postoffice Department, it has been uniformly held that the Postmaster General, the deputy postmasters, and their assistants and clerks appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him and subject to his orders. *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Le Despencer*, 2 Cowp. 754; *Dunlop v. Monroe*, 7 Cranch, 242, 3 L. ed. 329; *Schroyer v. Lynch*, 8 Watts, 453; *Bishop v. Williamson*, 11 Me. 495; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Conwell v. Voorhees*, 13 Ohio, 523, 42 Am. Dec. 206; *Story, Bailments*, §§ 462, 463; *Robertson v. Sichel*, 127 U. S. 507, 32 L. ed. 203, 8 Sup. Ct. Rep. 1286. The same doctrine has been extended or applied to mail contractors by the cases of *Conwell v. Voorhees*, 13 Ohio, 523, 42 Am. Dec. 206; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Foster v. Metts*, 55 Miss. 77, 30 Am. Rep. 504. The court, however, refused to extend the rule to mail contractors in the cases of *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; and *Sawyer v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445. The Alabama court adopted and followed the reasoning of the Virginia court. The reasoning of the cases cited is illustrated by the following language taken from the opinion in *Central R. & Bkg. Co. v. Lampley*: "The contractor, being the person who contracts with and is paid by the government, and who gives a guaranty for the faithful discharge of the service, is the public agent if such contract constitutes an agency. He is the one directly responsible to and with whom the government deals. He employs his own carriers, who are paid by him, and who are not known to the government other than as his employees. As to civil responsibility, the contractor stands between the carrier and the govern-

ment, although, for the purpose of public security, an oath may be required of the carrier, and penalties imposed for violations of the laws of the postal service. In a sense the carrier may be said to do work for the government, not as an agent, but as one employed by the contractor, in his own name, for his individual benefit, and on his personal responsibility, as necessary help to do the service which he has contracted to do. Laborers employed by a contractor for the construction of naval vessels, or for the erection of public buildings, may in the same sense be said to do work for the government, but they are not public laborers. We approve and adopt the legal propositions as to the liability of a contractor, maintained and asserted in *Sawyer v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445."

This reasoning would make the defendant in error a public agent, but would deny that position to the agent at Harvey; the subordinate agent of the defendant in error being what is called a carrier in the opinion under consideration. We do not think that the comparison between a laborer employed by a contractor for the construction of naval vessels or for the erection of public buildings an apt one. The United States in building a public building, or in constructing a naval vessel through a contractor, is not exercising sovereign power, or engaged in a purely governmental function. It is acting in its purely private or business capacity. Anyone possessed of sufficient means may construct a vessel or build a building. The United States only can carry the mail. Hence we believe that the character of the service in which the agent is engaged must determine in the case at bar as to whether the subordinate agents of the defendant in error, in so far as they were engaged in carrying the mail, were or were not public agents. Let us now apply the principles of law which, in our opinion, are controlling, to the facts in this case. There is nothing alleged in the complaint that would connect the defendant in error personally with the wrong complained of; that is, there is no allegation that any officer of the defendant in error whose act or omission the court would be bound to hold was the act or omission of defendant in error did any act, or omitted to do any act, which caused the loss of the mail. There is no allegation that the defendant in error did not exercise ordinary care in the selection of competent persons to handle the mail after it reached Harvey. The allegation of the complaint in regard to the agent at Harvey is as follows: "That upon the arrival of defendant's said train and postal car at said town of Harvey, North Dakota, said railway mail clerk or other

postal official, between 11 and 12 o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained, to one James Magson, the night station agent or night operator of defendant at said town of Harvey; that said night station agent or night operator was not sworn as an official or employee of the Postoffice Department of the United States government as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of railway at said town of Harvey, including the mail sack or mail pouch containing said package of currency, and to deposit same in defendant's depot at Harvey, North Dakota, and did so receive, take charge of, and deposit said mail sack or mail pouch."

The fact that Magson was not sworn is not controlling, for, if the defendant in error, in its business in carrying the mail, was a public agent, then it was responsible for its own negligence only, and not for the negligence of its servants engaged in the same business. If the defendant in error was a person, this case would be plain. The apparent difficulty arises from separating the negligence of defendant in error from the negligence of its subordinate agent arising from the fact that a corporation must perform all its acts through agents. We think, however, that there is a well-defined distinction with reference to its duties as a carrier of the mail. To illustrate: Supposing the agent Magson had left the mail sack on the depot platform, and by reason thereof the same had been stolen. This, in the absence of any showing that defendant in error had not used proper care in the selection of Magson as its agent, would have been the negligence of Magson, for which he would have been liable, but it would not have been the negligence of defendant in error. If, however, some officer of defendant in error who stood in such a relation to the company that his negligence would be its negligence should negligently do some act whereby a loss occurred from the mail, then defendant in error would be liable. Let us now examine the acts of negligence alleged. Section 713 of the postal regulations of 1893, set out in the complaint, determined the duty of defendant in error in relation to the mail sack after its receipt by Magson. The regulation is as follows: "The railroad company will also be required to take the mails from and deliver them into all intermediate postoffices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed."

Whatever duty this regulation imposed upon defendant in error must be determined from the regulation itself. The demurrer admits the existence of the regulation, not the pleader's opinion or legal conclusion of its effect. It simply made it the duty of defendant in error to deliver the mail sack at the postoffice. There is no allegation that the mail sack was not delivered at the postoffice, but, that, after it was delivered to Magson, some person unknown to the pleader opened the mail sack, and abstracted the package of money in controversy. We know nothing about the facts connected with the loss of the money except what is alleged in the complaint, and in the discussion of the case we of course disclaim any intention of reflecting on the character of anyone. The allegations of the complaint are entirely consistent with the theory that Magson stole the money. If so, in the absence of any allegation of negligence of defendant in error in employing him, there is no evidence of negligence that would charge the defendant in error, as all the precautions that it is alleged would have prevented the theft would not have prevailed against Magson,

for by the act of the postal clerk and defendant in error the custody of the mail sack was delivered to him. Mere proof that the package of money was stolen, no matter by whom, creates no liability against defendant in error, unless its own negligence was the direct cause of the larceny, as contradistinguished from the negligence of its agent at Harvey. We are not informed by the record as to what was done with the mail sack after Magson deposited the same in defendant in error's depot, or what became of it afterwards. We are satisfied, however, that, if the negligence of anyone directly contributed to the larceny, it was the negligence of Magson, for whose negligence in the matter of carrying the mail the defendant in error is not liable.

The judgment below must be affirmed, and it is so ordered.

Petition for writ of certiorari denied by Supreme Court of United States December 22, 1902.

Writ of error dismissed by Supreme Court of United States February 23, 1904.

IDAHO SUPREME COURT.

W. P. HARD, *Appt.*,
v.

BOISE CITY IRRIGATION & LAND COMPANY, *Respt.*

(.....Idaho.....)

- *1. Users of water from a ditch or canal acquire such a property right as they may transfer to other lands under such ditch or canal.
2. They may also sell and transfer the right to use such waters, and the purchaser may transfer it to other lands under the ditch or canal, so long as the change of the place does not interfere with the rights of others.

(Sullivan, Ch. J., dissents.)

(February 10, 1904.)

*Headnotes by STOCKSLAGER, J.

NOTE.—Transfer of right to use water for irrigation.

- I. Of right acquired by appropriation, 407.
- II. Of right in ditch, 409.
- III. May pass by conveyance of land, 409.
- IV. Method of transfer, 412.
- I. Of right acquired by appropriation.

The right acquired by a valid appropriation of water for the purpose of irrigation is a property right. Farnham, Waters, § 641.
65 L. R. A.

APPEAL by plaintiff from a judgment of the district court for Ada County in favor of defendant in an action brought to compel it to deliver water to him for irrigation purposes. *Reversed.*

The facts are stated in the opinions.

Mr. Hugh E. McElroy for appellant.

Messrs. Wood & Wilson, for respondent:

Our courts have persistently refused to recognize the water right as a property right, for which compensation might be exacted by the canal company. It is apparent from the entire framework of our irrigation system that it is not intended that the right to the use of water may be conveyed from hand to hand as a property right; but the same must necessarily be considered as the complement of, and appurtenant only to, the tract of land where used.

To acquire such right, however, it is necessary that the water should be put to some beneficial use, and, in order to do this, it is necessary to own or have an interest in a parcel of land where such beneficial use may be made, or intend to devote the water to the use of property owners. Therefore, it may be said that, in a sense, the water right is an incident of, or adjunct to, the land. The water right is not, however, so far a parcel of the particular land to which it is first applied that it cannot be changed so as to benefit other land, for the place

The canal company is more than a common carrier for the landowner. It is the original appropriator of the water,—it is the owner of the diversion works and conduit for the conveyance of the water.

Civil Code, §§ 2583, 2587; *Wilterding v. Green*, 4 Idaho, 773, 45 Pac. 137; *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; *Knowles v. Clear Creek, P. River Mill & Ditch Co.* 18 Colo. 200, 32 Pac. 279.

On petition for rehearing.

The rental water right acquired under the Constitution created no property right which could be set up as a basis of jurisdiction in a suit in the United States court.

Beardsly v. Boise City Irrig. & Land Co. (U. S. C. C.).

of use may be shifted at will so long as the vested rights of other persons are not interfered with. See *note* to *McGuire v. Brown*, 30 L. R. A. 384.

The question then arises as to how far the use of the water may be shifted to the land of a stranger by a sale of the water right to him. There seems to be no question that one who has acquired a water right by appropriation may sell and transfer it the same as he could any other species of property.

In *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472, it is said that a sale or transfer of the whole or part of an appropriation of water may be made after the appropriation is completed, either in connection with, or separate and apart from, the land; and the purchaser may use it for an entirely distinct purpose.

And the same rule was followed in connection with *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313, and *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054, the court in the former case saying: A priority to the use of water for irrigation is a property right, and may be sold and transferred separately from the land in connection with which the right ripened, the sole limitation being that the rights of others shall not be injuriously affected by such transfer.

A water right, even though it may be appurtenant to land, is the subject of property, and may be conveyed with or without the land. *Crippen v. Comstock* (Colo. App.) 68 Pac. 1074.

Although a water right may be appurtenant to the land on which it was used, it is the subject of property, and may be transferred either with or without the land. *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. 355.

One settling on a public domain may acquire a right to the use of water for the irrigation of the land taken by him; and he may sell such right independent of the land; or, in case of his death, such right may descend to his heirs. *Hall v. Blackman* (Idaho) 68 Pac. 19.

One of several landowners who have made a common appropriation of water for the benefit of all the lands may assign his share of the water for use on land not within that covered by the original appropriation, so far as such use will not prejudice the rights of the other appropriators. *Biggs v. Utah Irrigating Ditch Co.* (Ariz.) 64 Pac. 494. 65 L. R. A.

Stockalager, J., delivered the opinion of the court:

This action was brought to compel the respondent, the Boise City Irrigation & Land Company, a corporation, to change the point of diversion of, and deliver to the appellant, 1½ cubic feet of water per second of time, for the irrigation of certain lands of appellant, the right to the use of which appellant claims to have purchased from one who had formerly leased or rented it of respondent, and had used it upon certain land under respondent's canal, which was a different tract from that upon which appellant intended to use it. It is alleged in the amended complaint that the Boise City Irrigation & Land Company was duly organized and doing business in the state; that it is the

Owners of shares in water appropriated by several landowners for irrigating their tracts of land are estopped from contesting the right of assignees of their co-owners to use the water on land not within that for which the original appropriation was made, after the diversion to the new land has continued for from eight to sixteen years, and large sums of money have been expended on the faith of the diversion in improvement, cultivation, and betterment. *Ibid.*

And the character of the use need not be preserved, for a priority acquired to the use of water for agricultural purposes may be transferred to a city for city purposes provided the rights of others are not injured thereby. *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313.

But one who has acquired a prescriptive right to use water from a stream for the purpose of irrigation cannot sell a water right to one who intends to pipe it beyond the watershed of the stream for furnishing a municipal water supply, where the result will be to interfere with the rights of other property owners in the water. *South California Invest. Co. v. Wilshire* (Cal.) 77 Pac. 767.

The sale may include all of the right to which the vendor is entitled, or it may be limited to a portion of it; so that where a person has the right to use the water of a stream by virtue of prior appropriation, and it appears that all the water of that stream is necessary to irrigate his land, he may sell a portion of the water actually needed, and a subsequent patentee of the land through which the stream flows has no ground of complaint. *Drake v. Earhart*, 2 Idaho, 716, 23 Pac. 541.

That the water right is a class of property by itself, and not dependent upon the ownership of the land upon which the water is applied while the right is being acquired, is shown by *Hayes v. Buzard* (Mont.) 77 Pac. 423, holding that rights in land may be abandoned, and the water right retained.

But one purchasing irrigating rights or priorities from riparian owners does not thereby acquire the preference right to the use of the water which his grantor, as incident to his riparian ownership, made use of for domestic purposes, the right to which is, under the Colorado Constitution, inseparable from such ownership. *Broadmoor Dairy & Live Stock Co. v. Brookside Water & Improv. Co.* 24 Colo. 541, 52 Pac. 792.

owner of and managing and operating a certain irrigation canal, together with a water right from Boisé river, which canal is commonly known as the "Ridenbaugh canal," and that said corporation is engaged in the business of distributing water for the irrigation of the lands under said canal, charging therefor the compensation fixed by law; that the appellant is the owner of certain land (describing it) situated under said canal; that said land is arid in character, and is valueless without water for its irrigation; that during the year 1902, and several years prior thereto, one Simpson was the owner of certain land under said canal, and had received from respondent 1½ cubic feet of water per second of time of the water diverted from Boisé river by respondent's

said canal, and during said years, to the close of the irrigation season of 1902, said water was actually used by said Simpson for the irrigation of his said land; that said Simpson had paid in full therefor, and had the right to demand and receive said amount of water from respondent upon payment of the lawful annual charges therefor; that on the 15th day of December, 1902, said Simpson sold and conveyed his said water right, together with his said land upon which said right had theretofore been used, to three persons (naming them); that on December 27, 1902, one of the said grantees, acting for himself and his co-owners, served upon the respondent corporation a notice in writing that he desired the above-described 1½ cubic feet of water per second of time

One tenant in common of a tract of land and the water appropriated for use thereon cannot transfer a greater interest in the water than he possesses,—that is, his undivided share in the common property. *Beers v. Sharpe* (Or.) 75 Pac. 717.

II. Of right in ditch.

When land is located at such a distance from a source of water supply that the cost of a conduit to bring the water to the land exceeds the means of the landowner, he may unite with others to construct the ditch, or the ditch may become the subject of independent enterprise on the part of one who undertakes to construct the ditch and furnish water to those who need it. In such cases the ditch may, to a certain extent, be regarded as the embodiment of the water right, so that a conveyance of an interest in the ditch will include the right to the water. The water right and the ditch are, however, distinct, and the respective rights may be kept distinct in making transfers of property rights. See *Farnham, Waters*, § 632.

A ditch may be conveyed reserving the water right, or the water right may be conveyed reserving the ditch. *Ada County Farmers' Irrig. Co. v. Farmers' Canal Co.* 5 Idaho, 793, 40 L. R. A. 485, 51 Pac. 990; *Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045; *Oppenlander v. Left Hand Ditch Co.* 18 Colo. 142, 31 Pac. 834; *Wold v. May*, 10 Wash. 157, 38 Pac. 875.

But the question arises, whether there is any distinction between a water right acquired through connection with a ditch and one acquired directly by appropriation, so far as the right to transfer it independently of the land on which it is used is concerned. Like a right acquired directly by appropriation, the right to take water from a ditch depends primarily upon the beneficial use of the water upon some parcel of land.

As said in *Slosser v. Salt River Valley Canal Co.* (Ariz.) 65 Pac. 332. A right to water from an irrigation company's ditch, to be effective, must be attached to and pertain to a particular tract of land, and is in no sense a "floating" right, although it may be separable. Therefore, so long as a water right is attached to a particular piece of land, it cannot be made to do duty to such land, and as well to other land not owned or possessed by such water-right holder, at the will or option of the holder of the latter.

65 L. R. A.

Whether the interest in the ditch depends upon ownership of shares in a water company, or upon a partnership interest in the ditch, the courts agree with the rule stated in *HARD V. BOISÉ CITY IRRIG. & LAND CO.*, that the users of the water have a property right which they may transfer separate from the land. *McPhail v. Forney*, 4 Wyo. 556, 35 Pac. 773; *Snyder v. Murdock*, 20 Utah, 419, 50 Pac. 91.

A right of way in a canal and pipe line, although a servitude in gross, not assignable at common law is assignable under the California Civil Code, declaring this class of servitudes property, and providing that every species of property, except a mere possibility not coupled with any interest, may be transferred. *Fudickar v. East Riverside Irrig. Dist.* 109 Cal. 29, 41 Pac. 1024.

Water rights, though primarily applied to a certain tract of land, may be severed from it, used on other land by the owner or sold to any other consumer under the same ditch; or the ditch may be extended to apply the water right to other lands or uses, subject only to the limitation that the use and transfers shall not be injurious to a later appropriator. *Larimer & W. Reservoir Co. v. Cache la Poudre Irrig. Co.* 8 Colo. App. 237, 45 Pac. 525, Affirmed in 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318.

That a water right belonging to one because of ownership of a share in an irrigation canal may be separated from the land upon which the water has been applied, is illustrated by *Brockman v. Grand Canal Co.* (Ariz.) 76 Pac. 602, in which the owner of the land and water right sold both, and then repurchased the land without the water right, and was held to have abandoned his original right in the water company; and it was held that any further rights which he had to receive water from the company must be based upon subsequent proceedings.

But the right cannot be transferred to the injury of vested interests which have attached to it on behalf of other persons. Therefore, an appurtenant water right for the irrigation of lands cannot be sold separate from the land to the injury of the mortgagee. *Frank v. Hicks*, 4 Wyo. 503, 35 Pac. 475, 1025.

III. May pass by conveyance of land.

Although, as has been seen, a water right is a species of property which may be sold and conveyed the same as other classes of property, yet, since it is primarily connected with land

for the irrigation of the land last above described during the following irrigating season; that until March 5, 1903, the said three grantees were the owners of said water right, and upon that date they sold and conveyed the same to this appellant; that at the same time the said grantors notified the respondent of the transfer of said water right to appellant, and requested that the place of the use of said water be changed to the land as above described, and that, upon delivery thereof to the appellant, said grantors waived all right or claim to the rental of said water; that on March 6, 1903, appellant delivered said notice to respondent, and exhibited to defendant said deed conveying said water right to appellant, and appellant then and there requested of de-

fendant that the place of use of said water be changed from the land of plaintiff's grantors to the land of appellant, which request respondent then and there refused; that on the 14th day of April, 1903, appellant made a written demand upon respondent to deliver said water at the head of what is known as the "Rust lateral" (that being a lateral of the respondent's said canal); that said water was so demanded by virtue of the transfer aforesaid; that at the time of such demand appellant tendered the defendant \$120, as the lawful rental for said water through the irrigating season of 1903, and offered to pay the respondent such additional sum as it might require or designate as the reasonable rental value of said water for said year, and offered to enter into

and its acquisition depends upon its application to a beneficial use in connection therewith, there is no reason why, in making transfers of the land, the water right should not be regarded as an appurtenance of it, and pass with the land, under a clause in the deed conveying appurtenances. And the courts have recognized such rule.

The use of water from a stream for a beneficial use in connection with a particular tract of land makes the right appurtenant to such land, passing with a deed thereof. *Mattis v. Hosmer*, 37 Or. 523, 62 Pac. 17, 632.

A water right which is used in irrigating lands may pass as a grant of the lands themselves, under the word "appurtenances," if such was the intention of the grantor. *Kling v. Ackroyd*, 28 Colo. 488, 66 Pac. 906.

One purchasing a settler's rights, and acquiring a transfer of possession from him, takes thereby whatever water appropriation was appurtenant thereto. *Turner v. Cole*, 31 Or. 154, 49 Pac. 971.

After a complete appropriation, the appropriator may sell and convey his land in connection with which the appropriation is made, and water rights acquired thereby will pass as appurtenant to the land; and this is so, even where possessory rights to public lands, the title to which has not yet been acquired from the government, are transferred by delivery of possession without deed or other writing. *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472.

The purchaser of land with the water right appurtenant thereto acquires all the interest his grantor appropriated from the waters of a certain stream, although such appropriator had a partner, and the water was used by them in common upon their separate adjoining tracts, where the purchaser has also succeeded by grant to the interest of the other partner in his separate land,—especially where it does not appear that the appropriator ever conveyed to his partner any interest in his water right. *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339.

And in *Crooker v. Benton*, 93 Cal. 365, 28 Pac. 953, it was held that water appropriated and used upon land to the proper use of which it is necessary becomes an appurtenance thereof which will pass under a deed of the land, so that the grantee's rights thereto cannot be questioned by the grantor or a subsequent purchaser of the water right, although the ditch

through which it was appropriated terminates some distance from the land, and he has no title to a right of way for the water therefrom to his land, but it is carried across the adjacent lands under a revocable license only.

Since a water right is the subject of property, and may be transferred either with or without the land upon which it has been used, the question whether it will pass by a conveyance of the land depends upon the intention of the grantor, which must be gathered from the express terms of the deed, or, when that is silent, from the presumption that arises from the circumstances. *Bessemer Irrigating Ditch Co. v. Woolley* (Colo.) 76 Pac. 1053; *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. 355; *Travelers' Ins. Co. v. Childs*, 25 Colo. 360, 54 Pac. 1020; *Daum v. Conley*, 27 Colo. 56, 59 Pac. 753.

To pass a water right by a deed of the land, it must in fact have been made appurtenant to the land.

When one makes a valid appropriation of water, the beneficial use may comprehend a use upon lands other than those of the appropriator, and when so used the right resides in the appropriator, and does not become *ipso facto* appurtenant to the land; so that the owner of the land cannot convey the water right as an appurtenance to its land, as it never had title to the water right. *Smith v. Denniff*, 24 Mont. 20, 50 L. R. A. 741, 81 Am. St. Rep. 408, 60 Pac. 398, *Reversing* 23 Mont. 65, 50 L. R. A. 737, 57 Pac. 557, which held that water appropriated by one in possession of land under a contract with the owner, but having no title to the land, for the irrigation thereof, becomes appurtenant to the land, and remains an incident to the ownership thereof which the owner alone can sell and convey, where there has been no segregation, change of possession, or diversion of the water by the appropriator, nor intention on his part to do so, and there is no agreement between him and the owner by which the water right may be severed; and a purchaser at a foreclosure sale of a mortgage of the land "together with all the water ditches and water rights therewith usually had and enjoyed," made by the appropriator while in possession of the land, does not acquire any right or title to such water right.

The fact that the land to which springs of water were conveyed by an appropriator was at the time unsurveyed public land does not prevent the water from becoming appurtenant

the contracts or applications commonly required or entered into between the respondent and users of water from its said canal, all of which the respondent refused, and still refuses; that at such time respondent made no objection to the amount of compensation tendered by appellant, or of his offer to execute the proper contracts and applications for said water. The complaint contains many other allegations not necessary to be repeated here, and prays that a permanent writ of mandate be issued, requiring said defendant to deliver to the plaintiff the amount of water aforesaid for the irrigation of said land for the season of 1903, and for judgment for \$600 damages and costs. Counsel for respondent interposed what, in effect, was a general demurrer to

the amended complaint, which was sustained by the court. Appellant declined to amend his complaint or further plead. Thereupon judgment of dismissal was entered. This appeal is from the judgment, and by the demurrer all of the allegations of the amended complaint are admitted to be true.

The record in this case presents but one question for our consideration, which appellant says is: "Has the user of water upon lands susceptible of irrigation from the ditch of a company claiming a water right under § 3157, Rev. Stat., as amended (Sess. Laws 1899, p. 381), the right to change the place of use of the water to other lands susceptible of irrigation from such ditch, if others are not injured thereby?"

It is certainly unnecessary for us to sug-

thereto, so as to pass by a deed of the possessory right to the land with its appurtenances. It appearing that the appropriator was, at the time of the appropriation, a rightful occupant of the land, and not a trespasser, and to entitle the purchaser, who subsequently secured a patent from the government, to an injunction to restrain the obstruction of the flow thereof. *Ely v. Ferguson*, 91 Cal. 187, 27 Pac. 587.

Since the right to use water from either a public or a partnership ditch is as intimately connected with the land as is a right acquired by appropriation, there seems to be no good reason why such right should not pass as an appurtenance with the land. An early case from the intermediate appellate court of Colorado held that a conveyance of land without mention of a water right cannot be taken to transfer an interest in a ditch, although the water carried may have been used upon the land, as a technical transfer is essential to vest title to the water. *Child v. Whitman*, 7 Colo. App. 117, 42 Pac. 601. And the supreme court held that the rule that the right to the flow of the water of a natural stream will pass by a grant of the land through which it flows, unless specially reserved, does not apply to artificial streams designed for the purposes of irrigation in states where the doctrine of prior appropriation has been substituted for that of the common-law doctrine of riparian rights. *Oppenlander v. Left Hand Ditch Co.* 18 Colo. 148, 31 Pac. 834.

Upon what ground that ruling could be justified it is difficult to understand. Although the right to make an appropriation is vested in the appropriator personally, and not as a representative of the land, in order to perfect the right the water must be put to use in connection with some land, and, after it has been so put to use, it must be considered as an appurtenance of the land, unless it is expressly severed therefrom by some act of the appropriator. The water is what gives value to the land; and when the appropriator has sold and received the full price for the land from one who based his estimate of the value thereof upon its condition as he saw it, the act of the appropriator in claiming that the water right is not an appurtenance of the land is fraud which should not be countenanced.

But the view of the Colorado court did not prevail, and it has become the settled doctrine that a right to water for irrigation when appurtenant to land passes by a grant of land

without special mention. *Turner v. Cole*, 31 Or. 154, 49 Pac. 971.

Even the Colorado court, while not expressly overruling *Oppenlander v. Left Hand Ditch Co.* 18 Colo. 148, 31 Pac. 834, subsequently held that a right to water from a ditch may pass as appurtenant to land. *Travelers' Ins. Co. v. Childs*, 25 Colo. 360, 54 Pac. 1020.

So in *Gelwicks v. Todd*, 24 Colo. 494, 52 Pac. 788, *Overruling Bloom v. West*, 3 Colo. App. 212, 32 Pac. 846, although the character of the right involved does not appear, the court held that a water right may be appurtenant to land so as to pass by a conveyance of the land with its appurtenances, if incident and necessary to the beneficial enjoyment of the land without which its value would be greatly disproportionate to the consideration paid, which, with other circumstances, indicates a clear intention of the parties to transfer the water right with the land.

The right to take water from a water ditch necessary for the irrigation of his land, which an owner acquires by a parol agreement with the owner of the ditch as a consideration of the right of way for the ditch across his land, becomes appurtenant thereto as necessary to its successful cultivation, and passes to a subsequent grantee purchasing with knowledge of the agreement, although the water right is not expressly mentioned in the deed. *Sloan v. Glancy*, 19 Mont. 70, 47 Pac. 334.

A conveyance of the land by one owning both land and ditch and water right also passes title to the water right and ditch. *McPhall v. Forney*, 4 Wyo. 556, 35 Pac. 773.

Under the Utah statutes, the title to water rights appurtenant to land passes by a conveyance of the land, unless expressly reserved in the deed. *Snyder v. Murdock*, 20 Utah, 419, 59 Pac. 91.

A water right is appurtenant to the land upon which it is used, and, unless abandonment is proved, a transfer of the land with its appurtenances conveys the grantor's interest in any ditch or water right thereon necessary to the use and enjoyment of the land. *Beatty v. Murray Placer Min. Co.* 15 Mont. 314, 39 Pac. 82.

The view which has been generally adopted is that the right to use water for the irrigation of land is an appurtenance, and will pass as such with a conveyance of the land and appurtenant-

gest that it was the evident intent of the framers of the Constitution to so husband the water of the state as to secure the most beneficial use thereof; that is, that it should always be so used as to benefit the greatest number of inhabitants of the state. They were careful to provide who should be entitled to the preference right to the use of the waters flowing in our natural streams. Nearly every session of our legislature has attempted to improve upon its predecessor by so legislating as to improve the former use of water, and an inspection of the various acts plainly shows that the guiding star has always been to so legislate as to protect all users of water in the most useful, beneficial way, keeping in view the rule existing all over the arid region,—“First in time

first in right.” That a party may change the point of diversion when he takes water from a natural stream is a settled question, provided he can do so without injury to any other appropriator of the waters of the same stream. We do not think it material whether he takes it to other land than that for which it was first appropriated; the only question being, Can he so change the place of diversion without injury to some other appropriator? That a party has such property interest in water appropriated and used for useful and beneficial purposes that he can sell, we think, is beyond controversy; but the buyer cannot take the water to other lands than that for which it was appropriated to the detriment of any other appropriator is equally as well settled. If, how-

ces, unless it is expressly reserved. *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475, 1025.

The right to the use of a ditch and water appropriated for irrigation purposes, essential to the land for which it was appropriated and without which it would be practically valueless, passes by a deed of such land as “appurtenances.” *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7.

As in case of rights acquired by appropriation, so those depending on ditch interests must in fact be appurtenant to the land in order to pass with it. So the water right must not have been severed from the land at the time of the conveyance.

Water rights acquired by appropriation for purposes of irrigation, even though under certain circumstances the same may be appurtenant to land, may be severed, sold, and conveyed separate and apart from the land in connection with which such rights were acquired; and, where such severance, sale, and conveyance have taken place as by assignment and sale of stock representing water rights in an incorporated ditch company, a subsequent conveyance of the land with appurtenances does not pass the title to such water rights. *Oppenlander v. Left Hand Ditch Co.* 18 Colo. 142, 31 Pac. 834.

A purchaser of land the deed to which contains no reference to a water right, or any apt words of alienation, acquires no title to an interest in a ditch from which his grantors had permission or license to take water for the irrigation of the land, and which was attempted to be assigned to him by a parol transfer. *Child v. Whitman*, 7 Colo. App. 117, 42 Pac. 801.

Before an after-acquired water right can become appurtenant to land so as to pass by conveyance of it, there must be manifested an intention that it shall become so. *Crippen v. Comstock* (Colo. App.) 86 Pac. 1074.

The right to use water from a canal for irrigation purposes does not pass as appurtenant to a conveyance of land by one owning the canal, where the purchaser bought while the canal was in process of construction at a time when the grantor was selling land and representing that the right to needed water from the canal for irrigating such land inured therewith to purchasers, where neither the contract of sale, nor the deed, contained a grant of a water right, and the purchaser entered into possession before any water from the canal had 65 L. R. A.

been used thereon; although after its completion he was permitted to use a certain amount therefrom for a number of years. *Crawford v. Minnesota & M. Land & Improv. Co.* 15 Mont. 153, 38 Pac. 713.

The rule that a water right which was upon land prior to its purchase passes with a conveyance of the land as appurtenant thereto, although not mentioned in the deed, has no application to a case where, by the terms of the deed itself, such right is expressly granted or reserved. *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. 355.

A water right is not released from the lien of a trust deed by a release deed to a part of the land covered by the trust deed, not releasing that specific water right, but only such water rights as were used in connection with the portion released, where, although originally located and used on that tract of land, it was afterwards, during the existence of the trust deed, segregated therefrom and transferred and used exclusively upon another portion of the land also covered by the trust deed. *Travelers' Ins. Co. v. Childs*, 25 Colo. 360, 54 Pac. 1020.

A deed to land and a water right in which the latter is described as a certain interest in a certain ditch shows a manifest intention of the grantor to reserve in himself the right to the use of the remaining interest in the water flowing in the ditch, as well as in the ditch itself. *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. 355.

IV. Method of transfer.

The question what kind of transfer is sufficient to convey a water right separate from the land upon which it has been used depends for its answer upon the class of property to which the water right belongs. So far as the right rests upon ownership of stock in an irrigation company, it is personal property, and may be transferred by an assignment of the stock, or in any other method which is sufficient to transfer personal property. But, so far as the right depends upon ownership of a ditch or share therein, or upon a perfected right of appropriation, it is a corporeal right in the nature of real property, and must be conveyed in the method necessary to convey real estate. *Wyatt v. Larimer & W. Irrig. Co.* 18 Colo. 298, 36 Am. St. Rep. 280, 32 Pac. 144; *Fudickar v. East Riverside Irrig. Dist.* 109 Cal. 29, 41 Pac. 1024; *Travelers' Ins. Co. v. Childs*, 25

ever, he can use it upon other lands more beneficially, where could there be a well-founded objection to such change?

This brings us to a construction of §§ 4 and 5, art. 15, of our Constitution. It says:

"Sec. 4. Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters, so dedicated, shall have once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes, with the view of receiving the benefits of such water under such dedication, such person, his heirs, executors,

administrators, successors, or assigns shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use as may be prescribed by law.

"Sec. 5. Whenever more than one person has settled upon or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article, provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or im-

Colo. 260, 54 Pac. 1020; *Ada County Farmers' Irrig. Co. v. Farmers' Canal Co.* 5 Idaho, 793, 40 L. R. A. 485, 51 Pac. 990.

Such an interest cannot be transferred by parol. *McGinness v. Stanfield*, 6 Idaho, 372, 55 Pac. 1020; *Child v. Whitman*, 7 Colo. App. 117, 42 Pac. 601; *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. 216.

A tenancy in common in a water ditch and water rights is real estate within the statute of frauds. *Hayes v. Fine*, 91 Cal. 391, 27 Pac. 772.

The rule as stated in the above cases relates to a permanent water right which is a parcel of the inheritance and passes with the land, and not to mere temporary contracts for a water supply, which may be created by any form of contract which is sufficient for the creation of a lease or a transfer of an interest in personal property. When the water right has assumed the character of real estate, trespass may be maintained for interference with an easement in a water ditch. *Cave v. Crafts*, 53 Cal. 135.

And not every parol contract with respect to water rights is wholly ineffectual.

A purchaser of land by verbal sale from the owner, but whose title is derived from a quitclaim deed therefor with appurtenances from one having the legal title thereto by virtue of a similar deed from the owner, although given as security for a debt, acquires title, as between the parties, to a water right appurtenant to the land owned by the original grantor as a tenant in common of a water ditch; and his cotenant cannot claim an abandonment of that right because the same was not properly conveyed, in the absence of proof of title in them by adverse possession. *Smith v. North Canyon Water Co.* 16 Utah, 194, 52 Pac. 283.

The fact that the transfer of water rights from the owners thereof to their grantees was not strictly formal cannot be taken advantage of by those making appropriations subsequent in time to the original appropriation. *Spanish Fork City v. Hopper*, 7 Utah, 235, 26 Pac. 293.

And any executed contract which passes the equitable right to a ditch to which water is appurtenant is sufficient to assure to the grantee his rights for which he has stipulated therein, as against an adverse claimant, although not under seal. *Ortman v. Dixon*, 13 Cal. 33.

A settler in good faith upon the public lands 65 L. R. A.

of the United States, who has appropriated and used the waters of a stream for irrigating his land, may, before filing, orally, and as a gift, transfer his right to the same together with the water right as appurtenant thereto to another who takes possession thereof, and the latter may avail himself of his predecessors, priority of appropriation. *Wood v. Lowney*, 20 Mont. 273, 50 Pac. 794; *Hindman v. Rizer*, 21 Or. 112, 27 Pac. 13.

A verbal transfer of a settler's right to government land for the irrigation of which an appropriation of water was made renders the transferee, who takes possession of the land, the successor in interest of the original appropriator of the water, and vests in him all rights of his predecessor's priority. *McDonald v. Lannen*, 19 Mont. 78, 47 Pac. 648, *Disapproving Barkley v. Tieleke*, 2 Mont. 59, so far as that case held that the attempt to convey a water right by an imperfect deed operates as an abandonment of the title obtained by appropriation thereof.

A sale of a possessory right to government land, together with the water right appropriated and used in connection therewith, and the actual possession and use thereof by the purchaser during a three years' absence of the grantor, results in a loss of title to the water right of abandonment, which the grantor is estopped from reasserting on the ground that, the deed not having mentioned the water right, the same had never been conveyed. *Nichols v. Lantz*, 9 Colo. App. 1, 47 Pac. 70.

A purchaser of water rights by verbal sale takes subject to the rights of appropriators subsequent in time to that of his predecessors but prior to the date of the purchaser's possession under the sale, as his right under the verbal sale attaches only at the date of his possession, and does not relate back to the date of his predecessor's appropriation. *Salina Creek Irrig. Co. v. Salina Stock Co.* 7 Utah, 456, 27 Pac. 578.

An unacknowledged and unrecorded contract between lower and upper appropriators of the waters of a stream, whereby the former, in consideration of the furnishing to them by the latter of the use of a like quantity of water from another stream by means of a connecting ditch, did "give and grant" to the upper appropriators the use of a quantity of water previously appropriated and owned by them equal to the amount to be thus supplied them below,

provements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used, and times of use, as the legislature, having due regard, both to such priority of right, and the necessities of those subsequent in time of settlement or improvement, may by law prescribe."

Counsel for respondent earnestly insists that under the provisions of § 4, above cited, the water must be used upon the land where first taken, and any attempt to change it forfeits the right of the user; also that the user has no property interest in the water which he has taken from the respondent's canal. We cannot give our consent to this proposition. The fundamental law, as well as the statutes of our state, have both attempted to protect the canal owner as well as the user in their respective rights. In many instances, and in the case at bar, they must depend upon each other, to be successful in their respective enterprises. The ditch would be valueless without users of the waters along the canal, and the lands now supplied with water by the canal company would be equally valueless without the canal to furnish the water. It must be conceded that, if the change of the point of diversion of the water in controversy would affect either prior or subsequent appropriators of the waters of the canal, or if it were shown that the change would in any manner interfere with the rights of the canal company, the change could not be made. How could it affect anyone using the waters from this canal? The right only dates back to the time Simpson, the predecessor of appellant,

appropriated the water by his contract with the canal company, and construction of his lateral connecting with the canal, and the use of the water on his land. If the water is taken to the land of appellant, it would be the same quantity as theretofore appropriated and used by Simpson. This would in no way affect any appropriator of the waters of the canal. How can it affect the canal company? It is required to furnish the water used by Simpson to someone on compliance with the rules and regulations of the company, and it is certainly immaterial to it whether it is the appellant or someone else. If there is loss by evaporation or otherwise between the original point of diversion and the proposed place where appellant wants it diverted, or if any extra expense or loss is sustained by the canal company, appellant might have to bear the loss; but that question is not before us, and it is unnecessary to pass upon it.

The question arises: Does the canal company acquire any right greater than the privilege of taking the water from the main stream, and conducting it to the place of intended use for sale or rental? When it takes the water out of the stream, it is only by permission of the state, and it must handle the water in the same manner as if it were left in the channel. The canal company must comply with the provisions of the statutes as to the use of the water, to avoid a forfeiture, the same as an individual taking from the natural stream. If the theory of respondent should prevail in this case, valuable water rights might be lost for the simple reason that the state permitted this company to take a large body of water from Boisé river for the proposed reason of fur-

is a valid conveyance, as between the parties, of the use of that amount of water. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054.

And an appropriator of water from a stream subsequent to an unrecorded conveyance of the same water by a prior appropriator is not a "purchaser" within the meaning of a statute which provides that an unrecorded conveyance of real estate shall be deemed void as against any subsequent purchaser in good faith for a valuable consideration of the same real estate, where his own conveyance is first duly recorded; as, although the use of the waters of a stream for irrigation is in the nature of real estate, yet that provision refers to a subsequent buyer from the same grantor. *Ibid.*

The question what will pass by an attempted transfer must be answered by ascertaining the intention of the parties as gathered by the terms of the instrument or the surrounding circumstances.

A grant by a prior appropriator of the waters of a creek, of all the right to the use of the waters thereof, to be taken out at a designated point, conveys only his right to such waters at that point, leaving unaffected his right below such point to the waters escaping past 65 L. R. A.

the dam thereat, or coming into it by seepage from the ditch of another person,—especially where such intention is also evidenced by the practical construction put upon it by the parties by the continued use of such waters below that point in other ditches of such appropriator without objections of his grantee. *Smith v. Williams* (Cal.) 55 Pac. 600.

The lessor of premises upon which were springs the waters of which flowed on the land of another, who has the sole title to the waters by prior appropriation for irrigation purposes, and does not claim by, through, or under the lessor, is not liable for loss of such waters to the lessee, by virtue of the words "lease and demise" used in the lease, as the covenant implied by those words is limited by a further covenant that the lessee should quietly keep the premises "without hindrance or molestation from the said lessor or anybody claiming, by, through, or under it," under which covenant the lessee became the purchaser *pro tanto*, and was required to ascertain, at his own peril, the sufficiency of the lessor's title to the premises, including the appurtenances. *Groome v. Ogden City*, 10 Utah, 54, 37 Pac. 90.

H. P. F.

nishing settlers and others who might want to use it, instead of leaving it in the natural channel. Land sometimes becomes valueless for crops in various ways. Too much water will cause it to become "crawfishy," and salt grass will grow up; either rendering the soil valueless for most crops. Then, if the man with a right to the use of water for years cannot change it to other lands, and cannot sell it, he must lose his valuable right, and someone succeeds to it without any compensation whatever to the party who has made it valuable by using it as required by the company and the statute. We do not think the framers of the Constitution had any such object in view; nor do we think a fair construction of all of § 4, art. 15, justifies the construction placed upon it by respondent. The language is, "any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water," and it then continues by saying that such party, his heirs, etc., shall not be deprived of the use of such water "for domestic purposes or to irrigate the land so settled upon or improved." The language is but natural, following as it does the first declaration of settlement; but to say that it must always be confined to the land so settled upon and improved is what we cannot believe was meant by the language. Before the adoption of our Constitution, the statute recognized the right of the users of the water to change the place of diversion. Section 3157 provides: "The person entitled to the use may change the place of diversion if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made, to places beyond that where the first use was made." In 1899 the legislature passed the following act: "The person entitled to the use of water may change the place of diversion if others are not injured by such change; and may extend the conduit by which the diversion is made to places beyond that where the first use was made." Laws 5th Sess. p. 381, § 11. We find no legislation varying this rule. The legislature in 1899 did not construe § 4, art. 15, of the Constitution, as contended for by respondent, or they would have made an exception of canal companies from the rule. That persons entitled to the use of water may change the place of diversion, if others are not injured by such change, seems to be the universal rule, the test always being "if others are not injured by such change." In *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41—a California case—it is said: "It is also settled law that the person entitled to the use of water may change the place of diversion or the place where it is used, or the use to which it was

first applied, if others are not injured by such change." The following strong language is used in *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 115: "A party, having obtained the prior right to the use of a given quantity of water, is not restricted in such right to the use or place to which it was first applied. It is well settled that a person entitled to a given quantity of the water of a stream may take the same at any point on the stream, and may change the point of diversion at pleasure, and may also change the character of its use, if the rights of others be not affected thereby." A vast number of authorities are cited in support of this opinion. Many other authorities might be cited, but we deem it unnecessary. To uphold the contention of respondent in this case would be equivalent to saying that the framers of the Constitution intended to give to canal or ditch companies rights that are not granted to the citizens of our state. This we cannot do.

The judgment is reversed, and cause remanded for further proceedings consistent with this opinion. Costs awarded to appellant.

Allahie, J., concurring:

I am in accord with the view expressed by Mr. Justice Stockslager, to the effect that the right of the water consumer under an irrigation ditch is such a property right as may be segregated from the land and sold and assigned for use on another and different tract of land under the same ditch. Since the question presented in this case is one upon which there seems to be no authority directly in point, and concerning which there is apparently much difference of opinion among members of the bar, I venture to give some of the reasons which lead me to the conclusions here announced. If they make my position clear, I shall be content; and if, on the other hand, they convince those entertaining the opposite view of the correctness of their contention, I shall not have labored in vain.

As I have gathered both from the printed brief and oral argument of counsel for respondent, they place their chief reliance on the provisions of § 4, art. 15, of the Constitution, and § 9b of an act approved March 18, 1901 (Sess. Laws 1901, p. 200). That section of the act of 1901 provides as follows: "All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state, are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the rights to the use of any of the waters of the state

for useful or beneficial purposes are recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any of such waters shall never be denied or prevented from any other cause than the failure on the part of user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water."

Respondent insists that under the foregoing legislation the right of the water user "shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land" on which the water is applied. The more one analyzes this statute, the more clearly it appears that the legislators were not sure as to where they would settle the property right in water after it has been diverted from the natural stream, and their language is accordingly uncertain. They say that all water of the state, "when flowing in the natural channel," shall be the "property of the state," but they fail to say where the property right shall be vested after diverted by the appropriator. It is true, they declare that "the right to the use" of such waters "shall not be considered as being a property right in itself." This is immediately followed, however, by the declaration that such right becomes the "complement of, or one of the appurtenances of, the land" on which such right is used. It is clear to my mind that this mere declaration that the right to the use of water shall not "in itself" be considered a property right, and shall not, therefore, be called "property," does not, either in law or fact, deprive or divest such right of any of the qualities or elements of property it otherwise might have. In other words, if a thing really is property, the legislature, by saying it shall not be considered such, cannot in fact deprive it of the character and quality which constitute it property. It still remains a fact that the legislature recognized this right as valuable, and such a right as will attach to lands as an appurtenance, and one of which the person entitled thereto "shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water."

Section 3 of article 15 of the Constitution declares that the right to divert and appro-

priate any of the unappropriated waters of the state shall never be denied any person. Mr. Chief Justice Morgan, speaking for this court in *Wilterding v. Green*, 4 Idaho, 773, 45 Pac. 134, in considering the purposes of article 15 of the Constitution, made it very clear that the framers of that instrument were only dealing with the use of the waters, and not the property right in the waters. Indeed, it can be of no consequence to the state as to where the property right in the waters is vested, as long as the people have reserved to themselves the right to regulate the use. Respondent seems to argue that, because the legislature has made this right appurtenant to the land on which the water is applied, it therefore becomes inseparably attached to the land, and that the owner of the land cannot segregate the appurtenance from the thing to which it is appurtenant. "Appurtenant," says Mr. Justice Conaway in *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 483, 1025, "does not mean, and never meant, inseparable." I do not conceive of any well-founded reason or principle of law that forbids the owner of a tract of land from separating and segregating an appurtenance therefrom, and disposing of it with the same freedom of sale or *jus disponendi* as he may enjoy with reference to any other property right. But it is argued that under § 4, art. 15, of the Constitution, this appurtenance—water right or rental right—can only attach to "the land so settled upon or improved," and that an attempt to separate the right from the specific piece of land to which it was originally applied works an immediate forfeiture or abandonment. I think the argument is illogical and faulty. The framers of the Constitution in drafting this article, were reserving to the legislature the right to regulate the use of waters, and the "so settled upon" refers back to the use for which it was settled upon, namely, agricultural purposes. The language used is not in the nature of a prohibition upon the consumer, but is rather a grant to him of a perpetual right to the use of such waters, which can never be forfeited or defeated except upon one condition, and that is that he fail to pay the annual rents therefor. Now, the question arises, Shall we read into this constitutional provision another condition of forfeiture or abandonment, which the framers thereof never saw fit to incorporate into the fundamental law? I think we should not.

Again, it seems to me that, before the courts can be justified in denying to any person the right to voluntarily sell and dispose of any property right he may possess, they should find such prohibition clearly expressed in law. It is a fundamental principle that every citizen has the inherent right to dispose of all his acquisitions. 1 Bl. Com.

138. And unless that inherent right be expressly abridged by law, it should not be done by the courts. This is such a right as the law recognizes, and the courts are almost daily called upon to protect.

Irrigation companies construct ditches and canals, and divert water by means thereof, for the purpose of irrigating the lands lying under their distributing works; but their property is valueless without consumers. The settler takes up the land and clears it of the brush, and puts it in a condition that makes it susceptible of irrigation. This is done at a considerable cost and expense, and is the price the Constitution requires the consumer to pay for the right he acquires under the ditch, as distinguished from the annual rental he must pay the ditch owner for delivering the water. This right is perpetual, if the owner of that right keeps up his annual payments. Is it possible that, after the consumer has thus aided the company in perfecting and completing the water appropriation by applying it to a beneficial use, he still has no right which he can apply to another piece of land or sell it to his neighbor? Suppose he originally took up 40 acres of land, and acquired a right for the same, and years afterward finds a use for his original tract for which it needs no irrigation, and in the meanwhile he has acquired an adjoining 40; will it be contended that he cannot use the water on that tract? If that be true, then he has a right, valuable to others, and for which his neighbor is willing to pay a consideration, and in the acquisition of which he has been to much labor and expense, that at once becomes valueless by reason of judicial construction and forfeiture.

It has been uniformly held by the courts of the arid states, that those who divert and appropriate waters from the natural streams may change the point of diversion and place of use of such waters, so long as the same does not interfere with the rights of others, and that they may sell and transfer such right. I can see no more reason for denying this right of sale and disposition to a settler under a ditch, than for denying it to the settler under the natural stream, and an examination of the repeated legislation of the state ever since the adoption of the Constitution will at once disclose the fact that the legislature has never recognized or attempted to distinguish any difference between the two settlers in this respect.

I concur in the reversal of the judgment.

Sullivan, Ch. J., dissenting:

I am unable to concur in the conclusion reached by my associates in this case. I do not believe that the framers of our Constitution or the legislature, by any of its en-

actments concerning water, intended to or did grant the same right to a person who rents or leases water from canal owners, as was done in this case, to sell and transfer such right to be used by the purchaser upon different and other land than that upon which it was used; thus giving him the same right that an original appropriator and owner of the water right now has under our law. If the framers of the Constitution desired to give the rental users of water the same rights that were given to owners of water rights acquired by purchase or appropriation, they were very unhappy in the use of the language used in article 15, §§ 4, 5, of the Constitution. Said sections are quoted in the opinion of Mr. Justice Stockslager, and it is not necessary for me to repeat them here. The language in said sections clearly indicates, to my mind, that the right to the use of water as provided by said sections, under a sale, rental, or distribution thereof, was the right to use the waters so rented or distributed upon a particular piece of land. If not, why did the framers of the Constitution declare in said sections that after such water had been sold, rented, or distributed to any person who had settled upon or improved land for agricultural purposes with a view of receiving the benefit of such water, such person shall not thereafter, without his consent, be deprived of the annual use of the same when needed to irrigate the land so settled upon and improved, etc.? If the framers had intended to give them a perpetual water right, that they might sell and transfer as they desired, to be used upon other lands, why did they use all of the language used in those sections? Why did they not declare that the owners of such land, who were the users of water thereon, under a rental, should have a perpetual right thereto upon paying the annual charges, with a right to sell and transfer the same at any time to other parties, to be used upon other land? The provisions of said § 5 contemplate that ditch owners must furnish water, to the extent of their ability, to all settlers under their ditches, in the numerical order of their settlements or improvements; thus contemplating that the rental right to the use of such waters should be given to the settlers in accordance with the priority of their settlement or improvement, carrying out the theory that the first settler in time was the first in right. But under the conclusion reached by my associates, a settler who may have settled upon or improved lands under said canal long subsequent to other settlers would thereby be given a preference over older settlers, which I think the provisions of the Constitution clearly inhibit. As I understand the law, when water is once dedicated,

under those provisions of the Constitution, to a certain tract of land, that tract of land cannot be deprived of that water, so long as the owner thereof pays the annual rental for the use of such water; but, when the annual rental is not paid, said water reverts to the canal owners, to be allotted to the first subsequent applicant therefor in the numerical order of settlement or improvement.

In the case of *Wilterding v. Green*, 4 Idaho, 773, 45 Pac. 134, this court held that the ditch owner could not require the user of water under a rental to purchase a perpetual right, as a condition precedent to the use of such water; thereby holding, at least by implication, that a rental right from year to year was different from a perpetual right. And it appears to me that the conclusion reached in the majority opinion, by implication, at least, overrules the doctrine laid down there, and holds that a rental right from year to year is the equivalent of the ownership of a perpetual right located and appropriated by the user himself, or purchased from such locator and appropriator. The purchaser of a perpetual right, under the conclusions of the opinion, would have no other and greater right than a renter of water for a year or a term of years.

Our statute in reference to the change of the point of diversion or the point of intended use applies to the change of point of diversion and the change of place of use of rights acquired by appropriation or by purchase from appropriators, and not to leasees or renters of water from a canal company who has the same for sale or rental. Of course, I do not mean to say that one leasing water from a canal company cannot require them to turn the water out of their canal for him at the most convenient point to the land to be irrigated. As I view them, all the cases cited by counsel for appellant in support of his contention in regard to the change of point of diversion and place of use are not in point. In those cases the parties were the owners of their water rights, either by appropriation or purchase, of which they sought to change the point of diversion or the place of use. In some of those cases, at least, the ditch owners were simply common carriers permitting the owners of water rights to run their water through their canals. The respondent in this case is more than a common carrier of water for the landowner, as it is the locator of and the conductor of the water to the point of intended use, and in a certain sense an appropriator of the water,—the owner of the water right. Under the provisions of § 3163, Rev. Stat. and acts amendatory thereof, it is clear that, when such

diversion works are completed from the point of diversion to the place of intended use, such appropriation is perfected, at least so far as the canal company is concerned. The intent of the legislature was to treat the canal company, and not the one who rents the water from them, as the real appropriator of the water. The law contemplates that such sale, rental, and distribution of water is a dedication thereof, and brings it under the control of the state. But it was not intended to give the user of such water a sufficient property right therein to enable him to sell and transfer it to be used upon other land. The only right thereto acquired by the consumer was a rental right, which right amounts to a perpetual dedication of such water to the land upon which it is first used, or, in other words, as stated in said § 4 of our Constitution, "to irrigate the lands so settled upon or improved." The intent of the legislature, as shown in the act approved March 18, 1901 (Sess. Laws 1901, § 9b, p. 200), where it is declared that such a right as is here being considered "shall not be considered as being a property right in itself," was not to give a user of water under a sale or rental a property right thereto. I think it was the clear intent of the framers of the Constitution as well as the various acts of the legislature in regard to water rights, to perpetually dedicate the water used upon certain land to the use of such land, so long as the owner thereof pays the annual rental therefor, and that such owner of the land might sell the same, and the purchaser might continue the use of such water upon such land, but that it was not intended or contemplated that he had such property right in the use of such water as to enable him to sell and transfer it to other parties to be used upon other lands. It is not sufficient to say that it makes no difference to the corporation owning the ditch as to who pays them the annual charges for the water, and therefore it makes no difference to them who has the water. It must be remembered that others are interested, and, if the ditch owners do not have water sufficient to supply the demands of all under their canal, whenever one having a prior right ceases to use it upon the land to which it is dedicated, it then becomes the duty of the canal owners to deliver such water to the first applicant therefor in accordance with the priority of their application, in the numerical order of their settlements or improvements, as provided by said § 5 of our Constitution. Under the rule established by the majority opinion, a subsequent settler could procure a right to the use of water in violation of said provision of the Constitution.

The judgment of the district court should be affirmed.

A petition for rehearing having been filed, **Allahie, J.**, on April 21, 1904, handed down the following additional opinion:

The respondent has filed a very interesting petition for a rehearing, in which its distinguished counsel recite numerous reasons in support of their position that the original opinions herein by a majority of the court should not stand as the decision of the court. This case has been attended with much difficulty and labor, and the importance and effect of its determination have not been overlooked. Every question presented by the petition was repeatedly considered and discussed by all the members of the court before the filing of any opinion in the case. Some of the reasons argued against the conclusions reached are, we think, largely fanciful and speculative; others, perhaps, real and serious. Of the former we have no fears. With the latter we will endeavor to deal judiciously as they arise. The greatest stress is laid upon the contention that the result of the decision will be to encourage waste and extravagance in the use of water. That position is not well founded. There is no reason why the same economy cannot be practised and enforced both prior and subsequent to the sale of a rental right as if no right of assignment were recognized at all. A sale of this right cannot free it of any of its duties or burdens, nor lessen any of its liabilities or obligations.

It is argued that to allow a sale and transfer of this right permits a subsequent settler to acquire a water right prior in point of time to an older settler, in violation of the Constitution. This danger is rather argumentative than real. If one man goes into the market and purchases a piece of property and pays for it, he certainly has a right to it, although his neighbor wanted the same property, and had long previous made overtures to purchase it. The constitutional provision has no reference to such

acquisition. Its purpose is to require ditch owners to furnish water to settlers in the order of their settlement and application. If one who has acquired a rental right sells his right, the assignee does not become an original applicant, but takes by purchase the right of his assignor, and no other applicant has the right to complain, because he is in no different position than that held by him prior to the sale and transfer,—no worse, no better. No man secures or acquires a preference, in contemplation of law, who goes into the market and makes an honest purchase of property, and pays the price therefor.

It is suggested that the effect of the decision is to reverse *Wilterding v. Green*, 4 Idaho, 773, 45 Pac. 137. This is a mistaken idea. On the contrary, that case is cited with approval in the concurring opinion, as may be seen by reading it.

We see no sufficient reason for granting a rehearing in this case, and the petition is therefore denied.

Stockalager, J., concurs.

Sullivan, Ch. J., dissenting:

My associates, in their opinion denying a rehearing, say: "No man secures or acquires a preference in contemplation of law, who goes into the market and makes an honest purchase of property, and pays the price therefor." That statement is only partially true. If it were extended to include a purchase from one who had the right to sell the property purchased, it would be complete, and contain a well-recognized rule of law. But the difficulty in applying that rule of law to the case at bar is that the renter of water has no salable right to the use thereof, except in connection with the land on which it has been used, and to which land it has become perpetually dedicated, under the provisions of our state Constitution, so long as the annual rental value thereof is paid.

A rehearing ought to be granted.

CALIFORNIA SUPREME COURT.

Alfonso di NOLA, *Respt.*,
v.
D. E. ALLISON *et al.*,
and
James BARRON, *Appt.*
(.....Cal.....)

1. The title secured by a purchase, by

a stranger after an appeal has been taken from the judgment, from one who has purchased mortgaged real estate at his own foreclosure sale, is subject to be defeated by a reversal of the judgment, notwithstanding the execution of the judgment was not superseded pending the appeal.

2. A statute authorizing an appellate court, upon reversal of a judgment

NOTE.—As to how far a purchaser at execution or judicial sale is protected as a bona fide purchaser, see note to *Riley v. Martinell*, 21 L. R. A. 32.

As to doctrine of *lis pendens* generally, in 65 L. R. A.

cluding effect on purchaser *pendente lite*, see, in this series, *Houston v. Timmerman*, 4 L. R. A. 716, and note, and *Green v. Rick*, 2 L. R. A. 48, and note.

of foreclosure, to make restitution so far as such restitution is consistent with the protection of a purchaser at a sale under the judgment, does not operate to perfect the title of a stranger who purchases from the plaintiff in the action after an appeal is taken, since its operation must be limited to parties over whom the court has jurisdiction.

3. A stranger who purchases from a plaintiff in a foreclosure suit property which the latter has obtained at the foreclosure sale is not entitled to the benefit of a statute protecting the rights of one who purchases at a sale ordered by the judgment.
4. An order of restitution is not necessary to enable a defendant who has appealed from a judgment of foreclosure to assert his right to the property upon reversal of the judgment.
5. The appellate court has no jurisdiction to make a finding of fact from evidence before the trial court upon which the latter court made no finding.
6. A statement on motion for new trial because the evidence does not justify the decision, which contains substantially all the evidence given at the trial, need not specify the particulars in which it is insufficient.

(April 29, 1904.)

APPEAL by defendant, Barron, from a judgment of the Superior Court for Shasta County in plaintiff's favor in an action brought to quiet title to certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Naphtaly, Freidenrich, & Ackerman, Thomas B. Dozier, and H. M. Barstow, for appellant:

Plaintiff did not, as grantee of the purchasers at the foreclosure sale, acquire the legal title to the property. The purchasers at the foreclosure sale were the plaintiffs in the action, and the subsequent reversal of the judgment set aside the sale as to them and their grantee.

Freeman, Executions, 3d ed. 1900, § 347; *Singly v. Warren*, 18 Wash. 434, 63 Am. St. Rep. 896, 51 Pac. 1066; *Marks v. Cowles*, 61 Ala. 299; *Phillips v. Benson*, 82 Ala. 500, 2 So. 93; *Bryant v. Fairfield*, 51 Me. 149; *Adams v. Odom*, 74 Tex. 206, 15 Am. St. Rep. 827, 12 S. W. 34; *Dunnington v. Elston*, 101 Ind. 373; *Griswold v. Ward*, 128 Ind. 389, 27 N. E. 751; *Weloker v. Staples*, 88 Tenn. 49, 17 Am. St. Rep. 869, 12 S. W. 340.

A distinction seems to be made in some of the cases between a purchase by a grantee from the plaintiff before an appeal has been taken or a writ of error sued out, and after the taking of such appeal or suing out of such writ of error.

Rector v. Fitzgerald, 8 C. C. A. 277, 19 U. S. App. 423, 59 Fed. 808; *Purser v. Cady*, 120 Cal. 214, 52 Pac. 489.

Plaintiff is chargeable with notice of the

state of the record, and that appeal was taken, and the consequences of the successful prosecution of such appeal.

Reynolds v. Harris, 14 Cal. 668, 76 Am. Dec. 459.

Messrs. Charles W. Slack and Joseph E. Barry, for respondent:

The plaintiff, as grantee of the purchasers at the foreclosure sale, acquired the legal title to the property; and the subsequent reversal of the judgment did not set aside the sale as to him.

Purser v. Cady, 120 Cal. 214, 52 Pac. 489; *Guiteau v. Wisely*, 47 Ill. 433; *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358.

Code Civ. Proc. § 957, authorizing restitution in case of reversal, applies only to those cases where the judgment operates upon specific property in such a manner that its title is not changed,—as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like.

Farmer v. Rogers, 10 Cal. 335; *Hewitt v. Dean*, 91 Cal. 617, 25 Am. St. Rep. 227, 28 Pac. 93.

The judgment which was reversed, and on the reversal of which the appellant in this case relies, was not void; it was merely erroneous, and it would be unheard of in this state if, without motion under the statute, or without any pleading in an action directly attacking the execution sale, it could be treated as a nullity.

The right to have the sale set aside is at best a mere right of election on the part of the successful appellant.

Johnson v. Lamping, 34 Cal. 293; *Reynolds v. Hosmer*, 45 Cal. 616.

Until he makes that election in some direct proceeding for that purpose, the execution and the sale thereunder must necessarily stand.

Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404.

If a party who has recovered a judgment or decree becomes the purchaser of property thereunder, and conveys the same to a third party, and afterwards the judgment and decree, not having been superseded by undertaking or bond, is reversed, such grantee will retain the property notwithstanding the reversal.

McAusland v. Pundt, 1 Neb. 211, 93 Am. Dec. 358; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Guiteau v. Wisely*, 47 Ill. 433; *Wadhams v. Gay*, 73 Ill. 415; *Horner v. Zimmerman*, 45 Ill. 14; *Taylor v. Boyd*, 3 Ohio, 337, 17 Am. Dec. 603; *McCormick v. McClure*, 6 Blackf. 466, 39 Am. Dec. 441; *McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383; *Little v. Bunce*, 7 N. H. 485, 28 Am. Dec. 363; *Bickerstaff v. Dellinger*,

5 N. C. (1 Murph.) 273; *Parker v. Anderson*, 5 T. B. Mon. 445.

Messrs. Rodgers & Paterson also for respondent.

Harrison, C., filed the following opinion:

Action to quiet title. Plaintiff's title is derived as follows: In 1892 the defendants D. E. Allison, B. R. Sackett, and James Barron were the owners of the land described in the complaint, and executed a mortgage thereon to Charles and Benjamin Golinsky. In 1893 the Golinskys brought an action for the foreclosure of this mortgage, in which they obtained judgment January 5, 1895, directing a sale of the lands in satisfaction of the mortgage debt. Under this judgment the land was sold August 24, 1895, to the plaintiffs in the action, and on March 3, 1896, they received a deed therefor from the officer who made the sale, and on March 24, 1896, they conveyed the land to the plaintiff herein. September 18, 1895, the defendants in the action appealed from the judgment without giving any bond staying its execution, and on October 7, 1896, the judgment was reversed by this court. *Golinsky v. Allison*, 114 Cal. 458, 46 Pac. 295. The plaintiff brought this action March 19, 1897. Judgment was rendered in his favor, from which, and from an order denying a new trial, the present appeal has been taken.

The question presented by the appeal is whether the title taken by the plaintiff under the conveyance from the Golinskys was defeated by a reversal of the judgment under which their title was derived. It is contended by the appellant that at the time of the sale under the judgment the Golinskys took only a defeasible title to the land purchased by them, and that the effect of the reversal of the judgment was to set aside and vacate the sale, and that, as they could not transfer to the plaintiff any greater interest than they themselves had, the title taken by him under the deed from them was also defeated. The respondent, on the other hand, contends that, where the plaintiff purchases the defendant's property at a sale had under his own judgment, and, while the judgment is unreversed, conveys it to a third person, the title of his grantee will not be affected by a subsequent reversal of the judgment; and in support of this proposition he relies upon § 957, Code Civ. Proc., and has also cited several cases from other jurisdictions. The rule is unquestioned that, if a stranger to the action purchases the defendant's property at the execution sale, his title thereto will not be affected by a subsequent reversal of the judgment (*Freeman, Executions*, § 347); the chief ground therefor being that given in *Manning's Case*, 8 Coke, 96, that otherwise he would lose both 65 L. R. A.

his money and the land, and there would be no inducement to purchase at judicial sales. If the purchase is made by the plaintiff in the action, under the great weight of authority his title will be defeated by a subsequent reversal of the judgment. This rule was adopted in this state in *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459. Whether the reversal of the judgment will affect the title of the grantee of the plaintiff who has thus purchased the land has been differently decided in different jurisdictions; in some by reason of statutory provisions, and in others depending upon the manner in which the question has been presented. In those jurisdictions in which it is held that the title of the plaintiff himself, who becomes the purchaser, is not affected by a reversal of the judgment, the courts necessarily hold that the title of his grantee will not be affected, and the cases cited therefrom—*Parker v. Anderson*, 5 T. B. Mon. 445, and *Bickerstaff v. Dellinger*, 5 N. C. (1 Murph.) 272—need not be considered. In Nebraska it is provided by § 508 of the Code of Civil Procedure of that state that the reversal of a judgment "shall not defeat or affect the title of a purchaser" of land theretofore sold in satisfaction of such judgment, and in the case of *MoAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358, cited by the respondent, the court invokes that provision in support of its decision. In some of the cases cited on behalf of the respondent the court has discussed and stated the general rules applicable to the title of property purchased under a judgment which is subsequently reversed, and the rule thus stated has been followed in those states, without any discussion of the principles upon which the rule is based, as authority in cases where the facts were widely different. For example, in *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449, which is referred to in subsequent cases in that state as the authority for their decision, the court says in its opinion: "The rights of third persons are not affected by the reversal." This expression was purely *obiter*, for the court held that *McJilton* was not a "third person," inasmuch as he had taken an assignment of the judgment, and had control of the execution under which he had purchased the land. This case, however, is referred to as the authority for subsequent decisions in that state which hold that the grantee of a plaintiff who purchases at a sale under his own judgment is not affected by a reversal of the judgment.

Many of the cases cited by the respondent did not involve the rights of the purchaser at a "sale under a judgment" which was afterwards reversed, but the purchase was made where the judgment had been a direct adjudication of the plaintiff's title to the

land. And in the greater number of the cases cited by him the purchase from the plaintiff was made before any step had been taken by the defendant for a reversal of the judgment, and the purchaser was protected in his purchase upon the ground that it was made on the faith of a judicial declaration that the title was in his vendor; that a defendant who permits a final judgment against him to remain of record without questioning its validity can invoke no equity in his favor for questioning the title of one who has purchased his property in reliance upon the correctness of that judgment. See *Hunt v. Loucks*, 38 Cal. 382, 99 Am. Dec. 404; *Rector v. Fitzgerald*, 8 C. C. A. 277, 19 U. S. App. 423, 59 Fed. 808. *Horner v. Zimmerman*, 45 Ill. 14, was a case of strict foreclosure of a mortgage, and after the decree had been entered the plaintiff conveyed the land to a third person. The bill of review under which the decree was reversed was not filed until two years thereafter. In *Wadhams v. Gay*, 73 Ill. 415, Flagler, under whom the defendants derived their title, had obtained a decree in 1854, declaring him to be the owner in fee of the land. The bill of review under which the decree was reversed was not brought until 1866. The court held that the purchases "intermediate the time of the rendition of the decree and the suing out of the writ of error," having been made in good faith, for value, in reliance upon the validity of the decree, were entitled to be protected. In *Guiteau v. Wisely*, 47 Ill. 433, the judgment under which the land was sold was rendered in September, 1860, and at the sale in February, 1861, the plaintiffs became the purchasers. They assigned the certificate of sale March 14, 1862, and in November, 1863, the judgment was reversed upon a writ of error sued out by the administrator of the judgment debtor. The assignees of the certificate were held to be entitled to the same protection as if they had purchased at the sale. It does not appear at what time the writ of error was sued out. As the judgment debtor died March 7, 1862, and letters of administration upon his estate could not have been granted until some time thereafter, it is reasonable to assume that it was later than March 14th, and that the assignees took the certificate without any notice that the defendants questioned the validity of the judgment. In *McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383, the bill of review under which the decree was reversed was not filed until more than three years after the sale under the decree. Moreover, the court held in that case that Longworth, who purchased at the sale, was a "third person," and entitled to protection as such. What was decided in *Taylor v. Boyd*, 3 Ohio, 338, 17 Am. Dec. 603,

is fairly expressed in the syllabus as follows: "A party having title to land under a decree in chancery conveys in good faith before citation on error is served, a reversal of the decree does not divest the purchaser's title." In *Macklin v. Allenberg*, 100 Mo. 337, 13 S. W. 350, the validity of the title transferred by the plaintiff, who had purchased at his own sale, was upheld on the ground that it "ought not to be affected by a reversal of the decree on a writ of error sued out nearly a year after the date of the deed." In *McCormick v. McClure*, 6 Blackf. 467, 39 Am. Dec. 441, it appears in the opinion that the land was conveyed "after the decree and before the commencement of the suit in error."

None of the foregoing cases, however, or the principles governing them, have any application to a case where the defendant has appealed from the judgment before the sheriff's deed is executed to the plaintiff, or a sale made by him to a third person. By such appeal the effect of the judgment as evidence of the matters determined by it is suspended, even though its execution is not stayed. *Woodbury v. Bowman*, 13 Cal. 634; *Murray v. Green*, 64 Cal. 363, 28 Pac. 118; *Re Blythe*, 99 Cal. 472, 34 Pac. 108.

As against the authorities cited by the respondent, the appellant has cited *Marks v. Cowles*, 61 Ala. 299, in which the facts upon which the decision was rendered were in principle identical with those presented in the present case. There, as here, the land was sold in satisfaction of a money judgment, and purchased by the plaintiff in the action. After it had been sold, and before the time for a conveyance, the defendant appealed from the judgment, but did not cause its execution to be superseded. Thereafter the purchaser received a conveyance of the land, and subsequently sold and conveyed it to a third person, a stranger to the action. After this conveyance the judgment under which the property was sold was reversed. The court held that the defendant was entitled to a restitution of the land, upon the ground that the purchaser from the plaintiff was chargeable with notice of the defeasible character of the title of his grantor; saying: "The judgment or decree must be shown necessarily as an indispensable element of the title of the party on the face of the title papers. And when it is shown the defeasible quality of the title appears, of which the vendee is bound to take notice. . . . The right of a party aggrieved by an erroneous judgment to a restoration to the condition in which he was when it was rendered—the prohibition against the use of such judgment by his adversary so as to derive advantages he cannot restore—would be

of little avail if, through the mechanism of an alienation to a party bound to know that the right and prohibition exists, it could be defeated;" and that a different rule would authorize a party to transfer a better and higher title than he acquired. We are of the opinion that the principles here declared correctly state the rule governing the decision to be rendered in the present case. See also Freeman, Executions, 3d ed. § 347; Dembitz, and Titles, p. 1229; *Dunnington v. Elston*, 101 Ind. 373; *Singly v. Warren*, 18 Wash. 434, 63 Am. St. Rep. 896, 51 Pac. 1066. The suggestion that this case was thus decided for the reason that there is no statute in Alabama declaring the rights of the parties or prescribing the procedure to be followed in case of a reversal of the judgment does not impair its weight as an authority. The rights of the defendant whose property has been taken upon a judgment which is subsequently reversed do not depend upon the provision of Code Civ. Proc. § 957. That section is not restrictive of his rights, but is a remedial statute, and is to be liberally construed. The appellate court could have jurisdiction over only the parties before it, and would have no authority to restore to the defendant property over which the plaintiff had ceased to have any control. In *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459, the proceedings were instituted in the district court, and the action of that court was upheld, not by reason of the statute, but by virtue of the inherent power in the court to make restitution of what had been lost by reason of its erroneous judgment. See also *Dater v. Troy Turnp. & R. Co.* 2 Hill, 629; *Gott v. Powell*, 41 Mo. 416.

Section 1049, Code Civ. Proc. declares: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Any alienation of the property involved in an action while it is pending is subject to the rights of the other party, and will be bound by the judgment thereafter rendered in the case. 2 Pom. Eq. Jur. §§ 637 *et seq.* It does not appear from the record herein whether a notice of *lis pendens* had been filed in the foreclosure suit; but it does appear that the plaintiff derived his title to the land through the sheriff's deed to Golinsky, executed under the judgment in that action. "The grantee is charged with notice of the deeds and documents from which he derails his title. When he purchases from the plaintiff in the execution, he is presumed to know the course of proceedings and state of the record from which the title of his grantor proceeded, and he is presumed to know, too, that the right of the defendant is to take an appeal within 65 L. R. A.

the statutory period, and also the consequences of the successful prosecution of this right; and he must be supposed to purchase with reference to these things." *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459. See also 4 Kent, Com. 179; Story, Eq. Jur. § 400; Washb. Real Prop. § 2215; 2 Pom. Eq. Jur. §§ 626 *et seq.*; *Marks v. Cowles*, 61 Ala. 299; *Speck v. Riffin*, 40 Mo. 405; *Smith v. Cottrell*, 94 Ind. 379. The plaintiff was chargeable with notice, at the time he purchased the land, of the character of Golinsky's title; and he was therefore put upon inquiry, and bound by all the facts which such inquiry would have disclosed. Upon such inquiry he would have learned that Golinsky had purchased the land at a sale under a judgment in an action in which he was the plaintiff; that before the execution of the sheriff's deed under the sale the defendants had appealed from the judgment, and that the appeal was still pending; that thereby the validity of Golinsky's title to the property was disputed by the defendants in that action, and would be defeated by a reversal of the judgment.

Neither is the plaintiff herein in a position to invoke any protection under the provisions of § 957, Code Civ. Proc. By the terms of that section, as amended in 1874, the court is authorized to make restitution "so far as the restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment or had under process issued upon the judgment." The plaintiff herein did not purchase the property "at a sale ordered by the judgment," and the principles under which protection is given to strangers who purchase at judicial sales have no application. He did not purchase the property until after the sale had been completed by the execution of the sheriff's deed, and until after an appeal had been taken from the judgment and he had become chargeable with notice of the defects in Golinsky's title. He is therefore not in a position to invoke any equity in his favor, or to claim any protection from the restitution which Golinsky would have been required to make.

As the effect of the reversal of the judgment was to set aside the sale to the Golinskys, the appellant herein was thereby restored to his original estate in the land. He did not require any order of restitution from the court to enable him to assert his right to this estate, and it was incumbent upon the plaintiff herein, before he could have his title quieted, to establish a title in himself superior to that of the appellant. See *Black v. Vermont Marble Co.* 137 Cal. 683, 70 Pac. 776.

Whether the appellant is estopped from objecting to the validity of the sale to the

respondent cannot be determined upon this appeal. The record does not disclose any issue upon that proposition before the superior court (*Newhall v. Hatch*, 134 Cal. 269, 55 L. R. A. 673, 66 Pac. 266), and that court did not make any finding to that effect. Whether one is estopped by his conduct is a question of fact to be determined from the evidence in reference thereto. We cannot assume from the evidence before that court that it would have found that the appellant was so estopped, and it is not within the jurisdiction of this court to make a finding of fact from the evidence before that court.

The objection that the statement on motion for a new trial does not sufficiently specify the particulars in which the evidence is insufficient to justify the decision is overruled. It is stated therein: "The forego-

ing constitutes substantially all the evidence given upon the trial." See *Standard Quick-silver Co. v. Habishaw*, 132 Cal. 115, 64 Pac. 113.

We advise that the judgment and order denying a new trial be reversed.

We concur: **Gray, C.; Chipman, C.**

Per Curiam:

For the reasons stated in the foregoing opinion, *the judgment and order denying a new trial are reversed.*

McFarland, Henshaw, and Lorigan, JJ., concur.

Petition for rehearing denied May 28, 1904.

COLORADO SUPREME COURT.

**Ernest BLAND, Plff. in Err.,
v.**

PEOPLE of the State of Colorado.

(.....Colo.....)

1. **Proof that a docked horse was not registered is not necessary in a prosecution for using such horse contrary to the provisions of the statute, where, because of the time when the docking occurred, registration was not possible under the provisions of the act.**
2. **The constant use of horses with docked tails tends to corrupt the public morals so as to bring the prohibition of the use of such animals within the police power of the state.**
3. **A law permitting the use of docked horses registered within a certain time after its passage, and forbidding the use of all other docked horses, is not void as objectionable class legislation.**
4. **The legislature may lawfully deprive those who violate the provisions of a statute forbidding the docking of horses' tails of the right to use the horses as a penalty for such violation.**
5. **No unconstitutional deprivation of property is effected by a statute forbidding the use of horses whose tails are docked after its passage.**

(April 4, 1904.)

ERROR to the District Court for Arapahoe County to review a judgment con-

NOTE.—For other examples of laws for the protection of animals or birds against cruelty, see, in this series, *State v. Karstendiek*, 39 L. R. A. 520 (prohibiting cruel treatment of animals in public); *Com. v. Lewis*, 11 L. R. A. 522, and *note*; and *Waters v. People*, 33 L. R. A. 836 (as to shooting pigeons from traps). 65 L. R. A.

victing defendant of driving, working, and using an unregistered docked horse. *Affirmed.*

The facts are stated in the opinion.

Messrs. Cranston, Pitkin, & Moore, for plaintiff in error:

The right to use one's property is a property right, and as such protected by constitutional guaranties.

1 Bl. Com. p. 138; 2 Kent, Com. p. 320; *Tripp v. Overocker*, 7 Colo. 74, 1 Pac. 695.

A person may be deprived of his property without any physical taking thereof, and the Constitution is violated by any law which destroys the value of the property, takes away any of its essential attributes, or deprives the owner of the lawful use of it.

10 Am. & Eng. Enc. Law, p. 299; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; *St. Louis v. Hill*, 116 Mo. 527, 21 L. R. A. 226, 22 S. W. 861; *Re Morgan*, 26 Colo. 421, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071.

The law under which Bland was convicted cannot be upheld as a valid exercise of the police power of the state. The prohibition of the right to drive, work, and use an unregistered docked horse does not tend to the protection of the lives, limbs, health, comfort, quiet, or morals of the community. Such a law is not based upon the maxim, *Sic utere tuo, ut alienum non laedas*, which is the recognized foundation and justification of the police power.

Tiedeman, Pol. Power, § 1: *Re Jacobs*, 98 N. Y. 107, 50 Am. Rep. 636; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Re Morgan*, 26 Colo. 422, 47 L. R. A.

52, 77 Am. St. Rep. 269, 58 Pac. 1071; *Platte & D. Canal & Mill. Co. v. Douell*, 17 Colo. 376, 30 Pac. 68; *Platte & D. Canal & Mill. Co. v. Lee*, 20 Colo. App. 184, 29 Pac. 1036; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Re Marshall*, 102 Fed. 323; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Ruhrstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30, 57 N. E. 41; *People v. Hawkins*, 157 N. Y. 7, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 130, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *People v. Jackson & M. Pl. Road Co.* 9 Mich. 285; *Potter's Dwarr. Stat.* 458; *Austin v. Murray*, 16 Pick. 128; *Coe v. Schultz*, 47 Barb. 64; *Cooley, Const. Lim.* p. 710.

The fact, if it be a fact, that prohibiting the use of a docked horse might make it easier to enforce that part of the law which directly prohibits the docking of horses, is no justification for a law which, but for that purpose, would be unconstitutional.

Re Davenport, 102 Fed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 471, 24 L. ed. 530; *Wynehamer v. People*, 13 N. Y. 392.

Whether a statute can or cannot be justified as an exercise of the police power is not a legislative, but a judicial, question.

Re Morgan, 26 Colo. 424, 47 L. R. A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

Messrs. J. B. Melville and Henry J. Hersey, with **Mr. N. C. Miller**, Attorney General, for defendant in error.

Steele, J., delivered the opinion of the court:

The information charges that the defendant, on, to wit, May 1, 1902, at the county of Arapahoe, Colorado, did unlawfully drive, work, and use an unregistered docked horse. Section 1 of the statute under which the information is brought is as follows: "It shall be unlawful for any person or persons to dock the tail of any horse, within the state of Colorado, or to procure the same to be docked, or to import or bring into this state, any docked horse, or horses, or to drive, work, use, race, or deal in any unregistered docked horse or horses within the state of Colorado." Section 2 provides that, "within ninety days after the passage of this act every owner or user of any docked horse within the state of Colorado shall register his or her docked horse or horses by filing in the office of the county clerk and recorder of the county in which such docked horse or horses may then be kept, a certificate, which certificate shall contain the

name or names of the owner, together with his or her postoffice address; a full description of the color, age, size, and the use made of such docked horse or horses; which certificate shall be signed by the owner or his or her agent. The county clerk shall number such certificates consecutively, and record the same in a book or register to be kept for that purpose only; and shall receive, as a fee for the recording of such certificate, the sum of fifty cents." Laws 1899, chap. 93, p. 175.

The defendant sold the horse in question February 19th, and bought him back about the 1st of March, 1902. The horse's tail was docked between the last-mentioned dates, and there is no evidence showing that the defendant docked the horse, or that he had possession of the horse at the time, or was in any way involved in the commission of the offense of docking the horse's tail. No proof was offered that the horse was unregistered, but the court held that, as the proof clearly established the fact that the offense of docking the horse's tail was committed some time between February 19th and the first week in March, 1902, no proof of non-registration was necessary. This ruling was correct. The act was approved in April, and became a law in July, 1899, and requires registration within ninety days after the passage of the act. It follows that registration under the act was impossible in this case. The very purpose of the legislature was to exempt from the operation of the statute those owning docked horses at the time of the passage of the act, and, to secure them such exemption, it was provided that they might, within ninety days from the passage of the act, register their horses. Owners of horses who did not avail themselves of the privilege of registration, and those who could not take advantage of the act, are guilty of a violation of the statute if they drive, work, use, race, or deal in any unregistered docked horse. Although we hold that proof that the horse was not registered was not required in this case, it does not follow that such proof would not be required in a case where it appeared that the horse was docked while in this state, prior to or within ninety days after the passage of the act.

The defendant contends that the act in question violates the 14th Amendment to the Constitution of the United States, and § 3, art. 2, of our Constitution. which provide, respectively, that "no state shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and that "all persons have certain natural, essential, and inalienable rights, among which may be reck-

oned the right . . . of acquiring, possessing, and protecting property; and of seeking and obtaining their safety and happiness." It is not asked that the whole act be declared unconstitutional, but that portion only which forbids the driving, working, or using of an unregistered docked horse, registration being impossible.

Concerning the police power of the state, Mr. Justice Miller said in the *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394: "This power is, and must be, from its very nature incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." And, quoting from an opinion by Chief Justice Redfield, of Vermont, he continues: "It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state; . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." And this court, in *Re Scrip Bill*, 23 Colo. 504, 48 Pac. 512, said: "While it is difficult to define the boundaries of the police power, it admittedly extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." And in the case of *Waters v. People*, 23 Colo. 33, 33 L. R. A. 836, 58 Am. St. Rep. 215, 46 Pac. 112, it was held that "the killing of doves as they are released from a trap, merely to improve skill in marksmanship, or for sport and amusement, though without specific intent to inflict pain or torture, is within the inhibition of the statute, and punishable." In the course of the opinion it was said: "It is of common knowledge that within the past few years, as incident to the progress of civilization, and as the direct outgrowth of that tender solicitude for the brute creation which keeps pace with man's increased knowledge of their life and habits, laws such as the one under consideration have been enacted by the various states, having the common object of protecting these dumb creatures from ill treatment by man. Their aim is not only to protect these animals, but to conserve the public morals, both of which are undoubtedly proper subjects of legislation."

The docking of a horse's tail is cruelty, not only because of the torture inflicted by 65 L. R. A.

the operation, but because, by depriving the horse of the use of his tail, he is deprived of the use of a weapon supplied him by nature for his protection from the myriads of winged pests that infest the land. Counsel insist that the question of cruelty is not involved, and that, assuming that the legislature has full power to prohibit docking, it has not the power to prohibit the use of the horse after his tail has been docked, and, conceding that the use of property may be taken away for the public good, without compensation to the owner, that the prohibition of the right to drive, work, and use an unregistered horse does not tend to the protection of the health, comfort, or good morals of the community, and is not, therefore, a valid exercise of the police power. They say that, as the act itself is silent upon the subject of the purpose of the legislature prohibiting the use of docked horses, unless we can clearly perceive from the terms of the act that the thing prohibited necessarily affects the public morals we should not sustain it; that the sight of docked horses does not call to mind the process by which the tail was obliterated; that there is no difference in appearance between a registered and an unregistered docked horse; and that a docked horse is not an unsightly object. That whether the statute can or cannot be justified as an exercise of the police power is a judicial, and not a legislative, question. It belongs to the legislative department to exert the police power of the state, and to determine primarily what measures are appropriate and needful for the protection of the public morals, the public health, or the public safety. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. "The public interests imperatively demand that legislative enactments should be recognized and enforced by the courts, as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124.

It is said that the police power of the state is founded largely upon the maxim, "Use your property in such manner as not to injure that of another;" and counsel insist that the driving of an unregistered docked horse injures no one, and that, as the police power is founded upon the maxim stated, unless the use of an unregistered docked horse can be shown to be injurious to others, the statute cannot be sustained as a valid exercise of the police power. "The welfare of the people is the supreme law," is a maxim of the law; and it is upon these two maxims that the police power of the state is largely based. In the exercise of the police power the legislature has a large discre-

tion, and it is our duty to sustain such legislation unless it is clearly and palpably, and beyond all question in violation of the Constitution.

The fact that the legislature has failed to state that the use of an unregistered docked horse is, in its opinion, contrary to the public morals, does not preclude us from sustaining the statute upon that theory, for we must sustain the law if any sound and reasonable theory can be advanced as a basis for our judgment. It is urged by the attorney general that the legislation in question can be sustained under the police power of the state, because it tends to conserve the public morals; that seeing frequently the mutilated and disfigured animals sears the conscience and hardens the minds of the people until they become accustomed to look upon these things as a matter of course. The same thought was expressed by Pope in a few lines. And it is as true in our day as it was in his time that, although we may instinctively hate vice, yet, if we allow ourselves to become familiar with it, we, in turn, become depraved. It was upon this theory that Judge Carpenter sustained the law, and we fully agree with him that constantly seeing the disfigured and mutilated animals tends to corrupt the public morals.

We are of opinion that in forbidding the use of a docked horse the legislature has not exceeded its authority, that the interdiction is a reasonable and valid exercise of the police power of the state, and that the provisions of the Federal and the state Constitutions have not been violated. The questions here presented have been considered in very many cases by the Supreme Court of the United States. We shall not undertake a review of these decisions, but shall cite from a few of the more recent ones, which, in our opinion, clearly sustain the right of the legislature to enact such statutes as the one now assailed.

The legislature of Kansas declared all places where intoxicating liquors were manufactured or sold to be common nuisances, and that whenever, by the judgment of the court, such place was found to be a nuisance, the sheriff should be directed to shut up and abate such place, and destroy all property used in keeping and maintaining such nuisance. One *Mugler*, at the time of the passage of the act, was the owner of a brewery, and engaged in the manufacture of malt liquors. The sale of which he was found guilty occurred in the state after the act took effect, and was of beer manufactured before its passage. The buildings and machinery constituting the breweries were of little value if not used for the purpose of manufacturing beer. It was claimed by *Mugler* that the judgment of the court sus-

taining the statute and directing the destruction of his brewery deprived him of his property without due process of law. The law was upheld by the Supreme Court in *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. Mr. Justice Harlan, in the course of the opinion, said: "If, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized." Respecting *Mugler's* claim that his property, if not employed in the manufacture of beer, would be of no value, and that the prohibition of it being so employed was, in effect, a taking of the property for public use without compensation, and depriving the citizen of his property without due process of law, Justice Harlan said: "This interpretation of the 14th Amendment is inadmissible. It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. . . . The principle that no person shall be deprived of life, liberty, or property without due process of law was embodied, in substance, in the Constitutions of nearly all, if not all, of the states at the time of the adoption of the 14th Amendment: and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

Letters patent granting to Henry C. De Witt and assigns the exclusive right to make, use, and vend to others an article known as "Aurora oil" were issued in 1867. By a statute of Kentucky passed in the year 1874 (Acts 1873-74, p. 40, chap. 386), the sale or use of oil that would ignite or permanently burn at a less temperature than 130 degrees Fahrenheit was prohibited. The statute further provided that inspectors were required to brand casks and barrels containing oil with the words "Standard oil," or with the words "Unsafe for illuminating purposes," as inspection showed was proper.

The assignee of De Witt was convicted of the charge of selling oil known as "Aurora oil," the cask containing which had been previously branded by an authorized inspector with the words "Unsafe for illuminating purposes." It was admitted that the Aurora oil could not be made to conform to the standard of test required by the Kentucky statute as a prerequisite to the right to sell within that state illuminating oils of the kind designated. In the case, *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, the conviction was sustained, and the law upheld. The court said: "By the settled doctrines of this court, the police power extends at least to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation strictly and legitimately for police purposes does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided expressly or by implication to the national government. The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the state that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. Whether the policy thus pursued by the state is wise or unwise, it is not the province of the national authorities to determine. That belongs to each state, under its own sense of duty, and in view of the provisions of its own Constitution. Its action in those respects is beyond the corrective power of this court."

In *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989, it is held that "all rights are subject to the police power of a state, and if the public safety or the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience" and that "as the police power of a state extends to the protection of the lives, health, and property of her citizens, the maintenance of good order, and the preservation of the public morals, the legislature cannot by any contract divest itself of the power to provide for these objects."

In *Laicton v. Steele*, 162 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, it is said: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything es-

sential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. . . . Beyond this, however, the state may interfere wherever the public interests demand it; and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." And the court upheld the New York statute authorizing the summary destruction of nets set or maintained on the waters of the state in violation of the statute enacted for the protection of fish. At page 142, 152 U. S. page 390, 38 L. ed., and page 503, 14 Sup. Ct. Rep. the court says: "It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law, and may be summarily destroyed." And on page 140, 152 U. S., page 390, 38 L. ed., and page 502, 14 Sup. Ct. Rep., the court says: "While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard; and, if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed."

Mr. Justice Brown, in the case of *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714, said: "Where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained wherever it can be done without the impairment of vested rights. . . . The general rule holds good, that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state, and within [the exertion of] legislative control; and in the exertion of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry."

The foregoing authorities establish (1) that it is within the police power of the state to prohibit cruelty to animals, because such prohibition is a protection to the animals and tends to conserve the public morals; (2) that in the exercise of the power the legislature may adopt such reasonable means

as are necessary to accomplish the purposes of the statute; (3) that to the legislature is confided a large discretion in declaring the public policy, and that, unless the legislation is clearly and palpably in violation of the fundamental law, it will be sustained; (4) that all property is held under the implied obligation that the owner's use of it shall not be injurious to the public.

These propositions being established by abundant authority, it remains to be determined whether the means adopted by the legislature for the accomplishment of the purpose of preventing the species of cruelty forbidden by the statute can be regarded as a reasonable exercise of the power confided to the legislature. It is for the courts to determine whether the act can be justified as a reasonable exercise of the police power but, in the consideration of the question, we should be guided somewhat by the primary declaration of the legislature; and if, in its judgment, it is necessary, for the conservation of the public morals, and to effect the purposes of the act, to prohibit the use of docked horses, we should not disregard the determination by the legislature of that question. It is not a valid objection to the statute that only such horses as are not registered cannot be used. The legislature recognized the fact that many horses had been mutilated prior to the time the bill for the prevention of the cruel custom was introduced, and, instead of depriving the owners of the right to use such animals, justly provided that horses then docked might be used, provided they were registered within a certain time. At this time there was no law prohibiting the docking of horses' tails, and to have prohibited the use of docked horses would have been an unusual, if not an illegal, exercise of power. The defendant cannot complain if he comes under the ban of the law, even though means have been provided for other owners of docked horses to use their animals. The law excludes from its provisions those who use registered horses, and includes those who use unregistered horses. All persons who owned docked horses at the time of the passage of the act were permitted to register them. Horses docked after the passage of the act are denied registration. The law operates upon that class of persons who use unregistered docked horses, but the classification is reasonable, and not arbitrary, and is not objectionable as class legislation, and does not violate that provision of the Constitution which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The character of the offense prohibited by the statute is such that something more than the mere prohibition of the docking was necessary to accomplish

the purposes of the act, and the means employed by the legislature are probably the most efficient that could be devised to prevent the docking. The whole scheme and purpose of the act would probably fail if the use of the docked animals were not prohibited, and as the act is clearly intended to conserve the public morals and to protect the horses; and, as the means employed by the legislature to effectively prevent the cruelty prohibited by the statute are reasonable and consistent with the policy of the state as declared by the act, and are measures necessary for the protection of the interests of the public, it becomes our duty to uphold the statute. But for another reason the law can and should be sustained. It is competent for the legislature to provide such punishment as, in its judgment, the offense warrants; and, unless the punishment inflicted can be regarded as cruel or unusual, the courts cannot interfere. Although the statute expressly fixes the penalty for its violation as fine and imprisonment, or both, we know of no good reason why the provisions forbidding the use of unregistered docked horses may not be regarded as an additional punishment imposed upon those who violate the law. Counsel say the deprivation of the use of the unregistered docked horse was not imposed as an additional punishment upon the person who docked the horse, because the horse may have been docked in a state where the docking of horses' tails is not a crime, and brought here, and because, if a burglar should break into a stable and steal a horse, and then dock his tail, the owner, if he subsequently recovered his property, could not use his horse. The statute forbids the importation of docked horses. Whether that provision interferes with the right of Congress to regulate commerce between the states is not involved in this case, for the reason that the horse in question was docked in Colorado. What our ruling would be in a case where a thief had docked a stolen horse, and the rightful owner had undertaken to use him after he was docked, we are not prepared to say; but the horse in question was not a stolen horse, nor was it docked by a thief. With full knowledge of the law, the owner of the horse docked him and sold him to Bland, and Bland, with full knowledge of the law, bought a docked horse. Their property has not been taken without due process of law. The law has not destroyed their property. They have destroyed their own property. Bland sold the horse, and within two weeks bought him back. In the interim the horse's tail was docked. There was no necessity for docking the horse's tail, and the parties concluded to defy the law, and they must take the conse-

quences. We regard the law as just, wise, and humane, and withal a lawful exercise of the power confided to the legislature, because it conserves the public morals, and be-

cause it punishes the cruel and senseless treatment by man of his best and most constant friend.

The judgment is affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS.

Frederick B. McGUIRE, *Plff. in Err.*,
v.

DISTRICT OF COLUMBIA.

(.....D. C. App.....)

1. To uphold a statute imposing the duty upon the owners or occupants of abutting land to keep the sidewalks free from ice and snow, there must be no inequality in the burden imposed upon the respective classes of persons upon whom the duty is imposed, nor unjust discrimination in favor of some and against others.
2. A statute imposing the burden of removing ice and snow from the sidewalks upon the occupants of improved property abutting thereon, without anything to designate the person responsible in case of apartment houses, is void for uncertainty.
3. A provision that sand, sawdust, "or other such substance," must be used on icy sidewalks, without specifying what such substance may be, renders the statute void for uncertainty.
4. A statute imposing a penalty for failure to remove the ice from a sidewalk upon one who, under the provisions of the statute, may already be in confinement for violation of its provisions, is void.
5. The fact that the owners of unimproved property may be nonresidents is no excuse for making different provisions with respect to the removal of snow from the walks in front of such property from those relating to improved property.

(May 24, 1904.)

ERROR to the Police Court of the District of Columbia to review a judgment convicting defendant of violating a provision of the statute with respect to the removal of snow and ice from sidewalks. *Reversed.*

The facts are stated in the opinion.

Messrs. George E. Hamilton and Michael J. Colbert, for plaintiff in error:

The sidewalk in front of a man's house belongs no more to that man than to every other citizen of the United States, and he has no greater control over said sidewalk; nor has he any special use in, or benefit

from, the sidewalk, greater than any other citizens have; nor is he any more benefited by the removal of obstructions caused by snow and ice than other citizens.

The provisions of the act compel a man to perform a labor, not upon, or for the benefit of, his own property, but upon and for the benefit of property which does not belong to him, and compel him not only to perform such labor and thereby deprive him of that labor, which is property, without due process of law, but take from him, in the sand and sawdust required to be sprinkled, in certain contingencies, on this street, these kinds of property without process of law and without compensation.

Considered as a police regulation, the act is unconstitutional; for, while the government may, in the exercise of its police power, extend very largely the lines of legislation, there are limits beyond which such legislation cannot rightfully go, and those limits would seem to be defined by the Constitution itself.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *State v. Jackman*, 69 N. H. 331, 42 L. R. A. 438, 41 Atl. 347.

A more clear case of inequality could not be found than that presented here.

Allman v. District of Columbia, 3 App. D. C. 8; *Dill. Mun. Corp.* § 761. *Cooley, Taxn.* 2d ed. p. 20; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *McOormack v. Patchin*, 53 Mo. 36, 14 Am. Rep. 440; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

Messrs. A. B. Duvall, E. H. Thomas, and F. H. Stephens for defendant in error.

Morris, J., delivered the opinion of the court:

It is understood that this is a test case to determine the question which has been raised as to the validity of an act of Congress entitled "An Act to Provide for the Removal of Snow and Ice from the Sidewalks of the District of Columbia, and for Other Purposes," approved February 10, 1904, for the violation of which, consisting in the failure to remove snow and ice from the sidewalks in front of lots 62 and 63, in

NOTE.—As to right to impose upon abutting owners the expense of cleaning streets or sidewalks, see also *note to Chicago v. Blair*, 24 L. R. A. 412, and the later case of *State v. Jackman*, 42 L. R. A. 438. 65 L. R. A.

square 555, in this city, the appellant was adjudged guilty by the police court. The act in question is as follows:

"Be it enacted, etc., That it shall be the duty of every tenant or occupant of any lot or lots of ground within the fire limits of the District of Columbia, improved by a house or building adjacent to any improved sidewalk, within the first four hours of daylight after the ceasing of any fall of snow, to cause said snow to be removed from the paved sidewalk adjacent to such lot or lots to the extent in length to which said lot or lots abut thereon, and to the extent in breadth of not less than 6 feet, and, if such improved sidewalk be not of such width, then to the extent of the width thereof; and, in the event any snow that may have fallen shall, before its removal, become so hardened by freezing or otherwise that it cannot be removed without great difficulty, or if at any time ice shall have formed on any such improved sidewalk by the freezing of rain, hail, melted snow, or in any other manner, it shall be the duty of such tenants or occupant, within the first four hours of daylight thereafter, to sprinkle, or cause such snow or ice, to the extent aforesaid, to be sprinkled with sand, sawdust, or other such substance. And for any violation of the provisions of this section such tenant or occupant shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of \$5 and costs, or by imprisonment in the workhouse of the District of Columbia not exceeding five days, and by an additional fine of \$5 and costs, or by additional imprisonment in the workhouse of the District of Columbia, not exceeding five days for each additional twenty-four hours after the expiration of the time hereinbefore provided that such tenant or occupant shall suffer or permit such snow or ice to remain without being sprinkled or removed as hereinbefore provided.

"Sec. 2. That it shall be the duty of the commissioners of the District of Columbia, as soon as practicable after the ceasing of any fall of snow, or after the accumulation of ice on the paved sidewalks of the District of Columbia in front of and adjacent to public buildings, public squares, and public reservations in the said District owned or leased by said District, to cause such snow or ice to be removed, and also to cause the same to be removed from all crosswalks of improved streets and places of intersection of alleys with improved sidewalks; but in the event of inability to remove such accumulation of snow or ice by reason of the hardening thereof, it shall be their duty, as soon as practicable, to cause such paved sidewalks, crosswalks and places of intersection of alleys with improved sidewalks to be

sprinkled with sand, sawdust, or other such material.

"Sec. 3. That it shall be the duty of the owner or owners of every vacant or unimproved lot within the fire limits of the District of Columbia fronting or abutting upon a paved sidewalk, within the first four hours of daylight after the ceasing of any fall of snow, as set forth in § 1 hereof, to cause such snow to be removed from the paved sidewalk in front of such lot or lots in the same manner, and to the same extent, and subject to the same penalty as provided in said section; and in the event any snow that may have fallen shall, before its removal, become so hardened by freezing or otherwise that it cannot be removed without great difficulty, or if at any time ice shall have formed on any such sidewalk by the freezing of rain, hail, melted snow, or in any other manner, it shall be the duty of such owner or owners, within the first four hours of daylight thereafter, to sprinkle or cause such frozen snow or ice, to the extent aforesaid, to be sprinkled with sand or sawdust, or other such substance; and for failure to do so such owner or owners shall be subject to the same penalty provided in § 1 of this act.

"Sec. 4. That in the event of the failure of any such owner or owners of any vacant or unimproved lot to cause the removal of such snow or ice, or to sprinkle the same as hereinbefore provided, it shall be the duty of the commissioners of the District of Columbia, as soon as practicable after the expiration of the time herein provided for the removal or sprinkling thereof, to cause the snow or ice in front of such lot to be removed or to cause the same to be sprinkled as hereinbefore directed to be done by such owner or owners; and upon each and every such removal or sprinkling by them they shall assess the sum of \$1 against each such lot, and where any such lot has a frontage in excess of 25 feet an additional sum of \$1 for each additional frontage of 25 feet or fractional part thereof, which said assessment shall be a lien on such lot when entered of record on the tax records of the District of Columbia, and to continue until paid, and shall be added to the general tax annually levied on such lot, and shall be collected in the same manner and as part of such general tax: Provided, however, that such removal or sprinkling by the commissioners of the District of Columbia, and assessment therefor, shall not relieve the owner or occupant from the penalty hereinbefore provided for failure to remove or sprinkle such snow or ice.

"Sec. 5. That it shall be the duty of every owner of any unimproved or nontenanted improved lot or lots and of the tenant or

occupant of any improved lot or lots of ground in the District of Columbia, within three days after notice to do so by the commissioners, to cause to be cleaned off and removed all dirt, sand, gravel, or other refuse matter that may fall, wash, or be placed upon any paved sidewalk adjacent to such lot or lots in the District of Columbia, subject to the same penalty provided in § 1 of this act.

"Sec. 6. That in the event of failure on the part of any owner, tenant, or occupant of any improved or unimproved lot or lots of ground in the District of Columbia to comply with the provisions of the preceding section of this act within five days after the notice hereinbefore provided, it shall be the duty of the commissioners of the District to cause the removal of such accumulation of dirt, sand, gravel, or other refuse matter; and upon any and every such removal by them they shall make an assessment on account thereof at the same rates and under the same provisions named in § 4 of this act.

"Sec. 7. That, to enable the commissioners of the District of Columbia to comply with the provisions of §§ 4 and 6 of this act, the sum of \$5,000 is hereby appropriated, one half out of the revenues of the District of Columbia, and one-half out of any money in the Treasury of the United States not otherwise appropriated: Provided, however, that all assessments collected under the provisions of this act shall be deposited in the Treasury of the United States to the credit of the appropriation herein made, and shall form a continuous fund for the purpose of complying with the provisions of said §§ 4 and 6.

"Sec. 8. That all prosecutions under this act shall be in the police court of the District of Columbia, in the name of said District, and by its attorney or one of his assistants.

"Sec. 9. That the act of Congress approved March 2d, 1897, entitled, 'An Act for the Removal of Snow and Ice from the Sidewalks, Crosswalks, and Gutters in the District of Columbia,' be, and the same is hereby, repealed."

This act, which subserves the purpose of a municipal ordinance for this District, was intended to take the place of the act of March 2, 1897, which the last section purports to repeal. The act of 1897 was before this court in the case of *Holtzman v. United States*, 14 App. D. C. 454, 27 Wash. L. Rep. 385, and we were then compelled to notice in some detail, and to criticize, the infirmities which, in our opinion, rendered that act a nullity in so far as it was applicable to the matters then under consideration. The present act is, no doubt, the

result of the animadversions then made upon the act of 1897; but the present act is, if possible, more objectionable than that which it is intended to supersede. We find only one section in it, that which repeals the act of 1897, which does not in some way contravene the principles of common right and the fundamental law.

This is the third of a series of similar enactments passed within the last ten years, for, previous to the act of March 2, 1897, there was one approved on March 2, 1895 (28 Stat. at L. 809, chap. 178, U. S. Comp. Stat. 1901, p. 671), the first four sections of which did not differ much from the four sections that compose the act of 1897, and the fifth section of which manifested the laudable purpose of the government of the United States to co-operate in the work by providing that the commissioners of public buildings and grounds should cause the snow and ice to be removed from the sidewalks of the city adjoining the public squares and the property of the United States,—a provision absolutely essential to the successful operation of any such law, and which is presumed to be yet in force, although the remainder of that statute may have been superseded by the subsequent enactments.

The purpose of this legislation is in the highest degree humane and beneficent,—that of saving life and limb from untoward accident resulting from slippery sidewalks; and the co-operation of individual citizens is sought on the ground of convenience and of the great emergency of the case. On this aspect of the matter every intendment should be indulged in favor of the validity of such legislation.

But there is another aspect of these enactments which, in the interest of individual liberty and equal right before the law, cannot be ignored. This class of legislation is undoubtedly an attempt on the part of the municipality to shift to the shoulders of individual citizens the burden which it is primarily incumbent on itself to bear, namely, that of keeping the streets and thoroughfares in proper condition for the purpose for which they are intended. That this duty is primarily upon the municipality cannot be reasonably questioned. That the municipality can efficiently perform the duty in the respect contemplated by the enactment before us, as well as in other respects, is not to be doubted. This very enactment itself provides that the municipality shall do the work required, at least in part, in the event that individual citizens should fail to do it; and it is not apparent why, with proper organization, it should not do it in the first instance as well as in the last. When we view the matter in this light,

and when we consider that this legislation has been solicited by the officers of the municipality from Congress for their own relief from the duty which otherwise it would be incumbent upon them to perform, we find no reason that should preclude a critical and careful examination of a statute that imposes a somewhat heavy burden, in some cases a practically impossible burden, upon the individual citizen whose rights are entitled to at least equal consideration with the rights of the municipality.

But it requires no very rigid or critical examination of the enactment to discover its gross inequalities and its palpable invasion of natural rights. Almost in the very first line we are confronted with an ambiguity that amounts almost to an absurdity. It is provided in the first section that "every tenant or occupant" of improved property within a certain specified district shall cause the snow and ice to be removed from the adjoining sidewalk under a prescribed penalty. When there are a dozen or more tenants or occupants of one improved piece of property, such, for example, as an apartment house, of which class of building we have now very many specimens in our city, are all the occupants of apartments therein liable for the performance of the prescribed duty and punishable for failure to comply with the requirements of the act? And if not all are liable, is any one of them? An answer in the affirmative to either of these questions involves an absurdity; an answer in the negative leaves the statutes without any provision whatever for the removal of snow and ice from the sidewalks in front of these apartment houses. For the owner is not by the statute required to do it, unless, perhaps, he happens, which would only be possible in rare cases, to be an occupant also of the premises; and certainly no employee about the premises would be a tenant or occupant in the eye of the law amenable to the performance of the duty required by the statute. In the case of improved property, not the owner, but the tenant or occupant, is required to do the work or have it done; and this, of course, is eminently right and proper if the work is to be done at all by the individual citizen.

In the event that ice is formed upon the sidewalks, the owner or occupant of improved adjoining property is required by the enactment to cause the sidewalks to be sprinkled with sand, sawdust, or other such substance. What the "other such substance" is, or should be, we are left to conjecture to ascertain, and the citizen is left to conjecture to determine for himself, subject to the risk that if he makes a mistake in his selection he remains liable to the prescribed

penalty. Penal statutes cannot be based upon such looseness of language, although it may possibly be assumed that "ashes" are meant, as ashes have been very generally used for the purpose. But this is, perhaps, an unimportant detail. More important, apparently, is the inquiry as to how the individual citizen is to provide himself with such substances. There is no provision that the municipality shall furnish them to him. Except in the case of ashes, and that may not always be an exception, the ordinary citizen is not usually provided with these substances, and it would often, perhaps generally, be impossible for him to procure them in the emergency in which they are most urgently needed.

Again, it is provided in the same connection that, if the tenant or occupant of improved property fails to remove the snow or ice, or to cause it to be sprinkled, as the case may be, he is liable to be committed to the workhouse for five days. It is true there is the alternative of a fine; but he may elect not to pay a fine, or the court may elect, in its discretion,—for it has the discretion under the statute,—to impose the imprisonment, instead of the fine. And, while so imprisoned, he remains liable to a similar penalty of fine or imprisonment for every additional period of twenty-four hours during which he permits the snow to lie or the ice to remain unsprinkled. In other words, he has the right, and it is his duty under the statute, although he may have been delinquent in the first instance in causing the snow or ice to be removed within the first four hours of daylight, thereafter to repent at any time and to obey the mandate of the enactment, and thereby to avoid the additional penalty; and yet he is prevented from so doing because he is in the workhouse under forcible detention at the time, and therefore absolutely prohibited from doing the work. This is one of the many incongruities of this remarkable statute.

The second section of the enactment makes it the duty of the commissioners of the District to cause the snow and ice to be removed from the paved sidewalks adjacent to the public buildings and public reservations owned or leased by the District of Columbia "as soon as practicable" after the ceasing of any fall of snow, or after the accumulation of any ice on such sidewalks. But it is not apparent why the individual citizen should be required to do the prescribed work within four hours, and the commissioners should have their own time for the purpose. For there is no one to determine the practicable time but themselves, and assuredly the removal of snow and ice from the neighborhood of the public build-

ings and grounds of the District of Columbia is, if possible, more necessary and more imperative than from the neighborhood of private residences. Nor is there any penalty upon the commissioners for failure to comply with the law, and yet it cannot be admitted that they are above the law. There is no reason why, in this connection, the private citizen should be held to an accountability to which the officers of the District are not held, when the duty to be performed is equally mandatory on both, and the inequality is without justification.

The act is entirely destitute of any provision for the removal of snow and ice from the sidewalks adjoining improved property that happens to be vacant or untenanted at the time; and this class of property and its owners escape all liability under the act. This exemption or omission, whichever we call it, would be fatal to the act, even if there were no other defect; for the duty required to be performed is one which requires the most absolute uniformity with respect to all property within the so-called fire limits of the District adjoining the paved sidewalks. It is not to be tolerated that a burden should be imposed upon one piece of property, or upon the owner of it, when no such burden is imposed upon the adjacent property or the adjacent owner, notwithstanding that the duty to be performed is precisely the same for both. It is true that the owners of "vacant or unimproved lots" are required to have the snow and ice removed, equally with the tenants or occupants of improved property. But the words "vacant or unimproved lot" do not include a vacant house. If they were held to do so, the term "lot" would mean two distinct and different things in the same connection. Whether a lot is designated as vacant or as unimproved, it means to the common understanding that it has no house upon it. And these words in the act are the only terms by which vacant or untenanted improved property can be comprised.

But probably the most glaring infirmity of this enactment is its sharp discrimination between the tenants and occupants of improved lots and the owners of vacant or unimproved lots. When it is remembered that the sole purpose to be subserved is the removal of snow and ice from the paved sidewalks of the District, and the duty of such removal is sought to be imposed upon individual citizens with reference to their occupation or ownership of adjoining property, the utmost equality and uniformity must be observed in the imposition of the duty. It will not do to require one owner of property, by reason of his ownership, to perform a duty from which the owner of the adjoining property is relieved. The owner

of vacant property cannot be subjected to liability to which the owner of the adjoining improved property is not subjected, when the thing to be done is based exclusively on the propinquity of such property, and can have no possible reference to the condition of such property as improved or unimproved. The necessity of the removal of snow and ice from the sidewalks is precisely the same in the one case as in the other. To punish the one owner, for failure of compliance with the act, by fine and imprisonment and an assessment upon his property, and to exempt the other from all duty and from all liability for the same precise thing, is a species of inequality which is repugnant to the principles of natural justice; and the inequality is not obviated by the fact that the duty, which might otherwise be imposed upon the owner of improved property, is by the enactment shifted to the tenant or occupant. The fact remains that the owner of unimproved property is charged with a burden, by reason solely and exclusively of his ownership, with which the owner of adjacent improved property is not charged, notwithstanding that the burden has no relation whatever to the character of the property, whether improved or unimproved, for we are not to be understood as holding that there may not be difference of burden where the difference has a reasonable relation to the difference of character of the property.

It is to be noticed that, if the tenant or occupant of improved property fails to remove the snow and ice in front of his property, there is no provision in the act for the performance of the work by the commissioners of the District. Their duty of removal in this connection extends only to the sidewalks in front of unimproved or vacant lots. Here, again, is gross inequality as well as utter failure to subserve the purpose of the law; for the intervention of the commissioners is as necessary in the one case as in the other.

In excuse of the inequality here apparent, it is alleged that the owners of vacant lots are often nonresidents, and, when such, cannot be reached by the process of fine and imprisonment. But this plainly is no sufficient excuse. For either the assessment authorized to be made for the failure to remove the ice and snow, and the performance of that duty by the commissioners, are a charge under the power to assess property for benefits, or they are an exercise of the police power of the state or municipality. The former will scarcely be contended; and, if it were contended, it would lack the necessary element of uniformity. The charge must be sustained, if at all, under the police power; but here, again, the element of

uniformity is equally requisite, and is equally wanting in the enactment. We cannot have one law for the resident and another for the nonresident owner of real estate in this District. Probably only a comparatively small minority of the owners of vacant lots in this District are nonresidents, and we fail to see why the fact of the nonresidence of some owners of vacant lots should cause an inequality between all owners of vacant lots and the owners of improved property in the matter of a duty equally incumbent upon both, and incumbent on them, if at all, solely by reason of their adjacent ownership, wholly disconnected from the matter of improvement or absence of improvement of the property.

There are other difficulties connected with the enforcement of this act which may be mentioned without our entering into any extended consideration of them. Property may be owned or occupied by minor children, acquired, perhaps, by inheritance, and it might be impossible for them to perform the required duty. It might be held by trustees or receivers, upon whom no such duty could properly be imposed. It might be in litigation, or a tenant or occupant might be ill or temporarily absent from the District, or the ownership might be of vacant lots in widely distant parts of the District, which it might be impossible to reach within the time limited for the performance of the prescribed duty. Numerous cases might be supposed in which such performance would be simply an impossibility. And it will not do to say that these are exceptional cases, for the enactment is one which is worthless if it is not capable of universal enforcement. Of what advantage is it to the passenger on the sidewalk that he has passed safely in front of the premises of one man who has faithfully complied with the requirements of this act, if he falls and is injured on the slippery sidewalk adjacent to the neighboring property of one who has disregarded the enactment? Of what avail is it to remove the snow and ice in front of some premises, if other portions of the sidewalks, perhaps used to a greater extent, are to be left in a dangerous condition, which even the commissioners are not authorized by this enactment to remedy? The primary requisite of all such legislation is that it should be uniform, and that it should be capable of universal enforcement.

65 L. R. A.

We have no desire to ignore the fact that, in several of the states of our Union, notably in Massachusetts and New York, there have been adjudications sustaining the validity of legislation having in view the same general purpose as has the enactment now under consideration. *Re Goddard*, 16 Pick. 504, 28 Am. Dec. 259; *Carthage v. Frederick*, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480. At the same time, in view of modern methods and altered municipal conditions, we are disposed to attach at least equal importance to those adjudications which, like *State v. Jackman*, 69 N. H. 331, 42 L. R. A. 438, 41 Atl. 347; *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640, hold that, under the guise of the exercise of the police power, it is not competent either for the legislature or for the municipality to impose unequal burdens upon individual citizens. Upon careful examinations of the cases of *Re Goddard*, 16 Pick. 504, 28 Am. Dec. 259; *Carthage v. Frederick*, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480, and the other authorities on that side of the question, it will be found that there was no element of inequality found to exist in any of the enactments under consideration, but that only the question was considered whether the authority of the state or municipality extended to the promulgation of such ordinances. There was no such glaring inequality and unjust discrimination between citizens similarly situated and equally entitled to bear the same burden as is to be found in the enactment now before us. It is for this inequality, and for this discrimination, that we are constrained to hold the enactment to be a nullity. Equality before the law is a fundamental principle of our republican institutions. It is a principle as dear to us even as life or liberty; and any enactment that contravenes it cannot have the force of law.

We are of opinion that the act is void, and that therefore the judgment of the police court based upon it is erroneous.

The judgment will be reversed, with costs.

The cause will be remanded to the Police Court of the District, with directions to vacate its judgment, and to discharge the defendant.

And it is so ordered.

GEORGIA SUPREME COURT.

Mamie YOUNG, *Plff. in Err.*,
v.
CENTRAL OF GEORGIA RAILWAY COM-
PANY.

(.....Ga.....)

*To "mutilate" a railroad ticket, with-
in the reasonable meaning of a stip-
ulation on its face that it shall not be
good for passage if mutilated in any way, it
must be deprived of some essential or ma-
terial part; and such a ticket is valid, al-
though torn in two pieces, when both pieces
are presented to the conductor at the same
time, and it is apparent that they are parts
of the same ticket, that together they form
the entire ticket, and that no fraud has
been perpetrated upon the railroad com-
pany.

(May 11, 1904.)

ERROR to the City Court of Savannah to
review a judgment in favor of defend-
ant in an action brought to recover dam-
ages for alleged wrongful ejection from de-
fendant's train. *Reversed.*

The facts are stated in the opinion.

Messrs. Travis & Edwards for plaintiff
in error.

Messrs. Lawton & Cunningham, for
defendant in error:

The ticket was mutilated. It provides on
its face that it shall be good for passage
"when presented with coupons attached." It
also provides that coupons will be detached
by conductors only.

Hutchinson, Carr. § 580 (*c*); *Wightman*
v. Chicago & N. W. R. Co. 73 Wis. 169, 2
L. R. A. 185, 9 Am. St. Rep. 778, 40 N. W.
689; *Pennsylvania Co. v. Bray*, 125 Ind. 229,
25 N. E. 439.

The conditions upon the face of this ticket
were more than mere regulations. They
were conditions of a contract, and were bind-
ing upon the plaintiff, without regard to
whether they were reasonable or unreason-
able. The reasonableness or unreasonableness
of the contract is not involved.

Southern R. Co. v. DeSaussure, 116 Ga.
56, 42 S. E. 479; *Ripley v. New Jersey R.*
& Transp. Co. 31 N. J. L. 388.

The provisions of this ticket constituted a

*Headnote by CANDLER, J.

NOTE.—FOR a case in this series holding that
a round-trip ticket having the words, "Not
good for passage," on the going part of the
ticket, and the words, "if detached," on the
return part, is good when both parts, though
detached, are presented together at the same
time, to the same conductor on the going trip,
see *Wightman v. Chicago & N. W. R. Co.* 2
L. R. A. 185.
65 L. R. A.

contract between the parties, and were not
mere regulations.

Central R. Co. v. Lippman, 110 Ga. 665,
50 L. R. A. 873, 36 S. E. 202; *Southern R.*
Co. v. Watson, 110 Ga. 686, 36 S. E. 209;
Hollister v. Nowlen, 19 Wend. 234, 32 Am.
Dec. 455; *Hale*, *Bailments & Carriers*, p.
439.

Candler, J., delivered the opinion of the
court:

This was an action for damages for the
alleged tortious eviction of the plaintiff from
the defendant's train. The jury found for
the defendant, and the plaintiff excepts to
the overruling of her motion for a new
trial.

It appears that the plaintiff purchased
in Augusta, at a greatly-reduced price, a
ticket, over the defendant's line of railroad,
from Augusta to Savannah and return. This
ticket contained a printed stipulation to the
effect that, if it should become mutilated
in any way it should not be good for pas-
sage. On the return trip, when the plain-
tiff tendered the ticket to the conductor, it
was torn into two parts. The evidence for
the plaintiff was to the effect that she pre-
sented both pieces of the ticket, and that
they corresponded in such a way, as to the
numbering and other physical characteris-
tics of each, that there could be no doubt
that they were parts of the same ticket, and
that together they formed the entire return
ticket. Witnesses for the defendant, on the
other hand, testified that the plaintiff ten-
dered the conductor only a part of the torn
ticket. Be that as it may, the conductor
demanded the payment of fare by the plain-
tiff, which was refused, and she was evicted
from the train. The court charged the jury
as a matter of law that the ticket was mu-
tilated and by its terms invalid, and restrict-
ed their consideration of the case to the
question whether the plaintiff was evicted
from the train at a proper place.

This was error. Only by the most nar-
row and literal construction of the word
"mutilated," as contained in the stipulations
on the face of the ticket, could the charge
be justified. The writer has never favored
laxity in the enforcement of agreements be-
tween railroad companies and those to whom
special rates or gratuities are granted (*Central*
R. Co. v. Glascock, 117 Ga. 938, 43 S.
E. 981; *Gilleland v. Louisville & N. R. Co.*
119 Ga. 789, 47 S. E. 336; *Holly v. Southern*
R. Co. 119 Ga. 767, 47 S. E. 188), but he is
equally opposed to a construction so strict
as to do violence to the obvious intention
of the agreement and work a hardship on

the party sought to be bound. The definition given by the Standard Dictionary of the word "mutilate" is as follows: "To cut off or deprive of a limb or essential part of, as an animal body; maim; cut or break off, or otherwise remove any part of, as a statue; disfigure. To retrench, remove, expunge, or delete an essential or material part of, so as to render incomplete or imperfect, as a literary composition; as, to mutilate a speech." The main idea of this definition is the removal of an essential part, so that the whole is rendered imperfect. It is plain that if a ticket has been torn in two, and the two parts, preserved, fit exactly together in such a way as to make it indisputable that they are parts of the same ticket and together form the entire ticket, there has been no mutilation, except in a purely physical sense. Nothing essential to a valid ticket has been removed; only its physical symmetry has been marred. The only reasonable object to be accomplished by a regulation like the one now under consideration is to prevent fraud. It would, of course, be grossly unfair to the railroad company to require it to honor only a part of a ticket, for in that case two or more persons, only one of whom had paid any consideration to the company, might be enabled to ride on the same ticket. But if the plaintiff's evidence is to be believed, she furnished to the conductor of the train conclusive evidence that a fraud had not, and could not have been, perpetrated by her. As to this point there was, as stated before, a conflict in the evidence; but the jury should have been allowed to pass upon the contested issue, and to say whether the plaintiff presented to the conductor in good faith an entire ticket which had, as she claimed, been accidentally torn in two, or only a part of a mutilated ticket.

In the case of *Wightman v. Chicago, & N. W. R. Co.* 73 Wis. 169, 2 L. R. A. 185, 9 Am. St. Rep. 778, 40 N. W. 689, it was held: "A round-trip ticket having the words, 'Not good for passage,' on the going part of the ticket, and the words, 'if detached,' on the returning part, is valid when both parts are presented together at the same time to the same conductor on the going trip, although the parts have become separated by inadvertence." It is contended, however, by counsel for the defendant in error that this case turned on a special statute, and is therefore not applicable to the case at bar. While it is true that in the opinion reference is had to a Wisconsin statute, and it is held that the company is not authorized, "under the guise of regulations, to abridge or impair a passenger's statutory or legal rights," it does not appear that the statute in question related in any way to the ques-

tion of the mutilation or detachment or tearing of tickets or parts of tickets. On the contrary, it affirmatively appears in the opinion of Cassoday, J., that the statute referred to "required the defendant, upon application 'at its ticket station,' . . . and payment of the price, to sell to the plaintiff 'round-trip tickets, good for first-class passengers,'" between certain points mentioned. There is certainly nothing in such a statute that would alter the general rule involved, or render any the less applicable to the case now under consideration the principles announced in the case cited. Under the rule laid down by the court in the case of *Georgia R. & Bkg. Co. v. Clarke*, 97 Ga. 706, 25 S. E. 368, a stipulation in a special contract embodied in a railroad ticket should, in a case of uncertainty, be construed most strongly against the railroad company. In the present case the court gave the most rigid construction possible in the company's favor. The case, we think, was tried on the wrong theory, and we are therefore constrained to send it back for another hearing.

Judgment reversed.

All the Justices concur.

Priscilla McIVER, *Plff. in Err.*,
v.

FLORIDA CENTRAL & PENINSULAR
RAILROAD COMPANY.

(110 Ga. 223.)

- *1. Though the plaintiff in a suit which had been properly removed from a state to a Federal court having concurrent jurisdiction of the cause of action on which the suit was founded was nonsuited, or voluntarily dismissed his case in the United States court, it was, nevertheless, his right to bring another suit on the same cause of action in the state court at any time within the statute of limitations applicable to such an action. The above is true, notwithstanding in the second suit the damages were laid in an amount which would prevent another removal to the Federal court.
2. The petition set forth a cause of action as against the demurrer filed to the same.

(*Simmons, Ch. J., and Little, J., dissent.*)

(January 31, 1900.)

*Headnotes by COBB, J.

NOTE.—For other cases in this series as to right to recommence an action in a state court after its dismissal or a nonsuit in a Federal court, see *Baltimore & O. R. Co. v. Fulton*, 44 L. R. A. 520, and *Hooper v. Atlanta, K. & N. R. Co.* 53 L. R. A. 931.

ERROR to the City Court of Brunswick to review a judgment in favor of defendant in an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. Garrard, Meldrim, & Newman and **D. W. Krauss** for plaintiff in error.

Messrs. Crovatt & Whitfield, for defendant in error:

Suit once brought in state courts, and then removed to the United States courts, stand thereafter as if originally brought in the latter courts.

Removal Acts of Congress, 1887, § 3.

When thus brought, removed, and non-suited or dismissed for any cause, the privilege of renewal, if exercised at all, must be by renewal in the Federal courts.

Cox v. East Tennessee, V. & G. R. Co. 68 Ga. 448; *Kern v. Huidekoper*, 103 U. S. 490, 493, 26 L. ed. 356, 357; *Constitution Pub. Co. v. De Laughter*, 95 Ga. 17, 21 S. E. 1000; *Baltimore & O. R. Co. v. Fulton*, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 285.

When the United States court has once obtained jurisdiction, it is bound to continue that jurisdiction until the final determination of that entire controversy.

Dow v. Bradstreet Co. 46 Fed. 824; *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 169; *Desty, Removal of Causes*, 3d ed. § 109a.

Gobb, J., delivered the opinion of the court:

Priscilla Melver brought an action against the Florida Central & Peninsular Railroad Company, alleging in her petition, which was filed on January 17, 1899, in substance as follows: The defendant, a railroad corporation, damaged her in the sum of \$1,999, in that on July 17, 1897, her minor son, with a companion, had, with the consent of a negro train hand, boarded a freight train of defendant to go from one station on the road of defendant to another. They paid to a train hand the sum of 90 cents as fare, the latter agreeing to see the conductor in reference to the matter. Her son and his companion first went into a box car, and afterwards left the same and got on a flat car. While on the latter car, and the train was in rapid motion, a white man, having on the uniform usually worn by the employees of the company, "who petitioner believes and charges was the conductor in charge of the train, together with two negro train hands, one of whom was the party to whom" the 90 cents had been paid, came upon the flat car and demanded to know where they were going, to which a reply was made

that they had paid their fare to one of the train hands present. One of the train hands asked if they had any money, to which a reply was made that they had, whereupon he demanded the same, and upon refusal of the companion of petitioner's son to deliver the money the train hand attempted to take the same, and "did then and there brutally, cruelly, and inhumanly assault and beat your petitioner's said son, and did then and there force and hurl him from said rapidly moving car and train, thereby instantly causing his death." The injuries resulting in the death of her son were inflicted by the "defendant, its agents, servants, and employees." At the time of the death of her son he was seventeen years of age, and had been earning \$1 per day. He was unmarried, left no wife and child, and petitioner was dependent upon him, and he contributed to her support. One of the paragraphs of the petition was as follows: "Your petitioner further shows that at the May term, 1898, of the city court of Brunswick, in and for said county, she instituted her suit against the said defendant company for the homicide of her said son, which suit was subsequently removed to the United States circuit court for the eastern division of the southern district of Georgia, when, on the 16th day of January, 1899, and during the November term, 1898, of the said circuit court, after the evidence for the plaintiff in said case had been concluded, upon her motion the said case of your petitioner was discontinued and dismissed from said court; and the plaintiff now, within less than two years from the accruing of said cause of action, comes and reinstitutes her said case against said defendant in conformity with law." To the petition the defendant filed a demurrer, which was, in substance, as follows: (1) The injuries alleged do not appear to have been caused by defendant, or anyone acting with its permission, or under its command, or in its behalf, within the scope of the duty imposed upon such person. (2) It does not appear that the relation of passenger and carrier existed between plaintiff's son and defendant. (3) It appears that plaintiff's son was engaged with his companion in an undertaking to violate the rules of the defendant and defraud it of its revenue. (4) It appears that the train was a freight train, and not a passenger train, and it is not alleged that such train was accustomed or authorized to carry passengers. (5) It appearing that another suit on the same cause of action had been brought in the city court of Brunswick, in which the damages were laid at \$10,000, and removed to the United States court, and there discontinued and dismissed, the city

court of Brunswick has no jurisdiction to entertain the present suit, and the laying of damages in this suit at \$1,999 is an attempt to deprive the United States court of a case solely within its jurisdiction by virtue of the removal referred to. The demurrer was sustained, and the plaintiff accepted.

1. The last ground of the demurrer will be first dealt with. When one brings an action in a court having jurisdiction to determine the same, and is nonsuited or voluntarily dismisses the case, such nonsuit or dismissal does not determine in any way the merits of the controversy; and as a general rule the plaintiff may, if not barred by the statute of limitations, institute a similar suit in the same court, or in any other court having jurisdiction of the action, or he may adopt a different remedy appropriate to the cause of action, and enforce it in the court in which the first suit was brought, or in any other court having jurisdiction to enforce the same. In the language of one writer, a nonsuit "is but like the blowing out of a candle, which a man at his own pleasure may light again." 1 Freeman, Judgm. § 261, citing March, Arbitrements, 215. See also 3 Bl. Com. 296; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Homer v. Brown*, 16 How. 354, 365, 14 L. ed. 970, 975; *Smith v. Floyd County*, 85 Ga. 420, 11 S. E. 850; *Phipps v. Alford*, 95 Ga. 215, 22 S. E. 152; Civil Code, § 5043. The question raised by the ground of the demurrer now under consideration is whether the removal of a case to a Federal court from a state court which has concurrent jurisdiction of the same, and the entering of a judgment of nonsuit or the allowance of a voluntary dismissal in the former court, prevents the bringing of another suit on the same cause of action in the state court, when at the date the latter suit is filed the cause of action is not barred by the statute of limitations. An action brought in a court of this state, and there nonsuited or voluntarily dismissed or discontinued by the plaintiff, may be renewed in any court having jurisdiction of the cause of action, upon payment of costs. Civil Code, § 5043. If the cause of action was not barred by the statute of limitations when the suit was originally brought, the action may be recommenced at any time within six months after the dismissal or nonsuit, notwithstanding it may have become barred while the first suit is pending. Civil Code, § 3786. The city court of Brunswick and the Federal court had concurrent jurisdiction of the cause of action on which the first suit was founded, the damages being laid at \$10,000. The suit was originally brought in the former, and 45 L. R. A.

regularly and lawfully removed to the latter court, and there voluntarily dismissed by the plaintiff. The plaintiff then sought to bring another suit, in which the damages were laid at \$1,999, on the same cause of action, in the city court. If the cause of action was barred by the statute of limitations at the time such new suit was filed, then the case would have been properly dismissed, as it has been held by this court that when a case has been removed to the Federal court, although there may be no adjudication in the Federal court on the cause of action, if the same becomes barred while the case is pending in the latter court the action cannot be renewed in the state court within six months, under the provisions of the section above quoted. *Cox v. East Tennessee, V. & G. R. Co.* 68 Ga. 446. The same is true where the suit was originally brought in the Federal court. *Constitution Pub. Co. v. De Laughter*, 95 Ga. 17, 21 S. E. 1000. There is certainly nothing in either of the cases just cited to call for a ruling that no action could ever be brought in the state court merely because of the removal of the former suit to a Federal court, if the cause of action is not barred by the statute of limitations. The only point necessary to be decided in the *Cox Case* was, whether the law contained in the section of the Code above cited had any application to a case removed to the Federal court. In that case the suit had been brought in a state court, and had been properly removed to the Federal court, and while there a period of time had elapsed which would have the effect of barring the plaintiff from bringing another suit based on the same cause of action. It was held that the case could not be recommenced in the state court, as the six-months statute above referred to did not prevent the bar of the statute of limitations from attaching to a cause of action removed to the Federal court. There is some language, both in the headnote and in the opinion, which would seem to indicate that the case could not have been recommenced in the state court, notwithstanding it was not barred by the statute of limitations; but such language went further than the facts of the case justified, and what is thus said is not binding as authority. The last sentence of the first headnote, that "§ 2932 of the Code (Civil Code, § 3786) does not apply to such a case," is significant, as indicating the real question involved in that case. Moreover, the court passed upon the merits of the case, and held that the plaintiff failed to take out his case. The case might well, therefore, have been put upon that ground.

The case of *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354, cited in the opinion in the *Cox Case*, does not decide the ques-

tion presented by the present record. All there ruled (and there are a number of other rulings of that court to the same effect) is that, when a case has been removed from a state court to a Federal court, any action taken by the state court while the case is pending in the Federal court is *coram non judice* and void. We do not for a moment question the correctness of these decisions. When a case has been removed from a state court to the Federal court, the latter court certainly has complete and exclusive jurisdiction of that particular case. The state court is ousted of all jurisdiction over the action, and any action taken by it after such removal would, of course, be void. If the Supreme Court of the United States has ever ruled that a case which has been nonsuited or disposed of in the Federal court without a decision upon the merits cannot be recommenced in a state court of concurrent jurisdiction, if permitted by the statutes of the state, we have, after a most diligent search, been unable to find it. The supreme court of Ohio, in the case of *Baltimore & O. R. Co. v. Fulton*, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 265, which is cited on the brief of counsel for defendant in error, has made a direct ruling upon the question now under consideration. That case is, so far as we can ascertain, *sui generis*. The case of *Cox v. East Tennessee, V. & G. R. Co.* 68 Ga. 446, is cited to sustain the view therein expressed, but we think the Ohio court has entirely misapprehended the ruling in that case. A writer in the law magazine, Case and Comment, of July, 1899, has this to say in reference to the Ohio case and the *Cox Case*: "The right to bring a new action in a state court after dismissal of a prior action on the same demand by a Federal court into which the cause had been taken by removal is denied by the Ohio supreme court in the case of *Baltimore & O. R. Co. v. Fulton*, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 265. This court declares that the jurisdiction of the Federal court in case of removal extends to 'any suit thereafter brought on the identical cause of action after the former suit has been dismissed by it until the cause of action has been extinguished by a judgment on the merits.' The case of *Cox v. East Tennessee, V. & G. R. Co.* 68 Ga. 446, is cited as a precedent, but that was a materially different case, in which the decision was that after nonsuit in a Federal court a renewal of the action in the state court was not a part of the original case, or 'on the same footing with it' with respect to the statute of limitations. The possibility that a plaintiff might improperly permit the dismissal of a case after removal for the purpose of beginning again in the state court, and thus 65 L. R. A.

compel the defendant to remove the cause again or else submit to the state court, is one ground of the Ohio decision. But the unnecessary trouble caused to a defendant by dismissing an action and suing anew is not confined to cases that have been removed from a state court. It does not in other cases prevent the plaintiff from commencing a new action after dismissing the former one, and the difference in respect to actions removed into a Federal court is only in degree. The distinction between reinstatement of an action and the bringing of a new action does not seem to have been much considered in this case. Because a case can be reinstated only by the court that dismissed it, it is said that 'by parity of reasoning,' a state court cannot pass on the right of the plaintiff to recommence an action after it has been dismissed by a Federal court. But commencement of a new action, although for the same cause, is not a reinstatement, but a distinct and independent case. Exclusive jurisdiction of an action is a very different thing from exclusive jurisdiction of all possible actions for the same cause. An election to bring an action in one of two courts of concurrent jurisdiction is not usually irrevocable. After dismissal of the first one, the plaintiff has the same choice between the courts that he had originally. There seems to be no reason why this should not apply where the concurrent jurisdiction is in state and Federal courts. If bringing an action originally in the Federal court does not give it such exclusive jurisdiction of the entire cause of action as to prevent bringing any action therefor in a state court after the Federal suit is dismissed, why should this be the result of removing a suit from a state court into a Federal court? In either case it is difficult to see why, after an action has been dismissed without prejudice to the right to bring a new action, the plaintiff has not the same election that he had in the beginning with respect to jurisdiction." The writer of the above-quoted article thoroughly apprehends the true relation of the *Cox Case* to the question now under discussion, and his reasoning not only demonstrates the correctness of the conclusion reached by us, but also that there is nothing in the *Cox Case* really in conflict with the present ruling, and that the Ohio case is not based upon sound reasoning. There being no authority which would bind this court on the question under consideration, the case should rest solely upon principle. If an action had been brought in one of the courts of this state, and there nonsuited, or voluntarily dismissed or discontinued by the plaintiff, no one would contend that it might not be recommenced within due time in the same

court, or in another court of this state having concurrent jurisdiction of the action. If a suit has been begun in the Federal court, and there nonsuited or discontinued, another suit on the same cause of action could certainly be brought in a state court having jurisdiction of such an action. The superior and city courts of this state are courts of concurrent jurisdiction within the circuit court of the United States of the district embracing the county where such superior or city courts are located, as to certain cases; and there is no good reason why the rule applicable to state courts should not apply, merely because one is a state and the other a Federal court. The act of Congress provides that certain cases may be removed from the state court to the Federal court, but this does not mean that the cause of action is removed. The act refers in terms to suit, and not cause of action. Until the state court is absolutely deprived of jurisdiction of a particular cause of action, it may take jurisdiction of and pass upon the same, with the exceptions above noted,—that when the Federal court has taken jurisdiction the state court cannot take any action in connection with the same so long as the cause is pending in the Federal court. But when that court denies to the plaintiff a hearing, or fails for any reason to pass upon the sufficiency of his cause of action, he may bring the same again in the state court, and invoke an adjudication of that court. And the fact that the new suit is for an amount which will prevent another removal to the Federal court will not invalidate the suit. If the plaintiff in the new suit voluntarily abandons a portion of his claim for damages, it does not seem that the defendant should complain. The policy of the laws of the United States is to compel persons having claims of small amounts to litigate in the state courts, and voluntarily giving up a portion of his claim for damages, and being content to accept a sum less than the Federal court would entertain jurisdiction of, would not seem to be contrary to the laws of the United States and its established public policy in reference to the jurisdiction of its courts. The court had jurisdiction of the cause, and the ground of the demurrer raising objection to the jurisdiction was not well taken. See, in this connection, *Willson v. Milliken*, 42 L. R. A. and notes on page 459 (103 Ky. 165, 82 Am. St. Rep. 578, 44 S. W. 660).

2. The petition set forth a cause of action as against the demurrer filed to the same. The petition, in effect, alleged that one of the train hands, in the presence of the conductor, and impliedly with his consent, attempted to commit a robbery upon the companion of plaintiff's son, and while so en-

gaged did hurl plaintiff's son from a rapidly moving train, from which he received injuries causing his death. Under such circumstances, the defendant would be liable, whether the plaintiff's son was upon the train lawfully or unlawfully, and without regard to what was the character of the train. See *Higgins v. Southern R. Co.* 98 Ga. 751, 25 S. E. 837; *Smith v. Savannah, F. & W. R. Co.* 100 Ga. 96, 27 S. E. 725; *Savannah, F. & W. R. Co. v. Godkin*, 104 Ga. 655, 69 Am. St. Rep. 187, 30 S. E. 378, and cases cited.

Judgment reversed.

All the Justices concur, except **Simmons**, Ch. J., and **Little**, J., who dissent.

Little, J., dissenting:

I cannot concur in the ruling made in this case by a majority of the court. In my opinion, when a suit is commenced in a state court, and removed to the Federal court under the law of Congress, not only the actual case pending, but the cause of action upon which it is founded, is also removed, and, after dismissal or nonsuit in the Federal court, another suit on the same cause of action cannot be entertained by the state court, although in the second action the damages are laid in an amount less than the limit fixed by the act of Congress to entitle a defendant to a removal when there is diverse citizenship. As was said by Mr. Justice M'Lean in the case of *Gordon v. Longest*, 16 Pet. 97, 10 L. ed. 900: "One great object in the establishment of the courts of the United States, and regulating their jurisdiction, was to have a tribunal in each state presumed to be free from local influence;" and it was doubtless the purpose of Congress, in providing for the removal by a nonresident defendant of a case brought against him in a state court, to protect such nonresident, in the trial of his case, from the local influence which might exist in favor of the resident plaintiff in the state court. This purpose would be entirely defeated, if, after a plaintiff has instituted an action to recover damages for an injury which she claims to have sustained by reason of the wrongful act of the nonresident defendant, as in this case, and has named a particular amount as the proper measure of her damage, and, exercising the right conferred by the Congress, the defendant by lawful proceedings stays the jurisdiction of the state court, and brings the action before the Federal court for determination, and when that case has been dismissed in the Federal court, the plaintiff may again bring and maintain her action against the same defendant for the same causes for which she first complained in the state court, by arbi-

trarily fixing her damages in the second suit at a less amount, so as to place the last case brought out of the jurisdiction of the Federal court. The amount involved in the controversy is, under the act of Congress, an incident. Congress had for its object in providing for the removal of causes the better protection of aliens and nonresidents. The state courts would be no less competent to deal with a case involving \$2,100 than it would be to deal with a cause involving \$1,900. While the right of removal exists only in a case where the sum involved is not less than that named in the statute, yet the consideration which moved the minds of the lawmakers to authorize the removal rested in the purpose to provide a trial free from local influence which it was thought might be prejudicial to the defendant's cause, and not on the particular amount involved, except in so far as the importance of the case to the defendant was concerned. In other words, the prerequisite to removal, that a case should involve not less than \$2,000, was required because of the intention to limit such removal to cases which were deemed particularly important on account of the amount involved. As to those cases not deemed particularly important, the right of removal on account of diverse citizenship was not granted. Hence, in our opinion, the amount involved in a suit is to be considered only with reference to the question whether it may be removed. If it has once been removed, that cause, that controversy, stays removed. When it is taken out of the jurisdiction of the state court, that same cause between the parties cannot again be assumed by it, not because of the amount involved, but because, being a case which was authorized by law to be removed as originally brought, the removal has the effect of vesting jurisdiction of that cause, in all its phases, in the Federal court, which can alone finally adjudicate the controversy existing between the parties on the issues made by the pleadings. In *Kern v. Huidekoper*, 103 U. S. 485, 20 L. ed. 354, it was said: "The suit and the subject-matter of the suit are both transferred to the Federal court by the same act of removal," etc. In my opinion, the right of a plaintiff, after the removal of a case has been legally effected, to renew the action in the state court after a dismissal in the Federal court, is not an open question in this state. It was ruled by this court in the case of *Cox v. East Tennessee, V. & G. R. Co.* 68 Ga. 446, that, when a case has been removed from a state court to the circuit court of the United States, the jurisdiction of the former ceases, and after nonsuit in the Federal court the case cannot be renewed in the state court within six months, so as to avoid the stat-

ute of limitations. By a provision of our state law, a case which has been dismissed may within six months be renewed, and the statute of limitations can only be made to apply to time and the date at which the first suit was begun, in determining the question whether the last suit is barred by the lapse of time. The plaintiff in the *Cox Case*, 68 Ga. 446, sought to make this rule apply to the renewal of his case in the state court from which it had been originally removed to the Federal court, and he was there nonsuited. In delivering the opinion of the court, Chief Justice Jackson said that "the act of removal *ipso facto* transfers the jurisdiction of the cause to the circuit court of the United States, and divests that of the state court. . . . Therefore, when it appeared that plaintiff himself proved, in order to take his case without the statute of limitations, that it had been removed and adjudicated by the United States court, he removed himself out of court, and was properly nonsuited." It is said in the opinion of the majority that the exact question under discussion was not involved, and that the language used by the chief justice was *obiter dicta*. On the contrary, I conceive the case affords a direct ruling on the question involved. The point in question has also been expressly decided by the supreme court of Ohio in the case of *Baltimore & O. R. Co. v. Fulton*, 44 L. R. A. 520, 53 N. E. 265, 59 Ohio St. 575. That court ruled the question in the following language: "Where a case that may be is duly removed from a state to a Federal court, the jurisdiction of the state court over the cause at once ceases, and it can take no further step therein; and, if thereafter the case is disposed of in the Federal court otherwise than on the merits, the plaintiff cannot recommence the action in the state court, although under like circumstances he might have done so had the cause not been removed." The reasoning of the court seems to me not only to be sound, but conclusive. It is based on the proposition that the Federal court, having acquired jurisdiction of the action by its removal from the state court, must, on principle and the reason of the statute, retain it for all purposes,—for the purpose of determining whether it should be reinstated, or recommenced after it had been dismissed or stricken from its docket, as well as for its determination on the merits. It was also stated in the opinion rendered in the case that the jurisdiction of the Federal court "in such case does not merely embrace the suit brought and removed, but any suit thereafter brought on the identical cause of action after the former suit has been dismissed by it, until the cause of action has been extinguished by a judgment on the

merits." The chief justice agrees with the views above expressed, and we both think that the judgment of the court below should have been affirmed.

Writ of error dismissed by Supreme Court of United States, January 13, 1902.

COMMERCIAL BANK, *Plff. in Err.*,

v.

J. K. ARMSBY COMPANY.

(.....Ga.....)

*Where a merchant ships goods to his broker without conveying title to him, but purely for the purpose of distribution to others, and sends to the broker a bill of lading indorsed in blank for the goods, the possession of which, by the general custom of trade, is regarded as evidence of the right to dispose of the property for which it is issued, he cannot, in an action of trover, recover the goods from a bank which has, in good faith, and without notice of the owner's title, taken the bill of lading as security for a loan of money to the broker on his individual account, and converted the property upon default in the payment of its debt.

(May 13, 1904.)

ERROR to the City Court for Richmond County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful conversion of property. *Reversed.*

The facts are stated in the opinion.

Mr. William H. Fleming, for plaintiff in error:

The owner of a bill of lading indorsed in blank and entrusted to another is estopped from claiming title to the goods as against a bona fide holder for value to whom that agent has pledged the bill of lading.

Mechem, Sales, § 106; *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 7 L. ed. 189; *Winslow v. Norton*, 29 Me. 419, 50 Am. Dec. 601; *Newhall v. Central P. R. Co.* 51 Cal. 345, 21 Am. Rep. 713; *Barber v. Meyerstein*, L. R. 4 H. L. 317, 39 L. J. C. P. N. S. 187, 22 L. T. N. S. 808, 18 Week. Rep. 1041; *Arbodin v. Anderson*, 1 Q. B. 498; 6 Cyc. Law & Proc. p. 424; *Pollard v. Reardon*, 13 C. C. A. 171, 21 U. S. App. 639, 65 Fed. 848;

*Headnote by CANDLER, J.

NOTE.—For a case in this series holding that an ordinary contract of consignment of goods to a factor does not estop the consignor from setting up his title, even as against an innocent purchaser of the goods from the consignee, see *Romeo v. Martucci*, 47 L. R. A. 601.

As to negotiability of bill of lading, see also *National Bank of Commerce v. Chicago, B. & N. R. Co.* 9 L. R. A. 263. 65 L. R. A.

4 Am. & Eng. Enc. Law, 2d ed. p. 551; *Douss v. Greene*, 24 N. Y. 638; *Farmers' & M. Nat. Bank v. Hazeltine*, 78 N. Y. 104, 34 Am. Rep. 518; *Midland Nat. Bank v. Missouri P. R. Co.* 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521; *Beach*, Modern Eq. Jur. § 1103; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *Anderson v. Armstead*, 69 Ill. 452; *Stewart v. Munford*, 91 Ill. 58; *Morris v. Shannon*, 12 Bush, 89; *Mayo v. Leggett*, 96 N. C. 237, 1 S. E. 622; *Simmons v. Camp*, 71 Ga. 54; *Angell v. Johnson*, 51 Iowa, 625, 33 Am. Rep. 152, 2 N. W. 435; *Allen v. Maury*, 66 Ala. 10; *Winton v. Hart*, 39 Conn. 16; *Sandeman v. Scurr*, L. R. 2 Q. B. 94, 8 Best & S. 50, 36 L. J. Q. B. N. S. 58, 15 L. T. N. S. 608, 15 Week. Rep. 277; *Pollard v. Reardon*, 13 C. C. A. 171, 21 U. S. App. 639, 65 Fed. 848; *Munroe v. Philadelphia Warehouse Co.* 75 Fed. 545, 24 C. C. A. 685, 39 U. S. App. 762, 79 Fed. 999.

Mr. Joseph B. Cumming, for defendant in error:

Every man, dealing with another in reference to property that the other may have in his possession, must take care,—*caveat emptor*. The property may be stolen or borrowed, or pledged, or in the possession of a bailee for some specific purpose; and, if so, the party in possession can convey no better or further right than he has himself.

First Nat. Bank v. Nelson, 38 Ga. 397, 95 Am. Dec. 400; *Seago v. Pomeroy*, 46 Ga. 227; *Shaw v. North Pennsylvania R. Co.* 101 U. S. 557, *sub nom. Shaw v. Merchants' Nat. Bank*, 25 L. ed. 892; *Friedlander v. Texas & P. R. Co.* 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570; *Stollenswerck v. Thacher*, 115 Mass. 224; *Tison v. Howard*, 57 Ga. 410; *Haas v. Kansas City, Ft. S. & G. R. Co.* 81 Ga. 792, 7 S. E. 629.

Candler, J., delivered the opinion of the court:

The J. K. Armsby Company, an Illinois corporation, shipped to Walton & Carr, its brokers in Augusta, a quantity of salmon for distribution to different parties to whom the goods had been sold. Walton & Carr were merely agents of the Armsby company, and had no right or title to the salmon. The goods were shipped from a point in Oregon, by parties from whom they had been ordered by the Armsby company, on a through bill of lading to Augusta, and were consigned to the order of the consignor, with directions to notify Walton & Carr. The Armsby company sent Walton & Carr a check for the amount of the freight, which was paid; and it also mailed them the original bill of lading, which was indorsed blank. Carr, a

member of the firm of Walton & Carr, took the bill of lading to the Commercial Bank of Augusta, and hypothecated it for a loan of money. Shortly thereafter Walton & Carr failed, and the bank converted the salmon for the payment of its debt, whereupon the Armsby company brought against it the present suit, which was an action of trover. The case was tried before the judge of the city court of Richmond county, without a jury. The bank showed that it was the general custom of trade in Augusta that bills of lading "to order notify" were attached to drafts for the purchase price of the goods represented by them, that possession of the bill of lading could only be obtained by payment of the draft, that possession of such a bill of lading was considered prima facie evidence of ownership of the property for which it was issued, and that they were treated by banks as negotiable paper. It was also shown that the J. K. Armsby Company had done business in Augusta for a number of years, and that, while Walton & Carr were merchandise brokers, they also bought and sold goods on their own account. It was admitted that neither the bank nor any of its officials knew or had reason to suspect that Carr had no right to convey the salmon, and that, in the event the bank should be held liable, the proper amount to be recovered was \$700. The judge found in favor of the plaintiff, and rendered judgment in its favor for the amount mentioned. The defendant excepted.

"Where an owner has given to another such evidence of the right of selling his goods, as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external *indicia* of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title." Civ. Code, § 3539. The sole question for our determination, then, is, Does a bill of lading of the character of the one involved in this suit constitute such an external *indiciu*m of the right of disposing of the property for which it was issued as to bring the case within the operation of the rule laid down in the Code section cited? As a general rule, the transferee of a bill of lading can obtain no better title to the goods which it covers than that which was in the person by whom it was transferred. Indeed, it is a self-evident proposition that no man can convey that which he does not possess. But the true owner of property may, by placing it in the power of another to defraud innocent purchasers by an apparently valid transfer of the property, cut himself off from claiming it, and thereby divest the title from himself. In 4 Am. & Eng. Enc. Law, 2d ed. p. 551, it is said that 65 L. R. A.

an important exception to the general rule which has already been stated "arises in the case of the transfer of a bill of lading to a bona fide purchaser for value by a consignee to whom the goods are by the terms of the instrument made deliverable, or to whom the consignor and original owner of the goods has indorsed and delivered the bill. It seems to be established that in this case the transfer defeats the vendor's right of stoppage *in transitu*, and passes the title to the goods to the bona fide transferee." See also 6 Cyc. Law & Proc. 424; 1 Mechem, Sales, § 166; *Pollard v. Reardon*, 13 C. C. A. 171, 21 U. S. App. 639, 65 Fed. 848. While a bill of lading is not in the full sense a negotiable instrument, it is treated by universal commercial usage as a symbol of the goods for which it is issued, and consequently it is in a measure negotiable. In Georgia it may be pledged as security for debt (Civ. Code 1895, § 2956), and a bona fide assignee for value is protected in his title against the owner's right of stoppage *in transitu* (Civ. Code 1895, § 3553). In *American Nat. Bank v. Georgia R. Co.* 96 Ga. 605, 51 Am. St. Rep. 155, 23 S. E. 898, the status of bills of lading under our law is discussed with considerable fulness; and, while the decision in that case is not directly in point on the question involved in the case at bar, the reasoning of Mr. Chief Justice Simmons has an important bearing thereon. The following language from the opinion of Mr. Justice Miller in the case of *McNeal v. Hill*, Woolw. 96, Fed. Cas. No. 8,914, is there quoted with approval: "As civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter and otherwise which prevail while society is in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent, invention of like character, for the transfer, without the somewhat cumbersome, and often impossible, operation of actual delivery, of articles of personal property, is the indorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are *sui generis*. From long use and trade they have come to have among commercial men a well-understood meaning, and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale."

In this case there was no dispute as to the general custom of trade in regard to bills of lading of the character of the one negotiated by Carr with the Commercial Bank. It was the daily practice of banks in Augusta and elsewhere to advance money on such security, for possession of the bill

of lading was regarded as prima facie evidence of the title of the holder to the goods of which the bill was the symbol. Ordinarily bills of lading of this kind are attached to drafts for the purchase price of the goods, and can only be obtained by payment of the drafts. Carr's possession of the bill of lading was therefore prima facie evidence that he had paid a draft drawn by the consignor, and was entitled to the property. The departure of the Armsby company from this custom placed it in the power of Carr to commit a fraud on the bank, an opportunity of which he seems to have promptly availed himself. Applying the well-known rule that where one of two innocent persons must suffer from the wrong of another, the burden should be borne by him who placed it in the power of the wrongdoer to perpetrate the fraud, we fail to see how it can be held that the plaintiff can recover.

The Georgia cases cited by counsel for the defendant in error do not, in our opinion, conflict with what is here laid down. The case of *Tison v. Howard*, 57 Ga. 410, which is more nearly in point than any of the other cases cited, is easily distinguishable from the case at bar. There the owner of the goods received from the transportation company duplicate bills of lading, both of which he indorsed in blank; sending the original to his factor, and depositing the duplicate in a bank for safe-keeping, and for no other purpose. The bailee bank indorsed the duplicate bill of lading, and secured

from the factor an amount of money in excess of the value of the goods. The court held, in effect, that a bill of lading is not, in the full sense, a negotiable instrument, and that, the deposit of the bill with the bank being purely a bailment for safe-keeping, the virtual theft of it by the banker did not deprive the true owner of the goods of his title. In the case now under consideration no such state of facts is made to appear. The Armsby company forwarded to Walton & Carr a bill of lading, the possession of which, under the universal custom of business, gave a prima facie right to the disposal of the goods for which it was issued. The purpose for which the instrument was confided to Walton & Carr does not definitely appear from the record, but there is nothing to indicate that it was merely intrusted to them for safe-keeping. There was nothing to put the bank on notice that title to the property was in anyone other than the holder of the bill of lading. A fraud was committed by Carr, by means of which he obtained from the bank a large sum of money. To say nothing of the provisions of § 3539 of the Civil Code of 1895, the plainest principles of equity require that the Armsby company, which made the commission of the fraud possible, and not the bank, should bear the loss.

Judgment reversed.

All the Justices concur, except Lamar, J., disqualified.

VIRGINIA SUPREME COURT OF APPEALS.

City of RICHMOND, *Plff. in Err.*,
v.

Fritz SITTERDING.

(101 Va. 354.)

1. One joined as defendant with a city in an action for injuries to a pedestrian through obstructions on a sidewalk, but who fails to make any defense to the action, which results in his favor because of the statute of limitations, is not estopped,

in a subsequent one by the city to compel him to reimburse it the amount which it has been compelled to pay to the injured person, from showing that it was not through his fault that the injury happened.

2. A judgment against the city in an action against it and a private citizen for injuries to a pedestrian through obstructions on a sidewalk, in which the question of the liability of the latter was not considered, is not *res judicata* upon the question of his ultimate liability, in an action by the city to compel him to reimburse it for

NOTE.—Persons deemed to be independent contractors within meaning of rule relieving employer from liability.

- I. Independent contractors distinguished from servants and agents, 447.
- II. Persons acting in the dual capacity of contractor and servant or agent, 449.
- III. Contractors not within purview of statutes relating to servants or agents, 451.
- IV. Character of contract is tested by the existence or absence of a right of control on the employer's part, 453.
- V. Presumptions entertained as to character of contract, 459.

65 L. R. A.

VI. Independence of contract usually inferable where it is for the performance of an entire piece of work at a specified price.

- a. In general, 461.
- b. Persons engaged in construction or other work on railways, 461.
- c. Persons who undertake the construction of entire buildings or specific portions thereof, 462.
- d. Persons engaged to execute repairs or improvements on a building, 465.
- e. Architects, 465.
- f. Persons doing work on bridges, 466.

what it was required to pay under the judgment.

3. **A competent person who undertakes to construct the brick work on a building with his own employees and according to his own discretion is as to such work an independent contractor, for whose negligent acts the owner of the building is not responsible.**
4. **The construction of the brick work of a building adjoining a street is not so inherently or necessarily dangerous as to bring an injury caused to a pedestrian by reason of planks laid across the walk to facilitate the transfer of mortar from the street to the building, within the exception of the rule exempting property owners from liability for acts of independent contractors, which imposes such liability in case the work to be performed is necessarily dangerous.**

(March 12, 1903.)

VI.—continued.

- g. *Persons engaged in other kinds of construction work*, 466.
 - h. *Persons undertaking various kinds of work on highways*, 466.
 - i. *Persons operating mines*, 467.
 - j. *Persons operating quarries*, 467.
 - k. *Persons operating mills*, 467.
 - l. *Master tradesmen and craftsmen*, 467.
 - m. *Persons who furnish teams and men to do various kinds of work*, 467.
 - n. *Draymen, truckmen, carters, etc.*, 468.
 - o. *Keepers of livery stables*, 468.
 - p. *Drovers*, 468.
 - q. *Persons who undertake various operations connected with the handling of timber*, 469.
 - r. *Persons employed to clear land*, 469.
 - s. *Persons cultivating land on shares*, 469.
 - t. *Persons engaged in scavenging work*, 469.
 - u. *Railway companies operating cars on private lines*, 469.
 - v. *Persons assisting in public entertainments*, 470.
 - w. *Persons conducting departments in stores*, 470.
 - x. *Stevedores*, 470.
 - y. *Construction and repair of ships*, 470.
 - z. *Transfer agents doing business on railway trains*, 471.
 - zz. *Contractors not within purview of statutes relating to servants only*, 471.
- VII. **Liability arising from employment of tug.**
- a. *English doctrine as to relation between owner of tug and its tow*, 471.
 - b. *American doctrine*, 472.
 - c. *Liability of harbor commissioners*, 474.
- VIII. **Liability arising out of certain other contracts of an independent nature**, 474.
- IX. **Effect of reservation of a limited power of control.**
- a. *In general*, 475.
 - b. *Clauses relating to supervision of work*, 478.
 - c. *Clauses providing that the work shall be done under the direction of the employer*, 479.

ERROR to the Law and Equity Court of the City of Richmond to review a judgment in favor of defendant in an action brought to compel him to reimburse plaintiff the amount which it had been compelled to pay for injuries to a pedestrian through obstruction of a sidewalk. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry R. Pollard, for plaintiff in error:

If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose wrongful act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrongdoer.

2 Dill. Mun. Corp. § 1035; *Chicago v.*

IX.—continued.

- d. *Effect of other clauses*, 483.
- X. **Effect in general of reservation of full power of control**, 484.
- XI. **Matters negating independence of contractor.**
 - a. **Effect of specific terms of contract**, 485.
 1. *Work on railroads*, 485.
 2. *Construction of buildings*, 486.
 3. *Demolition of buildings*, 486.
 4. *Street improvements*, 487.
 5. *Construction of canals*, 488.
 6. *Laying of pipe lines*, 488.
 7. *Work in mines*, 488.
 8. *Scavenging work*, 488.
 9. *Work in manufacturing establishments*, 488.
 10. *Sale of commodities*, 489.
 - b. **Effect of provisions of statute applicable to the circumstances**, 490.
 - c. **Effect of direct evidence that employer exercised control over the work**, 490.
 1. *Work on railways*, 491.
 2. *Construction of buildings*, 492.
 3. *Work in streets*, 493.
 4. *Clearing of land*, 493.
 5. *Work in manufacturing establishments*, 494.
 6. *Work done with teams*, 494.
 7. *Unloading of ships*, 494.
 8. *Sale of commodities*, 494.
 - d. **Effect of character of stipulated work**, 495.
 - e. **Effect of employment being general**, 497.
 1. **Effect of partition of work among several contractors**, 500.
- XII. **Nature of contract determined with reference to various factors.**
 - a. *Degree of skill or care required*, 500.
 - b. *Existence or absence of obligation to perform work in person*, 500.
 - c. *Reservation of right to terminate contract of employment*, 501.
 - d. *Surrender or retention of control of premises on which stipulated work is done.*
 1. *Surrender of control*, 502.
 2. *Retention of control*, 504.
 - e. *The basis on which the compensation of the employee is calculated*, 505.
 - f. *Pecuniary circumstances of person employed*, 506.

Robbins, 2 Bl. 418, 422, 17 L. ed. 298, 302, 4 Wall. 657, 18 L. ed. 427.

The question of the defendant's ultimate liability was *res judicata* by reason of the judgment of the court in the case of *Leaker v. City of Richmond and Sitterding*.

Dillard v. Dillard, 97 Va. 434, 34 S. E. 60; *Robbins v. Chicago*, 4 Wall. 657, 672, 18 L. ed. 427, 430.

Where the work let to the independent contractor of necessity constitutes an obstruction in the street, which renders the street unsafe or dangerous unless properly guarded, the employer, as well as the contractor, is liable.

2 Dill. Mun. Corp. § 1030; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427, 430; *Western & A. R. Co. v. Atlanta*, 74 Ga. 774; *Brown v. Louisburg*, 126 N. C. 701, 78 Am.

St. Rep. 677, 36 S. E. 166; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Rochester v. Montgomery*, 72 N. Y. 65; 16 Am. & Eng. Enc. Law, p. 202, note 2; *Homan v. Stanley*, 66 Pa. 464, 5 Am. Rep. 389.

Messrs. Sol. L. Bloomberg and Harold S. Bloomberg, for defendant in error:

Defendant is not estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened.

Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; *Boston v. Worthington*, 10 Gray, 496, 71 Am. Dec. 678; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; 2 Dill. Mun. Corp. § 1035; *Catterlin v. Frankfort*, 79 Ind. 547, 41 Am. Rep. 627; *Western & A. R. Co. v. Atlanta*, 74 Ga. 774.

XII.—continued.

g. *Provision in contract that employer shall be indemnified for all losses caused by the negligence of the person employed*, 506.

h. *Use of contractor's appliances by employer*, 507.

i. *The furnishing by the employer of the appliances or materials for the work*, 507.

j. *The fact that the stipulated work constituted a part of the employer's regular operations*, 507.

k. *Provision in contract prohibiting use of employer's name*, 507.

l. *The fact that the contractor was a director of the employing company*, 507.

m. *Virtual identity of an employing and contracting company*, 507.

XIII. Province of court and jury, 508.

Scope.

This note is limited to the discussion of the question as to who are independent contractors. It does not deal with the general rule relieving employers from liability for the acts of independent contractors, or with any of its exceptions. Both the general rule and its exceptions will be treated in later notes.

I. Independent contractors distinguished from servants and agents.

The accepted doctrine is that, in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed.

"A servant is a person subject to the command of his master as to the manner in which he shall do his work." *Yewens v. Noakes* (1880) L. R. 6 Q. B. Div. 532, 50 L. J. Q. B. N. S. 132, 44 L. T. N. S. 128, 28 Week Rep. 562, 45 J. P. 8, per Brammell, L. J.

To the same effect is the following sentence in a letter which the same distinguished judge wrote to Sir Henry Jackson at the time when 65 L. R. A.

the English employers' liability act of 1880 was under discussion: "The relation of master and servant exists where the master can not only order the work, but how it shall be done. When the person to do the work may do it as he pleases, then such person is not a servant."

"The test is very much this, viz., whether the person charged [i. e. with embezzlement] is under the control and bound to obey the orders of another." *Reg. v. Negus* (1873) L. R. 2 C. C. 37, 42 L. J. Mag. Cas. N. S. 62, 28 L. T. N. S. 646, 21 Week Rep. 687, 12 Cox, C. C. 492, per Lord Blackburn.

"Does not the word 'clerk' or 'servant' imply the existence in someone of a power of control?" *Cockburn, Ch. J.*, in *Reg. v. May* (1861) *Leigh & C. C. C.* 13, 30 L. J. Mag. Cas. N. S. 81, 7 Jur. N. S. 147, 3 L. T. N. S. 680, 9 Week Rep. 256, 8 Cox, C. C. 421.

"The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, 'not only what shall be done, but how it shall be done.'" *Singer Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

"The relation [of master and servant] exists where the employer selects the workman, may remove or discharge him for misconduct, and may order not only what work shall be done, but the mode and manner of performance." *Butler v. Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017.

"A master is one who not only prescribes the end, but directs, or at any time may direct, the means and methods of doing the work." *Bailey v. Troy & B. R. Co.* (1884) 57 Vt. 252, 52 Am. Rep. 129.

See also the definitions in *Stephen's Digest Crim. Law*, 220; *New York Code*, § 1034; *Cal. Civ. Code*, § 2009; *Dak. Civ. Code*, § 1157.

This attribute of the relation supplies, as is apparent from the ensuing sections, the single and universally applicable test by which the servants are distinguished from independent contractors. But there is also high authority for the doctrine that the possession or nonpossession of the right of control may, in some instances, determine whether the person employed was a servant or an agent.

"It seems to me that the difference between the relations of master and servant and prin-

To be *res judicata*, the former judgment must "have been rendered in a proceeding between the same parties or their privies, and the matter in controversy must have been the same in the former suit as in the latter, and been determined on the merits."

Miller v. Wills, 95 Va. 353, 28 S. E. 337; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214; *Washington, A. & G. Steam Packet Co. v. Sickles*, 5 Wall. 592, 18 L. ed. 553; *Southside R. Co. v. Daniel*, 20 Gratt. 362; *Kelly v. Public Works*, 25 Gratt. 759; *Chrisman v. Harman*, 29 Gratt. 494, 26 Am. Rep. 387; *Allebaugh v. Coakley*, 75 Va. 637; *Fishburne v. Engledove*, 91 Va. 556, 22 S. E. 354.

The fact that Sitterding was the owner of the premises placed upon him no liability

for defects in the highway. The abutting property owner is liable for only such injuries as are occasioned by his own acts.

1 Am. & Eng. Enc. Law, p. 243.

Jones & Green were independent contractors.

Mechem, Agency, § 747; *Bibb v. Norfolk & W. R. Co.* 87 Va. 724, 14 S. E. 163; *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386.

The contract in this case was to do an act in itself lawful, and, it is to be presumed, in a lawful manner. It did not necessarily involve injury to anyone; hence the defendant cannot be held liable on the ground that it is inherently dangerous.

Emmerson v. Fay, 94 Va. 65, 26 S. E. 380; 2 Dill. Mun. Corp. § 1030; *Mechem, Agency*, § 747; *Shearm. & Redf. Neg.* § 175;

principal and agent is this: A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done." *Bramwell, B.*, in *Reg. v. Walker* (1858) 27 L. J. Mag. Cas. N. S. 208. *Dears. & B. C. C.* 600, 4 Jur. N. S. 465, 6 Week. Rep. 505, 8 Cox. C. C. 1. These words are reported only in the Law Journal, but they embody the doctrine applied in the decision itself and may therefore be regarded as expressing the opinion of the whole court.

Assuming that the right of control be unimpeachable, it is clear that the exercise or non-exercise of that right by the employer is not an available element for the purposes of differentiation where it is a question of distinguishing between agents and independent contractors.

The above statement of *Bramwell, B.*, was, it seems, overlooked by *Mr. Bowstead*, when he expressed the opinion that "the difference between an agent and an independent contractor is that an agent undertakes to act in the matter of the agency subject to the directions and control of his employer, whereas an independent contractor does not, but contracts to perform certain specified work or produce a certain specified result, the manner and means of performance or production being left to his discretion, except so far as they are specified by the contract." *Law of Agency*, p. 3, note (a); *Encyclopædia of the Laws of England*, *sub voc. Principal and Agent*, p. 338.

This assertion may be correct as regards some classes of agents, but it is clear that others, such as attorneys at law, factors, brokers, and auctioneers, have quite as much liberty of action in their respective employments as is accorded to independent contractors.

In this connection, it is important to observe that, if language is to be construed in its ordinary sense, such agents as those just mentioned would fall within the scope of the alternative phraseology by which independent contractors are frequently described,—as, where they are spoken of as persons who are exercising, pursuing, carrying on, or engaged in an "independent employment" (*Sadler v. Henlock* [1855] 4 El. & Bl. 570, 578, 24 L. J. Q. B. N. S. 138, 1 Jur. N. S. 677, 3 Week. Rep. 181, 3 C. L. Rep. 760; *Carter v. Berlin Mills Co.* [1876] 58 N. H. 52, 42 Am. Rep. 572; *Humpston v. Unterklrcher* [1896] 97 Iowa, 509, 66 N. W. 776; *Robinson v. Webb* [1875] 11 Bush, 464; *Deford v. State* [1868] 30 Md. 179; *Fink v. 65 L. R. A.*

Missouri Furnace Co. [1884] 82 Mo. 276, 52 Am. Rep. 376; *Pierrepont v. Loveless* [1878] 72 N. Y. 211; *Pickens v. Dlecker* [1871] 21 Ohio St. 212, 8 Am. Rep. 55; *Harrison v. Collins* [1875] 86 Pa. 153, 27 Am. Rep. 699; *Powell v. Virginia Constr. Co.* [1890] 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; *Bibb v. Norfolk & W. R. Co.* [1891] 87 Va. 711, 14 S. E. 163; or "a special employment" (*Murray v. Currie* [1870] L. R. 6 C. P. 26, 40 L. J. C. P. N. S. 26, 23 L. T. N. S. 557, 19 Week. Rep. 104); or "an independent business" (*Allen v. Hayward* [1845] 7 Q. B. 960, 10 Jur. 92, 15 L. J. Q. B. N. S. 89, 4 Eng. Ry. & C. Cas. 104; *Sadler v. Henlock* [1855] 4 El. & Bl. 570, 578, 24 L. J. Q. B. N. S. 138, 1 Jur. N. S. 677, 3 Week. Rep. 181, 3 C. L. Rep. 760; *McCarthy v. Second Parish* [1880] 71 Me. 318, 36 Am. Rep. 320; *Uppington v. New York* [1901] 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Carlson v. Stocking* [1895] 91 Wis. 432, 65 N. W. 58); or as being "in the exercise of an independent and distinct employment" (*De Forrest v. Wright* [1852] 2 Mich. 368; *Linton v. Smith* [1857] 8 Gray, 147); or as "prosecuting an occupation having some independence" (*Holmes v. Tennessee Coal, Iron & R. Co.* [1897] 49 La. Ann. 1465, 22 So. 403).

In the absence of any judicial discussion bearing directly upon the problem thus indicated, it is with much diffidence that the writer ventures to suggest that these two classes of employees can be discriminated, if at all, only by considering their position with reference to the character of the work which is ordinarily intrusted to them. An agent is ordinarily appointed to represent his principal in some transaction or transactions arising out of business, trade, or commerce.

This particular *indictum* of the relation is emphasized in definitions of "agent" which are given in 2 Kent, Com. p. 784; *Wharton, Agency*, § 1; *Mechem, Agency*, § 1.

Not infrequently the discharge of such functions by an agent may also involve the performance of a considerable amount of manual labor, by himself or others, in dealing with various material substances; but such operations are merely an incidental result of the execution of his agreement. Such situations may, and often do, occur in connection with the transactions of auctioneers and factors.

On the other hand, it is clear that operations of this character have formed the subject of

Hilliard v. Richardson, 3 Gray, 349, 63 Am. Dec. 743; *Moline v. McKinnie*, 30 Ill. App. 419.

Harrison, J., delivered the opinion of the court:

It appears from the record that one John J. Leaker sustained personal injuries by falling over a plank negligently extended over the sidewalk on Leigh street, in the city of Richmond, by laborers engaged in building four houses for one Fritz Sitterding. Suit was brought by Leaker against the city, and subsequently by an amended declaration Sitterding was made a party defendant; the amended declaration charging that the city and Sitterding were jointly liable in damages to Leaker for the injuries

suffered by him. The result of this suit was a judgment in favor of Sitterding upon the plea of the statute of limitations,—he having been brought into the suit more than one year after the date of the accident,—and a judgment against the city for \$1,000. The city of Richmond, having paid this judgment, amounting, principal, interest, and cost, to the sum of \$1,079.24, brings the suit now before us to recover over against Fritz Sitterding the sum so paid by it, alleging that it was by his wrongful and negligent act that the sidewalk was rendered unsafe, thereby causing the injury for which Leaker had recovered his judgment against the city.

The whole matter of law and fact having been submitted to the court, judgment was

the undertaking in the great majority of the cases in which the rights and liabilities arising out of the employment of independent contractors have been discussed. If, therefore, the terms "agent" and "independent contractor" are to be considered as having relation to two entirely separate regions of fact, this circumstance may possibly be taken as the distinctive factor which in any given case will determine the class to which the employee should be assigned.

An alternative view for which there is some authority would treat independent contractors as being one particular species of agents. That a contractor may be said to be "in one sense an agent" of his employee was conceded by Willes, J., in *Murray v. Currie* (1870) L. R. 6 C. P. 26, 40 L. J. C. P. N. S. 28, 23 L. T. N. S. 557, 19 Week. Rep. 104.

The method of classification thus indicated is doubtless inadmissible where it is a question of the scope of a criminal statute, and the doctrine of strict construction is necessarily observed.

But, so far as civil actions are concerned, there would seem to be no logical objection to taking, as the element which fixes the character of the employment, that aspect of an independent contractor's position which exhibits him as a substitute or deputy of the contractee in respect to the performance of the stipulated work.

In this point of view an independent contractor will be simply an agent whose employment does not carry with it certain incidents by which it is ordinarily attended, and he may be conceived as being distinguishable from other kinds of agents by the diagnostic mark which is referred to in the last paragraph.

It is impossible, however, to affirm that the very vague criterion thus suggested for purposes of differentiation is one of universal applicability, or that it is habitually recognized or taken into account by the courts. Indeed, cases are not wanting in which employers have been held liable on the specific ground that the tortfeasor was a servant, and not an independent contractor, although, so far as can be seen, the facts involved were such that this conclusion might equally well have been reached through the application of the principles of the law of agency.

Thus in two instances the question whether the negligence of employees belonging to the

class of "traveling agents" should be imputed to their employers was discussed solely with reference to the question whether they were servants or independent contractors; and recovery was allowed on the ground that the terms of their contracts showed them to be servants, and that their negligence in the management of the teams and vehicles used by them for the purpose of carrying about the commodities which they were selling was therefore imputable to their employers. *Singer Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55. Here it would seem that their representative capacity, as agents, would have justified a similar conclusion, without raising the question whether they were servants.

II. *Persons acting in the dual capacity of contractor and servant or agent.*

In all ordinary transactions the existence of the relation of contractor as between two given persons excludes that of principal and agent, or master and servant. But there is not necessarily such a repugnance between them that they cannot exist together.

In *Detroit v. Corey* (1861) 9 Mich. 165, 80 Am. Dec. 78, where a person was injured by falling into an open sewer left unguarded by contractors, the court said: "In the case before us, both relations exist, and must necessarily exist from the peculiar character and circumstances of the case. The contractors not only acted for themselves, but at the same time as agents for the city, under the power given it to construct sewers in its streets which are public highways. They had no right to make the excavation they did, except as agents for the city; and had they been proceeded against by indictment for creating a public nuisance, they could not have justified in their own right, but would have had to justify as agents of the city under their contract."

Hence the fact that an employee was a servant as respects one part of the functions discharged by him will not involve the consequence that the employer must answer for injuries caused by an act of negligence committed by such employee, while he was engaged in work which he had undertaken as an independent contractor.

A railway company entered into a contract with A to construct a branch line, who con-

rendered in favor of the defendant Sitterding. This action of the lower court we are now asked to review.

It appears from the evidence that Fritz Sitterding, a general builder and contractor, was erecting for himself four buildings on a lot owned by him at the corner of Leigh and Fourth streets, in the city of Richmond, and that he did all of the carpenter work by his employees. It further appears that the firm of Jones & Green were general contractors and bricklayers, and as such, under contract in writing, undertook to do, and did, all of the brickwork on said houses; that Jones & Green were competent contractors; that they employed and paid all labor necessary for the fulfilment of their contract, and exercised entire supervision over the same and

over their employees. It further appears that a plank walk way at the end of the mortar bed in the driveway of the street, across the gutter, and extending some distance into or over the sidewalk, and above the level thereof, was so placed by the brick contractors or their employees for the use of their laborers in carrying brick and mortar into the buildings.

It is contended on behalf of plaintiff in error that the defendant Sitterding, having had notice of the pendency of the suit of *Leaker v. Richmond*, and opportunity to make his defense in that suit, and having failed to do so, is now estopped from showing that it was not through his fault that the accident happened.

It is further insisted that the question of

tracted with B to erect a tubular bridge, a part of the works. B had a surveyor, C, whom he paid a salary of \$250 a year to attend to his general business, and, after obtaining the contract for the bridge, contracted with C to provide the necessary scaffolding, for which he was to receive \$40 irrespective of his salary. B to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and owing to the want of sufficient light to warn the passers-by D stumbled over the pole and was injured; subsequently to which additional lights were placed on the spot, and B paid for them. Held, that B was not liable, and that D's remedy lay against C. *Knight v. Fox* (1850) 5 Exch. 721, 14 Jur. 963, 20 L. J. Exch. N. S. 9.

During the argument of counsel the following remarks were made, Parke, B.: "But as to this contract, in the management of the erection and fitting up the scaffolding, he was not their servant. It is like the case of a gentleman who enters into a particular and distinct contract with his servant to supply him with job horses." Alderson, B.: "Suppose this contract had been with a third person, instead of with Cochrane, there would be no doubt, in such a case, that the defendants could not be liable for this accident. Then how does the fact of Cochrane being their general servant or surveyor make any difference?" The former judge also used this language in his opinion: "The act complained of was not an act done by Cochrane in the character of a servant of the defendants. It may be too much even to say that he was their servant in any point of view, for he acted as a contractor or surveyor for them, at a yearly salary of \$250, which he received in lieu of payment for each separate piece of work. Therefore the case, which rests upon the negligence arising out of the construction of the scaffold, is precisely the same as it would have been if the defendants had entered into a contract with some third party to perform that work." The significance of the fact that the lights were placed by the defendants after the accident was thus discussed by Pollock, C. B.: "This case is distinguishable from *Burgess v. Gray* (1845) 1 C. B. 578, 14 L. J. C. P. N. S. 184. There, a single matter—an admission by the defendant—which was unexplained by other testimony, was put to the jury; and possibly, if we knew nothing more of these lights than that the de-

fendants paid for them when they were put up after the accident, it might be some slight evidence for the jury of the liability of the defendants. But upon the evidence here, that fact is explained by the circumstances that Cochrane was not to find any of the materials for the bridge, and that he had made a contract that the defendants were to find the materials for it, but that he was to furnish the labour, and was to receive a specific sum for that job; and that this particular contract formed no part of, and had nothing to do with, his general employment by the defendants; and that those lights were so paid for, as forming part of the materials supplied."

Defendant's farm superintendent, who was also a member of a hardware firm, directed an employee of the firm to go to the farm, and repair a leak in a distillate tank, one of the appliances of the farm. By reason of the negligence of such employee in lowering a light into the tank an explosion occurred, by which plaintiff's decedent, a farm servant of defendant, was killed. Held, that the hardware firm, notwithstanding the connection of defendant's superintendent therewith, was an independent contractor. *Hedge v. Williams* (1901) 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106.

That the employee in question was a contractor or for the carpentry work only on a building, and that, as to the residue of the work, he was merely the superintendent or agent of the defendant, was held in a case where the uncontradicted testimony of the employee himself was to the effect that the defendant engaged him to put up the entire building, employ all the men, and indorse all their bills; that he engaged to do the carpentry work at twenty-seven cents on the bill, and employ all the mechanics, etc.; that the defendant employed no one about the building; that he gave the employee possession of the ground, which he was to keep until the contract was executed; that the defendant was at the place of work once or twice a day, and gave him directions to keep everything safe; and that he had nothing to do with the mechanics. *Samyn v. McClosky* (1853) 2 Ohio St. 536.

In a New York case it was laid down that even if it should be regarded as a legitimate inference, from the testimony, that the principal contractor was acting as the agent of the employer in negotiating certain subcontracts, in-

Sitterding's ultimate liability was *res judicata* by reason of the judgment in the *Leaker Case*.

Both these contentions are without merit. This is not a suit between the same parties, or their privies, that were litigants in the case of *Leaker v. Richmond*. So far as Sitterding is concerned, that case was not heard on its merits, but went off under an instruction of the court on the plea of the statute of limitations. The judgment in the former case is conclusive only of the fact that Leaker was injured by falling over a plank walk way, that the city was guilty of negligence, and that Leaker recovered damages to the amount of \$1,000; but upon well-settled principles it cannot be held to be conclusive of Sitterding's negligence, or

of his liability to the city. Those questions were left open, and are now for the first time brought to issue.

The general rule is that, for a judgment to be evidence against a party in another suit upon a different cause of action, it must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases, and must have been determined upon its merits. If the first action is disposed of upon any ground that does not go to its merits, the judgment rendered will not conclude the party. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

In cases like that under consideration it is well established that a municipal corporation has a remedy over against a person who

cluding that which was made with the person whose negligence was the cause of the injury, the mere fact that the principal contractor undertook such functions would not enlarge the liability of the employer for the negligence of those subcontractors, since it was also shown that, in making the subcontracts, the employer dealt directly with the subcontractors themselves. *Wolf v. American Tract Soc.* (1898) 25 App. Div. 98, 49 N. Y. Supp. 236.

III. Contractors not within purview of statutes relating to servants or agents.

The reports contain a considerable number of decisions which illustrate in one form or another the principle that independent contractors are not within the purview of statutes which their scope and phraseology show to be applicable only to servants or agents.

The servants of a contractor are not entitled to sue the principal employer under the provisions of the English employers' liability act. See the cases cited in § 721a of *Labatt on Master and Servant*.

This rule also prevails in all the British Colonies which have adopted that act, except Ontario and British Columbia, where special provisions for the benefit of such servants have been inserted. See the treatise just mentioned.

A similar doctrine has been laid down in Alabama, where a statute closely resembling the English act is in force. *Harris v. McNamara* (1893) 97 Ala. 181, 12 So. 103. It would doubtless be also applied in any other of the American states which have legislated in the same lines. But in Massachusetts, a special provision of the same tenor as those enacted in Ontario and British Columbia is now in force.

A contractor with the minister of railways and canals, as representing the Crown, for the construction of a branch of the Intercolonial Railway, is not an employee of the Railways and Canals Department of Canada, within § 109 of the government railway act of 1881 (44 Vict. chap. 25), requiring action against any officer, employee, or servant of the department for anything done by virtue of his employment to be brought within three months after, and upon one month's previous notice in writing. *Kearney v. Oakes* (1890) 18 Can. S. C. 148, Ritchie, Ch. J., and Gwynne, J., dissenting.

Commenting on the phraseology of the statute, Patterson, J., said: "We find the two ex-

pressions [*i. e.* employees and servants] used convertibly, as, *c. g.*, in § 112, 'any officer or servant of, or any person employed by the department, and in § 121, any officer or servant of, or person in the employ of the department,' obviously denoting the same persons described in §§ 64, 74, 82, 106, and 109, as 'officer, servant, or employee' of the department. The word as used in the statute means, in my opinion, 'servant,' and nothing more. It is, perhaps, inserted to save the feelings of those servants who do not like to be called servants, or by way of concession to the tendency of the day to understand the word 'servant' as expressive only of a lower or quasi-menial grade. . . . Thus the statute is its own interpreter. The 'employee or servant of the department' is not a contractor like these defendants, who agree with Her Majesty to provide materials and labor, and to execute such works as the construction of a branch railway."

"Section 120 illustrates this. It provides for the 'punishment of every person wilfully obstructing any officer or employee in the execution of his duty,' obviously including under the term 'employee,' persons who might be called servants without fear of resentment on their part,—switchmen for example,—and proving that the words 'employee or servant' are used to denote one class, and not two classes, of retainers."

A contractor is not within the purview of Maine Rev. Stat. 1857, chap. 51, § 25, which declares a railway company to be "liable for trespasses and injuries to lands and buildings adjoining, or in the vicinity of its road, committed by a person in its employ." *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430.

The court laid stress upon the fact that "contractors" were expressly mentioned in § 25 of the statute, and that the legislature had thus recognized the difference between them and servants. But the decision is also, as it would seem, put upon general grounds.

One who contracts to do the grading of a section of railroad, the entire work to be done by servants and laborers employed by himself, but subject to the approval of the company's chief engineer, and under the direction of its assistant engineer, is an independent contractor, and not an authorized agent or employee of the company, within S. C. Gen. Stat. § 1511, making railroad companies liable in damages for a

has so used the streets as to produce the injury, unless the corporation concurred in the wrong. But in such an action to recover back the damages the city has been compelled to pay for his assumed neglect, it is competent for the defendant to show that he was under no obligation to keep the street in safe condition, and that it was not through his default that the accident happened. *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Boston v. Worthington*, 10 Gray, 496, 71 Am. Dec. 678; *Catterlin v. Frankfurt*, 79 Ind. 547, 41 Am. Rep. 627; 2 Dill. Mun. Corp. § 1035.

The further contention on behalf of the plaintiff in error, that the firm of Jones & Green, contractors for the brickwork, were not independent contractors, is also without

merit. This question is concluded by the recent decision of this court in *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386. It is there said that, where a person is employed to perform a certain kind of work which requires the exercise of skill and judgment as a mechanic, the execution of which is, because of his superior skill, left to his discretion, without restriction upon the means to be employed in doing the work, and employs his own labor, which is subject alone to his own control and direction, the work being executed either according to his own ideas or in accordance with plans furnished him by the person for whom the work is done, such a person is not a servant under the control of a master, but an independent contractor: and hence it was held that one employed to

fire originating within the limits of its right of way, in consequence of the negligence of its authorized agents or employees. *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059.

A contractor is not a "servant or overseer" within the meaning of La. Civ. Code, 2299. *Peyton v. Richards* (1856) 11 La. Ann. 62; *Gallagher v. Southwestern Exposition Asso.* (1876) 28 La. Ann. 943.

A person operating a shingle machine to manufacture shingles by the thousand for the owners or lessees of a mill is a contractor, and not a person in their "employ" in such a sense that the owners are chargeable with liability for his acts, under the Maine statutes (Special Stat. 1868, chap. 448), passed "to prevent throwing slabs and other refuse into Penobscot river." *State v. Emerson* (1881) 72 Me. 455.

Fishermen under an agreement to fish from their homes, in their own boats, for lobsters during the fishing season, are independent contractors, and not servants. Accordingly they are not within the purview of the masters and servants act of Newfoundland (Consol. Stat. chap. 109), and cannot be prosecuted for the abandonment of their contract, where they have taken up their traps in the middle of the season, and refused to proceed with the fishery. *Ex parte Costigan* (1889) Newfoundland Rep. (1884-1896) 414. Referring to the phraseology of the statute, the court said: "Such words as 'his master consents to receive him back into his service;' 'absent himself from his employer's service without leave;' the forfeiture, for absence, of a 'sum equal to twice the rateable proportion of his wages;' the penalties to which third parties are made liable 'who shall harbour or employ the servant of another after notice;' and so forth attesting conclusively to the inapplicability of the statute to such a case as the present."

A person hiring himself to work with his own team of oxen is not within the English statutes which punish laborers who desert their service. *Whelen v. Stevens* (1827) 2 Taylor (Ont.) 439.

Under Mansfield's Digest (Ark.), § 1958, providing that if any hiring shall willfully set on fire any woods, etc., so as to occasion damage to any other person, with the consent or by the command of his employer, the latter shall be liable, the word "hiring" does not refer to independent contractors, but to servants of railroad companies. *St. Louis, I. M. & S. R. Co. v. 65 L. R. A.*

Yonley (1890) 53 Ark. 503, 9 L. R. A. 604, 13 S. W. 333, 14 S. W. 800.

Compare also the cases cited in *infra*, XII. b. That an independent contractor cannot be convicted under the embezzlement statutes has been held in several cases.

A finding that the prisoner was employed in the capacity of "clerk or servant" within the meaning of the statute, 24 & 25 Vict., is not warranted by evidence that the prisoner carried on an independent business as an accountant and debt collector, that he was employed by the prosecutors to collect certain debts specified in a list given to him and was to pay over to the prosecutors the amounts received as soon as he should have collected them; that the time and mode of collecting the debts was in his discretion, and he was authorized to sue for them, if necessary, but at his own charge; and that in no case was he to receive from the prosecutors more than 5 per cent on the amount collected by him and paid over to the prosecutors. *Reg. v. Hall* (1875) 13 Cox, C. C. 49, 31 L. T. N. S. 883.

A bare authority to get orders and collect moneys on commission does not constitute a "clerk" or "servant" within the meaning of the New Zealand larceny act, 1867. *Reg. v. Clifford*, 3 New Zealand J. R. N. S. S. C. 51.

See also the cases as to drovers, cited in *infra*, VI.

But a meaning sufficiently comprehensive to embrace contractors has been ascribed to the word "servant," as used in two English acts defining the responsibility of common carriers.

By the 8th section of the carriers' act, 11 Geo. IV. & 1 Wm. IV., chap. 68, it is provided that nothing in the act shall protect from liability from loss or injury arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his employ. Every person is a "servant," within the meaning of this proviso, who is directly or indirectly employed by the carrier to do what he has contracted to do. Accordingly, a carrier has been held responsible for the theft of an article by a man in the employ of a firm with which a subcontract had been made for the delivery of such goods as the defendant might convey to the city in question. *Machu v. London & S. W. R. Co.* (1848) 2 Exch. 415, 5 Eng. Ry. etc. Cas. 302, 17 L. J. Exch. N. S. 271, 12 Jur. 501.

This decision was followed in a later one, by which a railroad company was held liable for

do the woodwork on certain dry kilns was an independent contractor, notwithstanding the fact that his compensation was measured by a *per diem* and the further circumstance that the employer was to furnish the material.

The general rule is that, where the owner employs a careful, skillful, and competent builder or contractor to erect his building, and surrenders the possession of the premises for that purpose, then in such case the owner is not liable for an injury occurring to a stranger by the negligence or default of the contractor or his immediate servants or employees engaged in doing the work. *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386; *Moline v. McKinnie*, 30 Ill. App. 419; *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743.

the value of goods which had been obtained through a forged order while they were lying at one of the company's stations, and misappropriated by a man in the employ of the proprietor of the receiving office at which they had previously been delivered by the plaintiff for transmission to the station. *Stephens v. London & S. W. R. Co.* (1886) L. R. 18 Q. B. Div. 121, 56 L. J. Q. B. N. S. 171, 56 L. T. N. S. 226, 35 Week. Rep. 161, 51 J. P. 324.

A similar decision has been arrived at with regard to the meaning of the word "servants" in the railway and canal traffic act 1854, § 7, which enacts that every company within its purview shall be liable for the loss of, or for any injury done to, any horse, cattle, etc., occasioned by the neglect or default of such company or its "servants," notwithstanding any notice, condition, or declaration made and given by such company contrary thereto. In *Doolan v. Midland R. Co.* (1877) L. R. 2 App. Cas. 792, 37 L. T. N. S. 317, 25 Week. Rep. 882, 3 Asp. Mar. L. Cas. 685, a railway company was held liable under this provision for the negligence of the master and crew of a steamer with the owners of which the company had contracted for the conveyance of certain cattle.

IV. Character of contract is tested by the existence or absence of a right of control on the employer's part.

From what has been said in *supra*, I., it is apparent that, except in cases which involve the liabilities arising out of the torts of certain classes of agents, the existence or absence of a right to exercise control over the details of the work in question must be the appropriate test by which it is to be determined whether the person employed to do that work is or is not an independent contractor.

In one case the court expressed its disapproval of a doctrine stated to have been put forward by some of the authorities, *viz.*, that "the existence of actual present control and supervision on the part of the employer is the test" to be applied for the purpose of ascertaining whether his relation to the employee is that of a master. Such a circumstance, it was declared, "is only a circumstance to be considered, though one of much weight." The court then proceeds to state in the following words what it regarded as the correct theory: "To get at the truth we must look further, and see if the person said to be a hired servant and agent (45 L. R. A.

The contention on behalf of plaintiff in error is that the case at bar is not governed by the general rule, but comes within an exception as well established as the rule itself. The exception relied upon is fully recognized by all of the authorities that we have examined; the doctrine being that, if the enterprise entered upon by the owner of the premises is inherently and necessarily dangerous, or where danger and hazard must necessarily accompany the work, or where the doing of the work will necessarily create a nuisance, then the prosecution of the work becomes unlawful, and in such cases the owner cannot escape personal liability by contracting with another to do the work.

It cannot be successfully maintained that building a house on a lot abutting upon a

is acting at the time for, and in the place of, his master, in accordance with and representing his master's will, and not his own. It must be strictly his employer's business that he is doing, and not in any respect his own. If we find this to be the case we may safely conclude, as a general rule, that the relation of master and servant exists, so as to render applicable the rule of law that the employer must indemnify and protect the agent he employs." *Cornin v. American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63. The doctrinal position of the court is not very clearly indicated. If it is intended to deny the crucial character of the test supplied by the existence or absence of control, the case is manifestly opposed to the general current of the authorities. The latter part of the quotation seems to suggest that an employee must always be pronounced to be a servant, if it is found that he represents the will of his employer. But according to the generally received view, this inference should be drawn only when the employer's will is represented as to the means used in performing the stipulated work.

The qualified expressions occasionally used in the reports might seem to indicate that this test was not considered by some judges to be absolutely paramount.

"Independence of control in employing workman and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not." *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91.

"The question in these cases whether the relation be that of master and servant or not is determined mainly by ascertaining from the contract of employment whether the employer retains the power of directing and controlling the work, or has given it to the contractor." *Forsyth v. Hooper* (1865) 11 Allen, 419.

Whether the relation be that of master and servant, so as to invoke the rule of *respondent superior*, depends "mainly on whether the employer retains direction and control of the work, or has given it to the contractor. *Andrews v. Boedecker* (1885) 17 Ill. App. 213.

In one case it is laid down that "the question of control over the work, while not conclusive in all cases upon the question of service, is to be regarded as a test of the greatest importance." *State, Redstrake, Prosecutor, v. Swayze* (1880) 52 N. J. L. 129, 18 Atl. 697.

"Who is an independent contractor? Or.

street is inherently and necessarily dangerous, or that danger and hazard must necessarily attend its erection. It is a lawful work, and of necessity engaged in by thousands every day, and, if carefully and properly done, involves no danger to anyone. The negligence of the employees of the brick contractor in leaving their plank walk way extended upon the sidewalk after night was not a necessary incident of the work, or even to be anticipated by anyone. The case of *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743, is in all essential particulars like the case at bar, and it is there held in an able opinion, in which the authorities are reviewed, that the owner of land, who employs a carpenter to alter and repair a building thereon, and to furnish all the materials for the purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair.

In the case of *Moline v. McKinnie*, 30 Ill. App. 419, it is held that the employer of a skilful and competent person, under a contract to perform a certain labor, of which he will have exclusive control until completion, cannot be made liable for injuries arising from the negligence of such contractor or his employees. The erection of buildings adjacent to a highway, with the usual and necessary excavations, and the consequent obstructions to the sidewalk and street, is held not to be within the exception to the general rule, which attaches liability to employers where the work in hand is inherently dangerous, or will necessarily create a nuisance. Authorities to the same effect might be multiplied, but it is not necessary to go beyond our own jurisdiction; the case of *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386, being conclusive of the view that the case at bar does not come within the exception relied on.

For these reasons the judgment complained of must be affirmed.

rather, is he an independent contractor, or only an agent or representative of the employer in the particular case? A test which has been proposed, and generally an adequate one, or as good a test put in a few words as can be suggested, is, Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong? If he had, the employer is liable; if not, he is not liable, for the reason that the one doing the act is an independent contractor." *Carrico v. West Virginia, C. & P. R. Co.* (1894) 39 W. Va. 86, 24 L. R. A. 50, 19 S. E. 571.

But it is more than probable that this guarded language is to be ascribed merely to an excess of judicial caution. At all events the weight of authority, as well as the logical inferences to be drawn from the definition of servant, as given in *supra*, I., are decisively in favor of the doctrine that this test is so entirely conclusive, that it prevails against and overrides the effect of any antagonistic evidence which may be introduced. This doctrine is asserted in numerous direct statements made by various judges.

See, for example, the following:

"The test is whether the defendant retained the power of controlling the work." *Crompton, J.*, in *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 578, 24 L. J. Q. B. N. S. 138, 1 Jur. N. S. 677, 3 Week. Rep. 181, 3 C. L. Rep. 760.

"The test, I think, always is, Had the superior personal control or power over the acting or mode of acting of the subordinate?" Per Lord Gifford, in *Stephens v. Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 535; statement referred to with approval in *Atlantic Transport Co. v. Coneys* (1897) 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177.

"The right to control the negligent servant is the test by which it is to be determined whether the relation of master and servant exists." *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. E. 17.

"In every case the decisive question is, Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong?" *Thomp. Neg. p. 909*; statement adopted 65 L. R. A.

ed in *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691.

The test of the character of an employee as an independent contractor or as servant is "whether Smith was in the exercise of a distinct and independent employment, using his own means and methods for accomplishing his work, and not being under the immediate supervision and control of his employer." *Morgan v. Smith* (1893) 156 Mass. 570, 35 N. E. 101.

"The test by which to determine whether the person who negligently causes injury to another was acting as an agent or employee of the person sought to be charged, or as an independent contractor is, Did the person so sought to be charged have the right to control the conduct of the wrongdoer in the manner of doing the act resulting in such injury?" *Gahagan v. Aermotor Co.* (1897) 67 Minn. 252, 60 N. W. 914; *Corrigan v. Elsinger* (1900) 81 Minn. 42, 83 N. W. 492.

The doctrine above stated also supplies the essence of all the manifold forms of statement by which judges and text writers have undertaken to define more or less formally the meaning of the term "independent contractor."

"An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as to the result of his work." *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691, approved in *Hampton v. Unterkircher* (1896) 97 Iowa 509, 66 N. W. 776.

"When the person employed is in the exercise of a distinct and independent employment, and not under the immediate supervision and control of the employer, the relation of master and servant does not exist, and the liability of a master for his servant does not attach." *Linton v. Smith* (1857) 8 Gray, 147.

One who undertakes to do specific jobs of work, as an independent business, without submitting himself to control as to the petty details, is an independent contractor. *Carlson v. Stocking* (1895) 91 Wis. 432, 65 N. W. 58.

KENTUCKY COURT OF APPEALS.

CENTRAL COAL & IRON COMPANY,
App't.,
v.

Daniel GRIDER'S ADMINISTRATOR.

(.....Ky.....)

One who contracts for the sinking of a shaft on his property, agreeing to furnish the necessary tools, including a "hoist," while the other party is to furnish the labor, is not answerable to laborers for the continued safety of the machinery furnished: so that no recovery can be had against him for injuries to an employee through the breaking of a rope used on the hoist, which is sufficient when furnished, but is allowed by the contractor to become defective.

(June 3, 1903.)

A PPEAL by defendant from a judgment of the Circuit Court for Muhlenberg

In a leading New York case the contention of the defendant was stated to be, "In substance, that when a person is engaged in doing a job or piece of work, under an employment or contract which leaves to him the independent use of his own skill, judgment, means, and servants in the execution of it, he is not the agent or servant of the general employer." *Blake v. Ferris* (1851) 5 N. Y. 48, 55 Am. Dec. 304.

"This rule [*i. e. respondeat superior*] does not apply, and the liability does not exist, where it can be shown that those engaged in executing the work and by whose carelessness or want of skill the injury was occasioned are not the servants or subordinates of him for whose use and benefit the work is being performed, but are acting under a contract of employment which leaves the contractor or employee free to exercise his own judgment as to the means and assistants to be employed in accomplishing the work, without being subject to control in these respects by the party for whom the work is being done." *McCamus v. Citizens' Gaslight Co.* (1863) 40 Barb. 380.

In a Maryland case the court, referring to certain decisions, said: "It results from them that the rule of *respondeat superior* does not apply where the party employed to do the work in the course of which the injury occurs is a contractor, pursuing an independent employment, and, by the terms of the contract, is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of the control and direction, in this respect, of the party for whom the work is being done." *DeFord v. State* (1868) 30 Md. 179.

The following passage is extracted from a charge to the jury: "If you find from the proof that the defendant let the whole work of excavating and finishing the vault to Tamlyn, as a contractor, to finish and complete the whole as a job, without reserving any control or direction over him in its construction, or over the construction of the work, or the place where it was being constructed, or the mode of its execu-

County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. R. Y. Thomas and H. P. Taylor for appellant.

Messrs. W. L. Reeves, W. J. Ross, and Q. B. Coleman for appellee.

Paynter, J., delivered the opinion of the court:

The appellant, a corporation, is a coal operator. It, desiring to have sunk on its property a circular shaft, 8 feet in diameter, entered into a contract with *Foley & Nunan*, evidenced by a writing, by which they, at a stipulated price per foot, agreed to sink it. There are provisions of the contract which read as follows: "The party of the second part agrees to sink a shaft at a point desig-

tion, or the workmen to be employed to do it, then he would be an independent contractor, and the defendant is not liable for his negligence in not providing suitable guards against danger to persons passing on the sidewalk." *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875.

"To incur the responsibility [on the ground of the relation merely] the master must not only have the power to select the servant or agent, but to direct the mode of executing the work, and to so control him in his acts in the course of the employment as to prevent injury to others." *Robinson v. Webb* (1875) 11 Bush, 464.

If the employer "merely prescribes the end and contracts with another to accomplish the end by such means or methods as such other may in his discretion employ, the latter is as to such means and methods not a servant, but a master; and for negligence therein is alone answerable." *Bailey v. Tru-y & B. R. Co.* (1863) 57 Vt. 252, 52 Am. Rep. 129.

"If, in rendering the service, the person whose negligence caused the injury was in the course of accomplishing a given end for his employer, by means and methods over which the latter had no control, but which were subject to the exclusive control of the person employed, then such person was exercising an independent employment, and the employer is not liable." *Wabash, St. L. & P. R. Co. v. Farrer* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296.

"In general, the master is liable in law for the negligence of the servant, through whom, in legal contemplation, he is said to act, while in his employment. When, however, the person employed is engaged under an entire contract, for a gross sum, and in an independent operation, not subject to the direction or control of his employer, the relation is not regarded as that of master and servant, but is said in modern phrase to be that of contractor and contractee; and the negligence of such contracting party, or of his servant, cannot be charged upon him for whom the work is contracted to be

nated by the party of the first part, the said shaft to be 8 feet in diameter and circular, for the sum of \$7.87½ per foot in depth, reckoned from a point on a level with the bottom of the retaining wall, which will be built by a separate contract. It is further agreed that the party of the first part shall furnish the necessary tools with electric blast battery for doing this work, and also a whim or hoist to be worked by horse-power, also two horses for said whim. All labor and ammunition necessary for the completion of the work to be furnished by the parties of the second part. . . .” Pursuant to the contract, the appellant furnished “a whim or hoist,” and, as a part of it, a rope was necessary to be used for the purpose of suspending a tub used in the

removal of the material from the shaft, and for the use of the workmen going to and from their work in it. First a grass rope was used, but it was believed to be unsafe, when the appellant, at the request of Foley & Nunan, furnished them a new wire rope, — one that had never been used before. It was delivered to them on the — day of November, 1901, and they continued to use it from that date until the 22d day of May, 1902, when Allen Bailey, one of Foley & Nunan’s employees, got into the tub for the purpose of going to the bottom of the shaft in the prosecution of his labors; and, as the tub swung clear, the rope broke about 6 feet above the bail of the tub. It fell, with Bailey in it, to the bottom of the shaft, which was about 170 feet deep, striking the

done.” *Forsyth v. Hooper* (1865) 11 Allen, 419; statement adopted in *McCarrier v. Hollister* (1902) 15 S. D. 366, 91 Am. St. Rep. 695, 89 N. W. 562.

“The test is, Which party controls the work while it is progressing? Who has charge of the management and control of the forces, and who controls the movement and location of the material used in the construction? Who hires the workmen, buys the material, arranges the details, directs and superintends the labor, and is responsible for all failures which do not meet the requirements of the contract, or fulfil the specifications? Who alone is responsible for results produced by separate and independent management? Who has control of the mode and manner of doing the work, subject only to a provision that it must be equal to a fixed rule, or a certain degree of excellence? When that is determined, liability is fixed.” *St. Louis, Ft. S. & W. R. Co. v. Willis* (1888) 38 Kan. 330, 16 Pac. 728.

“Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employer’s design, he is an ‘independent contractor,’ and in such case the contractor alone, and not the employer, is liable for damages caused by the contractor’s negligence in the execution of the work.” *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113.

The rule is “that where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or misdoings of the former.” *De Forrest v. Wright* (1852) 2 Mich. 368; Adopted in *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55.

“If one renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished, it is an independent employment.” *Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699.

An independent contractor has also been described as a person who contracts to do a given piece of work “according to his own methods, and without being subject to the control of his employer, except as to the results of his work” (*Humpton v. Unterkircher* [1896] 97 Iowa, 509, 65 L. R. A.

66 N. W. 776); and as one who is “answerable to his employer, only as to the results of the work, and not in the details of its management, or the incidents of its prosecution” (*St. Louis, Ft. S. & W. R. Co. v. Willis* [1888] 38 Kan. 330, 16 Pac. 728); and as one who is “left to produce the desired result in his own way” (*Bennett v. Truebody* [1885] 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329); and as one who “carries on an independent employment in pursuance of a contract by which he has entire control of the work and the manner of its performance” (*Smith v. Simmons* [1883] 103 Pa. 32, 49 Am. Rep. 113; *Smith v. Belshaw* [1891] 89 Cal. 427, 26 Pac. 834). Similar phraseology embodying the same antithesis as is indicated by this form of statement is also found in many other cases. See, for example, *Casement v. Brown* (1892) 148 U. S. 616, 37 L. ed. 582, 13 Sup. Ct. Rep. 672; *Tennessee Coal, Iron & R. Co. v. Hayes* (1892) 97 Ala. 201, 12 So. 98; *Jefferson v. Jameson & M. Co.* (1897) 165 Ill. 138, 46 N. E. 272; *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663; *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Wood v. Watertown* (1890) 58 Hun, 298, 11 N. Y. Supp. 864; *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404; and *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113. As to the meaning of the word “result” in this form of statement, see *Jensen v. Barbour* (1895) 15 Mont. 582, 39 Pac. 906.

In one case it was laid down that “a contractor is not the agent or servant of his employer, except as to the specific results which he undertakes to accomplish.” *Holt v. Watley* (1874) 51 Ala. 569. But this mode of stating the nature of the relation is hardly to be commended.

“While performing his contract and complying with its terms he [i. e. an independent contractor] is not subject to the rule and control of the employer, who cannot interfere save to require the performance as agreed. The relation is one of contract under which the contractor retains the same degree of independence, while the labouring man follows the employer’s direction, and is not independent in the sense of the independent contractor’s independence.” *Holmes v. Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465, 22 So. 403.

It is error to give an instruction from which the jury may infer that the mere employment and payment of another to perform a given piece

intestate, Daniel Grider, who was working at the bottom of the shaft, killing him, probably, instantly, as he was dead when rescued from the shaft a few minutes later. The accident occurred while Foley & Nunan were sinking the shaft under their contract with the appellant. The personal representative of the intestate Daniel Grider, brought this action to recover damages for the alleged negligence of the appellant in furnishing an insufficient, dangerous, and defective rope to be used for the purpose hereinbefore stated.

The appellee claims that, as it was the duty of appellant to furnish a rope to be used for the purpose and in the manner in which the one in question was being used when the accident occurred, the law im-

posed the duty of furnishing one in a reasonably safe condition, and to so keep it during the progress of the work. For the appellant it is contended that Foley & Nunan were independent^a contractors; that, in addition to paying them a stipulated price per foot for the work, it agreed to furnish tools, whim, etc., which it did to their satisfaction; that the intestate was their, not its, employee; and that the relation of master and servant did not exist between it and the intestate.

The evidence, without contradiction, establishes the facts to be as follows: That the wire rope was new, and, when furnished the contractors, that the estimated weight it would carry was many times greater than it was sustaining when the accident happened; that when the rope was furnished

of work is the test by which to determine whether the relation of master and servant exists. *Andrews v. Boedecker* (1885) 17 Ill. App. 213. In this case the jury were charged that it was legal and proper for the defendant to employ and pay the negligent person to do the work in question and that in such case that person would be the servant of the defendant in doing that work.

In one case it was laid down that certain requested instructions to the effect that if the defendants employed an experienced carpenter to erect the building in question they were not liable, were defective in not requiring the jury to find that the building was being erected under an independent contract which gave the carpenter exclusive control over the work. *Hearn v. Quillen* (1901) 94 Md. 39, 50 Atl. 402.

In a case where the question was whether the owners of a steamboat were liable for the negligence of the persons operating it, the trial judge was held to have erred in sustaining objections to the introduction of evidence tending to show a transfer of control by such owner. *Gulzoni v. Tyler* (1883) 64 Cal. 334, 30 Pac. 981.

The following definitions by legal authors have received the approval of various American courts:

"Where the contract is for something that may lawfully be done and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control reserved either as respects the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the persons employed by the contractor so as to be responsible to third persons for their negligence." *Cooley, Torts*, p. 646; quoted in *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663.

"An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." 2 *Thomp. Neg.* 1st ed. § 22, p. 890, 2d ed. § 622; Adopted in *Crenshaw v. Ullman* (1892) 113 Mo. 633, 20 S. W. 1077; 65 L. R. A.

Fink v. Missouri Furnace Co. (1884) 82 Mo. 270, 52 Am. Rep. 376.

"One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant." *Shearm. & Redf. Neg.* § 185; Adopted in *Foster v. Wadsworth-Howland Co.* (1897) 168 Ill. 514, 48 N. E. 103; *Hale v. Johnson* (1875) 80 Ill. 185; *Barg v. Bousfield* (1896) 65 Minn. 355, 68 N. W. 45; *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55; *Cunningham v. International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632.

The true test by which to determine whether one who renders services to another does so as a contractor, or not, is to ascertain whether he "renders the services in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." *Shearm. & Redf. Neg.* § 184; Adopted in *Rome & D. R. Co. v. Chasteen* (1889) 88 Ala. 591, 7 So. 94.

"When a person lets out work to another to be done by him, such person to furnish the labor and the contractee reserving no control over the work or workmen, the relation of contractor and contractee exists, and not that of master and servant, and the contractee is not liable for the negligent or improper execution of the work by the contractor." *Wood, Mast. & S.* p. 593; Adopted in *Faren v. Sellers* (1887) 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363.

"If, therefore, the principal using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work. The employment is regarded as independent when the person renders service in the course of an occupation.

there were no apparent defects in it; that the contractors employed and paid their laborers; that their laborers were not on the pay roll of the appellant; that it did not direct or control them in the performance of their duties; that a party representing the appellant occasionally visited the shaft to note the progress of the work and make estimates, as required by the contract, to enable it to make payments to the contractors on the work. The rope could not have been defective when delivered to the contractors, or it would not have stood the use for six months before it broke. Copperas water, in contact with which it constantly came, caused it to rust and become defective. No jury composed of reasonable men could,

from the evidence, or by reasonable inference drawn therefrom, have reached conclusions other than the ones last above stated.

Counsel invites the attention of the court to a great variety of cases which he contends support the right of the appellee to recover in this case; claiming that some place the right upon one ground, and some upon others. Attention has been called to the case of *Bright v. Barnett & R. Co.* 88 Wis. 209, 26 L. R. A. 524, 60 N. W. 418. In that case it appeared that the defendant was engaged in building an elevator for grain, and contracted with a fire-extinguishing company to construct a fire-extinguishing apparatus and appliances. The defendant was to furnish the staging that the men employed by the fire-extinguishing company

representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." *Mechem, Agency*. § 747, quoted with approval in *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163.

"An independent contractor may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to accomplish it, and representing the will of the company only as to the result of his work." *Elliott, Railroads*. § 1063, adopted in *Norfolk & W. R. Co. v. Stevens* (1899) 97 Va. 631, 46 L. R. A. 367, 34 S. E. 525.

"Where a person contracts with another, excluding an independent calling, to do work for him according to the contractor's own methods, and not subject to his control or orders except as to results to be obtained, the former is not liable for the wrongful acts of the contractor or his servants." 14 Am. & Eng. Enc. Law, p. 830, adopted in *Long v. Moon* (1891) 107 Mo. 334, 17 S. W. 810.

An analysis of the elements embraced in the statements quoted above indicates that the juridical conception of an independent contractor is simply that of a person who, being in the exercise of a distinct and recognized trade, craft, or business, undertakes to do certain work, without submitting himself to the control of the employer in respect to the details of that work. Considered from one point of view, the situation contemplated when such a person is engaged implies that the employer has nothing to do in respect to the work, except to see that it is done according to the terms of the contract (*Martin v. Tribune Asso.* [1883] 30 Hun, 391); or that he has merely a right to see that the contract is performed in pursuance of its terms, conditions, and specifications (*Scammon v. Chicago* [1861] 25 Ill. 424, 79 Am. Dec. 334).

Considered from another point of view, that situation implies that he is to have the independent use of his own skill, judgment, means, and servants in the execution of the work (*Blake v. Ferris* [1851] 5 N. Y. 48, 55 Am. Dec. 304); or that he is to have the exclusive direction and control of the manner in which the work is to be done (*Harrison v. Collins* [1878] 86 Pa. 153, 27 Am. Rep. 690; *Corbin v. American Mills* [1858] 27 Conn. 273, 71 Am. Dec. 63); or that he is to have full control of the work and workmen (*Allen v. Willard* [1868] 57 Pa. 374); or that the execution of

the work is to be left entirely to his discretion (*Hexamer v. Webb* [1886] 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 753); or that he is to be free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work (*Deford v. State* [1868] 30 Md. 179); or that he is to be left entirely free to do the work as he pleases (*McCarthy v. Second Parish* [1880] 71 Me. 318, 36 Am. Rep. 320); or that the work is to be done according to his own methods (*Wiese v. Remme* [1897] 140 Mo. 289, 41 S. W. 797); or that he is to procure labor and materials in his own way, provided they are such as the contract demands, and use such machinery and appliances as he deems proper, provided they do not unnecessarily injure the subject-matter of the contract, or interfere with work done by others (*Hughbanks v. Boston Invest. Co.* [1894] 92 Iowa, 267, 60 N. W. 640).

Ordinarily, of course, the servants of the person employed are, for the purpose of applying the above-mentioned test, identified with him in considering the effect of the evidence. It may be observed, however, that there is a class of cases in which, although it may be apparent that the person employed was himself an independent contractor, there is still an ulterior question to be settled, *viz.*, whether the men who were engaged in doing the work which was the immediate cause of the injury were, at the time when the injury was received, under his control or under the control of the employer. If the latter should be the situation established by the evidence, the employer is plainly liable, and the independence of the contract ceases to be a differentiating factor.

See a full collection of the authorities in a monograph contributed by the present writer to the *Lawyers' Reports Annotated*, vol. 37, p. 33, especially pp. 69 *et seq.*

In *Turner v. Great Eastern R. Co.* (1875) 33 L. T. N. S. 431, where the plaintiff was injured by the negligent management of moving railway cars, while he was working for a man who had contracted to discharge coal from cars standing on a siding, the discussion was centered wholly upon the question whether the defendant company exercised such a control over the plaintiff and his fellow workmen as to make them its own servants *ad hoc*. *Grove, J.*, in his opinion remarked: "No doubt the cases do not necessarily depend on the term 'contractor,' because the man may stand in different relations

would need in performing the work. A staging plank or a plank walk of a single plank was needed, to be thrown across the bins about 70 feet from the bottom, or above the floor on which the employees stood or walked while prosecuting the work. The defendant undertook to, and did, furnish the walk across one of the bins for the use of the employees. The plank used had a large knot, extending nearly across it, about 5 feet from one end. The deceased was an employee of the fire-extinguishing company, and it was necessary for him to walk across the plank; and, while doing so, it broke at the place where the knot was, precipitating him to the floor, and killing him instantly. The deceased did not know of the defect in the plank, and, owing to darkness, could not

see it. The defendant undertook to furnish the material and build the walk in a safe and suitable manner for the use of the deceased and other employees of the fire-extinguishing company. A recovery was sustained against the defendant on two grounds: (1) The defendant, in furnishing the staging for the use of the employees of the fire-extinguishing company, had impliedly invited the deceased to walk on it while doing his work, and was liable to him if he suffered injury from its defective condition, caused by negligence in its construction. (2) Such liability might rest upon the duty which the law imposes on everyone to avoid acts immediately dangerous to the lives of others. In *Mulohay v. Methodist Religious Soc.* 125 Mass. 487, on an analogous state of

to the person with whom he contracts and those whom he employs."

Where the employer's agent, acting under a power expressly reserved to "vary, extend, or diminish the quantity of work during its progress," orders the performance of additional work which is connected with the work covered by the contract, the inference is that, while the additional work is in progress, the relations between the parties and the obligations and responsibilities to which they are subject are identical with those which are deducible from the provisions of the contract. *Charlock v. Freel* (1891) 125 N. Y. 357, 26 N. E. 262. The court remarked that the additional work, as it came between the completion of the sewer and the repaving of the street, and was designed to make the drainage better, was cognate in its nature to the principal undertaking, and that the effect of its assumption was to continue the contract relations between the parties, with all the obligations and responsibilities which either expressly or by legal implication, were imposed by that contract.

V. Presumptions entertained as to character of contract.

The weight of authority is in favor of the doctrine that, when the inquiry is at that initial stage at which nothing more appears than that the actual tortfeasor was, at the time when the injury was inflicted, in the employment of the party whom it is sought to hold responsible for the injury, the latter, if he relies on that defense, has the burden of proving that the tortfeasor was an independent contractor.

In *Welfare v. London, B. & S. C. R. Co.* (1869) L. R. 4 Q. B. 693, 38 L. J. Q. B. N. S. 241, 20 L. T. N. S. 743, 17 Week. Rep. 1065. Cockburn, Ch. J., in the course of some remarks which were concurred in by Blackburn, J., said: "I agree that where a thing is being done upon the premises of an individual or a company in the ordinary course of business, it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done."

In a New York case it has been laid down that *prima facie*, the person at whose instance and for whose use and benefit work is done is liable for all injuries to third parties resulting from the negligence or unskillfulness of those executing the work; that, unless some evidence is given as to the terms of the contract, "it is no

more proper to assume that . . . it gave the contractor an independent employment, than that it stipulated for the work to be done under the immediate supervision and direction of the defendants;" and that, if the defense relied upon is that the relation between the parties was not that of master and servant, "it is always necessary to show the terms of the contract with sufficient particularity to enable the court to determine whether the employment was of this independent character." *McCamus v. Citizens' Gaslight Co.* (1863) 40 Barb. 380.

Where it is a question of the effect of a complaint, the relation of master and servant will, as a general rule, be inferred from any allegations which merely show that the persons for whose negligence it is sought to hold the defendant responsible were doing the work in question upon his property, while he had possession and control thereof, that the work was being done with his consent for his benefit, and that it was executed in an unskillful manner. *Dillon v. Hunt* (1884) 82 Mo. 150, Affirming (1881) 11 Mo. App. 246, where, however, the decision was put upon the ground of the non-delegable quality of the duty of a landowner so to use his property as not to create a nuisance. The reasoning of the court of appeals is mentioned with approval in (1891) 105 Mo. 154, 24 Am. St. Rep. 374, 16 S. W. 516, where a new trial was ordered for the reason that there had been error in the admission of evidence.

The doctrine stated above is also recognized in *State, Redstrake, Prosecutor, v. Swayze* (1889) 52 N. J. 129, 18 Atl. 697; *Perry v. Lord* (1885) 17 Mo. App. 212.

See *infra*, XI. c.

These authorities outweigh the effect of the remarks of the court in *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103, to the effect that, as the burden is on the plaintiff to prove that the relation of master and servant existed, no presumptions which do not arise from the evidence can be indulged in his favor.

In an earlier case, *Rome & D. R. Co. v. Chas-teen* (1889) 88 Ala. 591, 7 So. 94, where an accident was caused by the negligent manner in which the servants of a person engaged in constructing a railway had operated a train, it was the opinion of a portion of the same court that, as it was in the power of the defendant to produce and prove a contract, and it had not done so, evidence that the engine and cars belonged to the company, and that the road was

facts, the court held the Methodist Religious Society liable upon the theory that it had, in effect, invited and induced the injured party—an employee of one who had contracted to do certain painting on its church—to go upon dangerous and defective staging which it had procured to be erected for use of the contractor and his employees in performing the work under the contract. If the dangerous and defective condition of the staging from which the injuries resulted as appeared in *Bright v. Barnett & R. Co.* and *Mulchey v. Methodist Religious Soc.* had not existed by reason of the defective construction of the staging, it is evident, from the statements and reasoning of the court, no recovery would have been allowed. In the last-named case the court said: "In the

present case the society, through its authorized agents, had accepted and used the staging, and had, in effect, invited and induced Needham and his workmen to come upon it to paint the church, and was liable to any of them who suffered injury from the dangerous condition of the staging, which was not apparent to them, and which was caused by negligence in its construction." A fair inference to be drawn from the cases to which we have alluded is that, if the staging had become defective by being used after it had been constructed and accepted by the contractors, the injured employee could not have maintained the action against Barnett & Record Company or the Methodist Religious Society. Many cases enunciating the same doctrine exist, but it would be un-

being constructed for its benefit, showed prima facie that those employed in the work of construction were the servants of the company, and cast upon it the burden to prove that the person employed had possession of and controlled the road, engine, and cars, as a contractor, and not as a servant.

On the other hand, though such a doctrine has apparently not been explicitly formulated, it would at least seem to be a reasonable inference from the decisions as a whole that no presumption that the relation of the parties was that of master and servant can be entertained, when the case has been developed to a point at which the nature of the employment,—whether general, or with a view to a specific result,—the character of the work contracted for, and the industrial status of the person engaged have been disclosed by the testimony.

That this statement is fully as favorable as the authorities warrant to the party who relies on the theory that, under the given circumstances, the relation was that of master and servant, is abundantly manifest from the cases cited in the ensuing subdivisions.

An instruction is erroneous which would authorize the jury to assume that a man employed to take charge of a stable and train his employer's horses was necessarily a servant. *Aramsmith v. Temple* (1882) 11 Ill. App. 39 (trainer assaulted a man hired by him). Discussing the question how it is to be ascertained in such cases as the one under review that the employer has not the right of control, the court said: "The contract in terms makes no provision in relation to it. Of necessity, therefore, resort must be had to circumstantial evidence; the parties, the work, and such other facts shown as would naturally lead us, in the light of our general knowledge of men and business, to infer their intention. For example, if the contract disclosed nothing more of what was to be done than that it was to work on a farm, the natural inference from the single circumstance that nothing more was specified, in the light of common knowledge of the variety of work to be done on a farm, would be that the employee was to be directed from time to time what to do and how to do it. So, if it were to work at plowing, or ditching, or fencing on a certain farm; for there would still be nothing definite in respect to the time, place, amount, or style of the work, and as to these the party for whom it was to be done would naturally be expected to

direct. If, however, it were to plow a certain field for the next corn planting, to build a certain described fence, to dig and complete a well as specified, or the like, it would present the case of a contract for a 'specific job,' where the employer might be interested only in the 'result' and quite indifferent to the method of its accomplishment. Here it might be difficult to form a satisfactory conclusion upon the point in question from this circumstance alone. But the further fact that the job was such as to require for its accomplishment some special knowledge and skill, falling within 'a regular independent employment' or 'distinct calling' which the employee followed as a business, would raise some probability that it was intended to leave to his judgment, to be exercised on his own responsibility, the means, the manner of using them, and all the details of the work. This probability would be increased by the additional fact that he was to be paid for it a 'gross sum,' and still further, 'if he used his own tools and assistants;' and still further, if the employer neither had nor pretended to have the special knowledge and skill required; and might become a clear belief, if it also appeared that during the progress of the work he did not in fact, though present, give any directions in regard to them. These and other like circumstances appearing in different cases have come to be recognized as *indicia* of the character of a contractor, and have been gathered up by courts and text writers into definitions to distinguish it from that of a servant. No one perhaps is essential to it or conclusive of it, but they all tend to establish the one fact which is decisive, namely, that as to the act in question the employee was not subject to the control and direction of the employer."

In a Michigan case the nature of the employment and the occupation of the person employed are mentioned, *arguendo*, among the factors which determine the nature of the relation between the parties to any given contract. *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209.

In fact there is express authority for the rule that, in some states of the evidence the contrary presumption will prevail and inure to the advantage of the defendant.

In *Welfare v. London, B. & S. C. R. Co.* (1869) L. R. 4 Q. B. 693, 38 L. J. Q. B. N. S. 241, 20 L. T. N. S. 743, 17 Week. Rep. 1085, where a person was injured by a plank which

profitable to cite and review them. Cases are cited to show (yet there are cases holding a contrary view) that premises upon which an independent contractor is required to labor for the benefit of the owner must be safe for the purpose. Other cases are cited to show the circumstances under which owners of land were held responsible for injuries suffered by persons going upon it at the owner's invitation, etc. The injury did not result from the defective condition of appellant's premises. Therefore no such question is here for consideration.

The chief contention of counsel for appellee is that the relation of master and servant existed between the appellant and the intestate, and that the appellee is entitled to recover upon that theory. In this view

was let fall by a workmen engaged in repairing the roof of a railway station, Cockburn, Ch J., remarked that if it were necessary to determine the question whether the workman was a servant or a contractor, the court would have to consider whether the case was improperly withdrawn from the jury on the ground that the plaintiff offered no evidence to show that the workman was a servant of the company, and, after adverting to the general principle already stated in the text, proceeded thus: "But in the case of work of this description, it seems to me that that principle would not apply, because it is a matter of universal knowledge and experience that in a great city like this persons do not employ their own servants to do repairs to the roofs of their houses or buildings; they employ a builder whose particular business it is to do it. That being a matter of universal practice, and of universal and common knowledge, I think this is a circumstance which the judge ought to take into account in determining whether there is evidence to go to the jury or not; but I do not think it is necessary to decide this case on this particular point."

In order to charge an undertaker with liability for the negligence of the driver of a carriage at a funeral it is not enough to show that the latter was engaged by the former to furnish and drive the carriage. It is also necessary that some specific evidence should be given which tends to show that the employer had the right to control the driver. *Boniface v. Relyea* (1868) 6 Robt. 397.

Evidence that a city had a contract with the person who piled lumber on a street for the purchase of the lumber is sufficient to authorize a charge on the law respecting the liability of an owner to third persons from the negligence of an independent contractor although the terms of the contract do not appear, since, if there is anything in the terms of the contract tending to show the relation of master and servant between the city and such person, the party asserting that such was their relation should offer evidence to prove it. *Evansville v. Senhenn* (1898) 151 Ind. 61, 41 L. R. A. 734, 51 N. E. 88, Denying rehearing in (1897) 151 Ind. 42, 41 L. R. A. 728, 68 Am. St. Rep. 218, 47 N. E. 634.

See also *Woodward v. Peto* (1862) 3 Fost. & F. 398, as stated in *infra*, VI. x. 465 L. R. A.

the court below concurred, and instructed the jury in accordance therewith. Among other instructions the court told the jury that it was the duty of the appellant to use ordinary care to keep the rope which it furnished Foley & Nunan in a sufficiently strong and safe condition for the purpose for which it was being used. As the uncontradicted testimony shows, the rope at the time it was delivered to Foley & Nunan was new and reasonably safe for the purpose for which it was to be used. The real question is, Did the law impose upon appellant the duty to keep it in that condition during the prosecution of the work under the contract? This duty was not imposed on appellant by the terms of the contract, nor was it by law, unless the relation of

VI. *Independence of contract usually inferable where it is for the performance of an entire piece of work at a specified price.*

a. *In general.*

The adoption of the conception of an independent contractor, as it has been explained in *supra*, I., IV., may be said to entail, as a necessary consequence, the acceptance of the doctrine that, where the substantial effect of the evidence is that the person employed was engaged in some occupation which might in a reasonable sense be described as distinct, and that he undertook to execute a particular piece of work for a specified price, calculated with reference to the quantity of work actually performed, it is, as a general rule, an inference, in point of law, that the employer did not intend to exercise any control over the work while it was in progress, but merely reserved the right to reject the results produced thereby.

When a person "enters into contract with competent contractors doing an independent business, who agree to furnish the necessary materials and labor and make the entire improvement according to specifications prepared in advance, for a lump sum, or its equivalent, they are not the servants or agents" of the contractee, but are independent contractors. *Upington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91.

Under § 1799 of the French Civil Code (which is in force in Quebec and Mauritius), masons, carpenters, locksmiths, and other workmen who make contracts by the job for their own account, are deemed to be contractors for the kind of work they undertake, and subject to the rules prescribed with regard to that class of employees.

The decisions which illustrate this doctrine are collected under the following headings.

b. *Persons engaged in construction or other work on railways.*

In *Steel v. South-Eastern R. Co.* (1855) 16 C. B. 550, there was evidence to show that the work was being done under the superintendence of one F, the defendant's surveyor, who furnished the plans; but one E, the foreman of one F, a bricklayer, stated that the work was done by him and the men employed by him, under a contract between F and the company. Upon his cross-examination, the witness said that he had

master and servant existed between appellant and the intestate. If the relation of master and servant existed, then the duty was imposed to furnish a rope in a reasonably safe condition for the purpose intended, and so maintain it. The intestate was neither employed, controlled, nor paid by the appellant. It had neither the authority to employ him to work in the shaft, direct him while there, or to discharge him. If he had been the servant of the appellant, he would have been entirely under its control and direction. In *Cooley on Torts*, pp. 531, 532, it is said: "A preliminary remark is essential regarding the employment, in the law, of the words 'master and servant.' The common understanding of the words and the legal understanding is not the same; the

latter is broader, and comprehends some cases in which the parties are master and servant only in a peculiar sense and for certain purposes,—perhaps only for a single purpose. In strictness, a servant is one who, for a valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful business. . . . It could not at all depend on whether the master was to pay anything, nor whether the service was permanent or temporary. His control of the action of the other is the important circumstance, and the particulars of his arrangement are immaterial." The court, in *Mulchey v. Methodist Religious Soc.* cited by counsel for appellee, said: "The plaintiff, not being employed, controlled, or paid by

orders from P to go on, that P was the person who told him what to do, but that he was the responsible person to determine in what manner that which P directed him to do should be carried out. It further appeared that P had directed the witness to do the work in a certain manner, and that the injury resulted from the workmen having disobeyed this direction. It was held that the trial judge had properly directed a nonsuit on the ground that F was an independent contractor.

Provisions in a contract, which show that a construction company was to survey and locate a line, procure the right of way, build the roadbed, tracks, bridges, side tracks, etc., and equip the same with engines and cars in accordance with certain specifications, implies a condition of things which necessarily makes the construction company an independent contractor, so far as the provisions of the contract furnish a rule for classification. *St. Louis, Ft. S. & W. R. Co. v. Willis* (1888) 38 Kan. 330, 16 Pac. 728.

A person who contracts to build the roadbed of a railway, ready for the superstructure, according to the terms of the agreement, and deliver it over on a certain date, and who in doing the work employs his own hands and teams and furnishes his own materials, implements, and tools, is prima facie an independent contractor. *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449.

The inference that a railway company intended to reserve the right of controlling the construction trains of a contractor who agreed to lay its track at the rate of a certain number of miles per month cannot be drawn from a provision that the company is "to furnish all motive power and cars, and operate the construction trains." *Miller v. Minnesota & N. W. R. Co.* (1888) 76 Iowa, 635, 14 Am. St. Rep. 258, 39 N. W. 188. The court observed that the word "operate" was, as the general tenor of the contract showed, not used in the general sense common to all the acts necessary to the use of a railroad by moving trains over it, but in the restricted sense that the necessary force was to be furnished to move the train over the road at such times as directed by the contractors.

A person employed by a railroad company to pump water out of an excavation by means of a portable steam engine is an independent contractor, where neither the company nor any of its employees has the right to operate the en-

gine, or to interfere in the manner of its operation, or to direct the owner how or when it shall be operated, and the only right the company has in respect to the matter is to require the owner of the engine to accomplish the end of keeping the water down to a certain level. *Wabash, St. L. & P. R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296.

A man who undertakes for a lump sum to repair a wharf belonging to a railway company, and who is not controlled or interfered with while the work is in progress, is an independent contractor. *Brunswick Grocery Co. v. Brunswick & W. R. Co.* (1898) 106 Ga. 270, 71 Am. St. Rep. 249, 32 S. E. 92.

So also is a man who undertakes to supply, at a stipulated price per cord, the wood which a railway company requires for fuel. *Leavitt v. Bangor & A. R. Co.* (1897) 89 Me. 509, 36 L. R. A. 382, 36 Atl. 998.

See also the cases cited in *infra*, IX.

c. *Persons who undertake the construction of entire buildings or specific portions thereof.*

A person with whom a contract is made for the erection of an entire building, and to whom the premises are surrendered for that purpose, is an independent contractor. *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334. The court said: "Were those contractors the servants of the owners? That they are not, seems to us apparent. They were not bound to perform the labor under the direction of the owners or their agents, but under their contract. It was not to them that the contractors looked for directions, but to the agreement. They were bound to furnish the materials and labor, and complete the building within a given time; and the owners had no right to control the selection of the materials, or direct when the work should be performed, but only to look to their contract for its performance in pursuance to its terms, conditions, and specifications."

One having an entire contract to erect a building according to the plans and specifications furnished to him by the owner, who has nothing to do with the work, employment, payment, or hiring of the hands, is an independent contractor. *Crenshaw v. Ullman* (1893) 113 Mo. 633, 20 S. W. 1077; *Wiese v. Remme* (1897) 140 Mo. 289, 41 S. W. 797.

One who contracts to build a house, and undertakes to furnish the materials, make the excavation, build the walls of the foundation, put

the defendants, would seem not to be their servant, so that they would be liable for his acts, or their liability to him be governed by the rules applicable as between master and servant. *Johnson v. Boston*, 118 Mass. 114." In *Robinson v. Webb*, 11 Bush, 465, the court quotes with approval a definition of "master" as follows: "He is to be deemed the master who has the superior choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of his work, but in all its details." It appeared in that case that the owner of a lot of ground contracted with a builder that the latter furnish all the materials and labor, and should erect thereon a building for a fixed price, to be done under the supervision of an archi-

tect. The court held that it was an independent employment, in which the relation of master and servant did not exist.

The court concludes that the relation of master and servant did not exist between appellant and Foley & Nunan, or between it and the testate, and that it was not under a duty to look after the rope and keep it in a reasonably safe condition. If anyone was guilty of actionable negligence, Foley & Nunan were, in using the rope after it got in an unsafe condition. Suppose a pick and shovel which appellant had furnished them had become unsafe for use after they had commenced using it, and in consequence thereof one of their employees had been injured; would the appellant have been re-

up the building, and complete the work, replacing the plank removed from the sidewalk, etc., within a specified time, and in a specified manner, and for a stipulated compensation, is an independent contractor. *Clark v. Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590.

The plaintiff and defendant being owners of adjoining lots, the latter built a wall upon his lot, along the boundary line between them; the same being constructed for him by D and C under a written contract, at a specified price calculated with reference to the quantity of work done. The defendant furnished the materials only, but employed no workmen and exercised no control over them. Held, that the relation of master and servant, or principal and agent, did not exist between the defendant and those by whom the wall was constructed. *Benedict v. Martin* (1862) 36 Barb. 288 (error to exclude from the consideration of the jury the question whether the action was not barred on this ground).

One engaged in the construction of a building, who employs and pays the laborers himself, without being under the control of the owner of the building, is an independent contractor, though he is to be paid a percentage on the cost of erection. *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242.

A contract couched in the following terms was held to indicate on its face that the employer did not, in any respect, retain control of the work as to the method, time, or place of its execution, but only as to the result accomplished: We will pay you \$3.60 per ton for the erection of the structural ironwork, not including stairs, on our order No. 131 for Gluck Brewing Company, you to erect the same in a satisfactory manner, according to plans, to bolt all lintels together as required, and paint all material one coat, when not already painted. It is understood that you are not to take the material from the place where it is now piled. You are to make out your pay rolls, and we will pay the same on regular pay days at the office. If you want to discharge a man, we will pay him on presentation of regular discharge slip by you. It is understood that we are to furnish all tools and paints. *Klages v. Gillette-Herzog Mfg. Co.* (1902) 86 Minn. 458, 70 N. W. 1116. But from a consideration of all the evidence surrounding the making of the contract the court was of the opinion that it did not conclusively 65 L. R. A.

appear that the true relations of the parties were defined by the writing.

The employment is independent, where a landowner agreed with one person for the entire granite material needed for a building, and with another person for the rest of the material and for work necessary to complete the building and structures required, and had nothing to do in respect to the work, except to see that it was done according to the terms of the contract. *Martin v. Tribune Assn.* (1883) 30 Hun, 391.

A corporation owning a lot entered into a contract for the erection of a building thereon, by the terms of which one D agreed to "take entire charge of all the work, . . . to make all contracts for the various departments of work required, . . . to see that the contracts entered into are honestly and faithfully kept," to be "responsible for all loss or damage from accidents during the construction of the building," and to take all proper precautions for the avoidance of such accidents. Through D the corporation thereafter made a contract containing similar covenants of indemnity with subcontractor named W, for the mason work and scaffolding, and with a large number of other contractors for all the other work upon the building. Discussing the contention that an injury caused by the negligence of one of the workmen was imputable to the corporation, because it was the owner of the premises, the court said: "The evidence shows that it had made contracts with other parties for the entire construction of the building. D, by the terms of his contract, was not the agent of the society in the construction of the building, but an independent contractor within the meaning of the authorities, and the society had no control over the details of the work, or over the workmen employed in the building, the erection of which it had surrendered to D and the other contractors." *Wolf v. American Tract Soc.* (1898) 25 App. Div. 98, 49 N. Y. Supp. 236.

D, being the owner of a city lot, employed R to draw plans and superintend the erection of a building thereon. R drew a plan, to which D assented. He paid R a commission on the value of the building, R having no interest other than to have the work done well. D paid for the materials and the bills for all the workmen upon orders from R. R employed T, a master bricklayer, and two carpenters; T employed the journeymen bricklayers and hod carriers. Held, that R and T occupied the position of in-

sponsible therefor? We think not. Neither is it any more responsible in the case at bar than it would have been in the supposed case. The undisputed facts show that the negligent act (if such there was) did not consist in furnishing an insufficient or defective rope, but in allowing it to become so by those to whom it was furnished,—the intestate's employers, between whom the relation of master and servant existed. Without passing upon the question (it not being before us) as to whether or not the appellant would have been responsible had it furnished a defective rope, and the intestate

had been killed in consequence thereof, it is sufficient to say that, as there was no evidence to show that it was defective when it was delivered to Foley & Nunan, and, further, as the relation of master and servant did not exist between appellant and intestate no duty rested on it to see that the rope continued safe for use in the shaft, the court should have given the jury peremptory instructions to find for the appellant.

The judgment is reversed for proceedings consistent with this opinion.

Petition for rehearing overruled.

dependent contractors. *Deford v. State* (1868) 30 Md. 179.

A wife authorized her husband to have a house erected for her on her separate property. The husband let the contract for brickwork to a contractor for a stated consideration; "said work to be done in a workmanlike manner." He assumed no control over the employees of the contractor or the method of construction. He paid the contractor, and not his employees. Held, that the husband and wife were not liable for injuries received by a boy employed by the contractor to work on the house. *Simonton v. Perry* (1901; Tex. Civ. App.) 62 S. W. 1090.

A person who contracts to put up and deliver to the owner of a building an elevator, fully completed and in working order, for a specified sum and according to written specifications, is an independent contractor. *Long v. Moon* (1891) 107 Mo. 334, 17 S. W. 810.

A contract under which the contractor exercised exclusive control and direction over the digging of the cellar of a house, the erection of the walls around it, together with the passages ways into the same, and over the erection of the entire building, created an independent employment. *Ryan v. Curran* (1878) 64 Ind. 345, 31 Am. Rep. 123.

The evidence showed that a firm doing business under the name of H & M were contractors engaged in jobs of the same kind as that which they were doing when the accident occurred; that they had undertaken to excavate for the foundations of a building for one R; that they were to be paid a percentage upon the cost of the labor; that they employed and paid all laborers themselves; that they alone exercised supervision of the work; that plaintiff was employed by them as a day laborer about the work at the time he received the injury complained of. It did not appear that after the making of his agreement with M & H, R had any connection whatever with the excavation which was being done, further than to pay them the stipulated price when the work was finished. Held, that R was not liable for the negligence of M & H. *Hale v. Johnson* (1875) 80 Ill. 185.

One under contract with the owner of premises to erect a wall thereon at a specified price per 1,000 brick is not a servant of a corporation of which the owner is an officer, and which is in possession of the premises and also of the adjoining premises, so as to impose the duty of a master upon it in respect to protecting him from injury from its machinery. *Horton v. Vulcan Iron Works Co.* (1897) 13 App. Div. 508, 43 N. Y. Supp. 699.

One employed to do the woodwork on dry kilns, under a contract providing that the own-

er shall furnish the materials, and that the contractor shall employ the labor, and superintend the same, and erect the buildings according to certain plans, and receive a *per diem* for himself and each of his employees, is an independent contractor. *Emmerson v. Fay* (1896) 94 Va. 60, 26 S. E. 386.

An artisan who makes a contract to trim the stone front of a building for a lump sum is an independent contractor. *Matthes v. Kerrigan* (1886) 21 Jones & S. 431 (plaintiff, who was injured by the fall of a scaffold which had been hung by a gang of painters, and which he used by defendant's permission, held not entitled to maintain an action on the theory that he was a servant of the defendant).

Where a carpenter engaged in building a house on his own lot contracts with a firm of brick masons to do all the brickwork, such firm employing the necessary labor, the brick masons are independent contractors. *RICHMOND v. SITTINGER*.

A landowner is not liable for the negligence of a person who agrees to do all the necessary excavation and all the masons' and bricklayers' work required in the construction of a building on his property, and who, under the contract, is to have the care of the building and whatsoever belongs thereto during the process and until completion. *Allen v. Willard* (1868) 57 Pa. 374.

A man who makes a special contract to put up the iron front of a building for a lump sum, which he is to receive when the job is completed, is an independent contractor. *Peyton v. Richards* (1856) 11 La. Ann. 62.

That a mason was an independent contractor has been held to be a proper inference, where the evidence was that the mason was employed in a single transaction at a specified price for the job; that by the terms of the contract he was to accomplish a certain result, the choice of means and methods and details being left wholly to him; that he was employed as a mechanic in a regular business recognized as a distinct trade, requiring skill and experience; that his duty was to conform himself to the terms of the contract; and that he was not subject to the immediate direction and control of his employers. *Lawrence v. Shipman* (1873) 39 Conn. 586.

Where a witness in answer to the question: "Was the building erected by the defendant company; was it erected for them?" said, "It was erected for them,"—it was held that the language, although equivocal, was such that a jury would be warranted in inferring that the persons constructing the building were independent contractors, and that a charge by which they were

told that they were "not to presume, in the absence of all evidence on the point, that the building was being erected under a contract," was erroneous. *Prairie State Loan & T. Co. v. Doig* (1873) 70 Ill. 52.

d. Persons engaged to execute repairs or improvements on a building.

"As a general rule, where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building, by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, with no restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof,—such person does not occupy the relation of a servant under the control of the master, . . . and the owner is not liable for his acts or the acts of his workmen who are negligent and the cause of injury to another." *Hexamer v. Webb* (1886) 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755.

Plaintiff and defendant occupied buildings which were separated by a passageway about 6 feet wide, the dividing line of the properties being in the center of the way. Water ran through the wall of defendant's building into the cellar, and it employed a man to repair the wall. The one so employed sent his workmen, who dug up the ground in the passageway, and left it so piled that, when a storm occurred, water was turned into plaintiff's cellar. In answer to the contention of the defendant that S, the person employed, was a contractor, the auditor reported as follows: "I do not find that said S made any contract with the defendant to stop the water from running into its cellar, but I find that said S did the work under a general employment, and was to receive a reasonable compensation therefor." The following sentence also formed part of the report: "It did not appear that the defendant gave any directions about the work done by G, but left the method of doing the work and stopping the leak to his judgment." Commenting upon this report, the court said: "The language of the auditor, when he says: 'I do not find that said S made any contract with the defendant to stop the water from running into its cellar,' would seem to mean 'no contract in writing.' But this is not important. There was clearly a verbal contract either to stop the water from running into the cellar, or to try to stop it,—and it is immaterial which,—for which S was to have a reasonable compensation. In carrying out this contract the plaintiff was injured by the negligence of the servants of S, who were hired by his representative, G. The defendant neither hired these servants nor was under any obligation to pay them. It exercised no control over them, nor, so far as appears, had any right to exercise such control. The method and manner of doing the work was left entirely to the skill and judgment of S, who on the facts found does not appear not to have been an independent contractor." *Dutton v. Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N. E. 405.

Where a superintendent chosen by a school district to superintend certain improvements in a schoolhouse is only authorized to direct the person employed in respect to the manner in

which the work is to be executed, the latter is an independent contractor. *School District v. Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627.

The following employees have been held to be independent contractors:

A gas fitter who takes a subcontract under a person who has contracted to make certain alterations in a building. *Rapson v. Cubitt* (1842) 9 Mees. & W. 710, Car. & M. 64, 6 Jur. 606, 11 L. J. Exch. N. S. 271.

A plumber employed to execute the entire job of repairing a cistern in a house. *Blake v. Woolf* [1898] 2 Q. B. 426.

A man who makes a contract with his employer to furnish all the material, and do all the work, and to complete certain specific alterations and improvements, to the satisfaction of the defendant, for a fixed and certain sum to be paid to him. *Connors v. Hennessey* (1873) 112 Mass. 96.

A plumber, where he is left to exercise his own discretion. *Burns v. McDonald* (1894) 57 Mo. App. 699.

A plumber who has a right to send, and does send, a subordinate to do the stipulated work. *Bennett v. Truebody* (1885) 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329.

One who contracts to do the plaster work for a person who has taken a contract to execute certain alterations in a building. *M'Lean v. Russell* (1850) 12 Sc. Sess. Cas. 2d series, 887, 22 Sc. Jur. 394.

A scaffold builder employed by a painter to construct a scaffold for the use of his servants. *Devlin v. Smith* (1882) 89 N. Y. 470, 42 Am. Rep. 311.

See also *Welfare v. London, B. & S. C. R. Co.* (1869) L. R. 4 Q. B. 696, 38 L. J. Q. B. N. S. 241, 20 L. T. N. S. 743, 17 Week. Rep. 1065, cited, *supra*, V.

A mere contract to do certain work in repairing a house for a stipulated price, does not create the relation of master and servant so as to relieve the personal representative of the one for whom the work was done, from liability for work performed after his death, even though the house is specifically devised and the personal representative has no interest therein. *Russell v. Buckhout* (1895) 87 Hun, 46, 34 N. Y. Supp. 271. *Dykman, J.*, dissented on the ground that the contract was dissolved by the death of the contractor (*Lacy v. Getman* [1890] 119 N. Y. 112, 6 L. R. A. 728, 16 Am. St. Rep. 806, 23 N. E. 452), and that the administratrix was liable only for the amount due when that death occurred.

e. Architects.

As building operations are ordinarily conducted, the architect acts as the agent and representative of the person for whom the work is being done. See, for example, *Campbell v. Lunsford* (1887) 83 Ala. 512, 3 So. 522; *Schwartz v. Gilmore* (1867) 45 Ill. 455, 92 Am. Dec. 227; *Slater v. Mersereau* (1876) 64 N. Y. 138; *Ridgeway v. Downing Co.* (1900) 109 Ga. 591, 34 S. E. 1028; *School District v. Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627. But he is an independent contractor if he merely prepares the plans and specifications for the work, and does not afterwards supervise its execution on behalf of his employer. *Pitcher v. Lennon* (1896) 12 App. Div. 356, 42 N. Y. Supp. 156; *Burke v. Ireland* (1901) 166 N. Y. 305, 59 N. E. 914. In the judgment of the supreme court in the last-cited case (see 30

(1898) 26 App. Div. 487, 50 N. Y. Supp. 369; (1900) 47 App. Div. 428, 62 N. Y. Supp. 453; the architect was assumed to be the agent of the owner, but it was held that he had exceeded his authority in modifying the plans and specifications without the assent of the owner. Still more is he to be considered an independent contractor, where he undertakes to execute the entire work as well as to draw up the necessary plans. *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345.

1. Persons doing work on bridges.

That the negligence of a company employed to replace a broken shoe on a city bridge was not imputable to the city was held to be a necessary inference, where the only evidence of any action on the part of the defendant was, that one of its aldermen, who was a member of its street committee, directed the company to have new and heavier shoes cast and placed under the bridge; and it was not shown that any directions were given as to the manner in which the work was to be done, as to the persons who should be employed to do it, as to the means to be used in removing the old shoes and replacing them with the new ones, or as to the manner in which the bridge should be supported while this was done. *Wood v. Watertown* (1890) 58 Hun, 298, 11 N. Y. Supp. 864.

This case was recently cited in *Scanlon v. Watertown* (1897) 14 App. Div. 1, 43 N. Y. Supp. 618, as being a correct application of the general rule.

g. Persons engaged in other kinds of construction work.

The independence of the contract is inferable, where the person employed undertakes to perform the work of diverting a creek at a certain price, according to the employer's plans and to the satisfaction of his engineer; to provide machinery and materials, pay wages, give personal attendance, recompense landowners for injuries done by his neglect or mismanagement, and indemnify the employee from action in respect thereof. *Allen v. Hayward* (1845) 7 Q. B. 960, 4 Eng. Ry. & C. Cas. 104, 15 L. J. Q. B. N. S. 99, 10 Jur. 92.

A person who agrees to construct a dam by such methods as he may think proper or expedient is an independent contractor. *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345.

One who contracts with a city to excavate a reservoir and do the preliminary work, using his own men, teams, and material, and adopting his own method of doing the work, without interference or the right to interfere on the part of the city, is an independent contractor. *Groesbeck v. Pinson* (1899) 21 Tex. Civ. App. 44, 50 S. W. 620.

h. Persons undertaking various kinds of work on highways.

A contractor who has undertaken to excavate a sewer for a city, and, though directed by the city officers to perform it, is doing it with workmen employed by himself, without interference from the city officers as to the manner or details of the work, is an independent contractor. *Charlock v. Freel* (1891) 125 N. Y. 357, 26 N. E. 262, Affirming (1888) 50 Hun, 395, 3 N. Y. Supp. 226.

A, having obtained a license from the borough authorities to lay a water-pipe in a street, con-

tracted with B, for a specified sum, to dig a ditch in a borough street, and lay the pipe, A to furnish the pipe and boxing, but to have no further connection with the work. In an action against A to recover damages for an injury caused by B's negligence in leaving the ditch unprotected, it was held that B was an independent contractor. *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113.

A person who agrees to provide the materials and construct a sidewalk in front of the premises of an employer, who retains no power to direct the manner or means of doing the work, is an independent contractor. *Independence v. Slack* (1895) 134 Mo. 66, 34 S. W. 1094.

That the contract was an independent one was held in a case where a firm engaged in work of that description agreed to lay a granite pavement for the defendant. *Schweickhardt v. St. Louis* (1876) 2 Mo. App. 571.

A person who undertakes for a specific sum to repair a highway is an independent contractor. *Shute v. Princeton Twp.* (1894) 58 Minn. 337, 59 N. W. 1050.

The plaintiff, a stone mason, contracted with the selectmen of the town of Vernon to widen a certain highway in the town, by removing out of it a certain ledge of rocks, for which services they stipulated to pay him a certain amount of money. The stones were to be his except so far as they might be wanted to build and complete a wall by the wayside. A few months afterwards the plaintiff and his men got out a quantity of the stones by blasting. These stones being in his way and obstructing the work, he found it necessary to remove them, for which purpose, as well as to get a job as a mason, he proposed to the defendants, who owned a mill close by, to build for them a dam and breakwater, with the stones on hand and such as he might subsequently blast out. To this proposition they assented, and as a compensation agreed to pay him for his own services and the work of his men, by the day, computing their time while getting out, carting, and laying the stone. The defendants were to furnish the powder and cement, and a derrick at the place of the dam. While the execution of the plaintiff's contract with the selectmen was in progress one of his men, by an overcharge, blew a rock of some 2 tons upon the mill of one S, crushing in the roof and doing other damage. For this the plaintiff has been sued and compelled to pay damages, and now seeks indemnity from the defendants, insisting that he and his workmen were hired servants and agents of the defendants. But the court said: "We are not able to see anything to justify such a claim. There clearly was not the relation of master and servant between the plaintiff and the defendants. The defendants had no control or supervision over the plaintiff's work in blasting this ledge of rocks under the contract with the town of Vernon, and they could not have interfered or arrested the progress of the work had they desired to do so. The plaintiff himself had the sole control and oversight of the work—hired his own men, as many as he pleased, set them to work as he pleased, and dismissed them if they did not serve him with fidelity. He was in no degree a hired servant of anybody. He had bound himself to remove the ledge, and to the defendants he had bound himself that the stones should be laid in their dam and breakwater. In getting them out he could order the blasting here or there, one day or the next, in greater

or lesser quantities, with powder or otherwise, according to his own judgment and interest, if he but got the road cleared in time, subject to no other man's will or direction. The fact that the plaintiff was to be paid by the day makes no difference, we think, though in a case of doubt this circumstance would have weight. On the whole we see nothing to distinguish this case from the ordinary case of a mechanic or master builder who agrees to furnish materials and build a house, and who is to be paid for his work by the day instead of receiving a gross sum for the job; and such a contractor is in no proper sense a hired servant or agent." *Corbin v. American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63.

1. *Persons operating mines.*

The lessees of a shale-pit had contracted with a separate party to work the shale for them on being paid a contract price per ton on the output delivered at the pit-head. This separate party was to supply necessary furnishings, maintain the machinery and fittings, etc., and pay the wages of the men employed. He was also to be liable for all accidents, and he was to satisfy himself before commencing to work that the shaft and all fittings were safe, and it was specially contracted that he and the lessees were not to interfere with one another's workmen. Held, that the party so agreeing to work the shale was a separate contractor, and that the lessees were not liable for injury sustained in his service by workmen, employed by him,—that they were his servants, and could look to him alone for reparation. *Grant v. Shaw* (1872) 9 Scot. L. R. 234.

The owners of a gold mine are not liable in a case where a servant in the employ of a person who has taken a contract for the stoking is injured by the negligence of the servants of a person to whom a contract for the trucking and hauling has been let. *Martin v. Sunlight Gold Min. Co.* (1896) 17 New South Wales L. R. 364.

One who contracts with a mining company to break down rock and ore for a certain distance to disclose the vein, at a stipulated price per foot, the company to furnish steam drill and keep the drift clear of rock, as the contractor broke it down, was held to be an independent contractor. *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100.

The inference that an injured person was the servant of the defendants cannot legitimately be drawn from evidence to the effect that his immediate employer had agreed to get ore in the defendants' mine, and deliver it to them upon cars furnished by them at a specified price; that he was to furnish his own labor, tools, and other appliances for executing the engagement, and the means and details of its execution were subject to his own exclusive control and management; that he was to select and employ his own assistants, as many as he chose, and pay them such wages as he saw fit to agree to pay; and that with these means the defendants had no concern, and had not reserved any authority or control over them. *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103. (Question was whether the deceased was a servant in such a sense that recovery could be had for his death under the provisions of the employers' liability act of Alabama.)

A workman in a mine cannot recover for injuries received by reason of negligence in its operation, where the evidence is undisputed that,

at the time of the accident, and for some months prior thereto, the mine was in the exclusive possession and control of an independent contractor; that he employed and paid the workmen; that he had entire charge of and authority over the mine; and that he received a fixed rate per ton, from the owner, for the coal taken therefrom, when the same was delivered to him. *Smith v. Belshaw* (1891) 89 Cal. 427, 26 Pac. 834.

Such contracts as the above are, it will be observed, virtually leases by which the contractor agrees to do certain work on the demised premises.

j. *Persons operating quarries.*

An independent contract is shown to have been entered into, where the complaint alleges that the owner of a limestone quarry permitted the employer of the injured person to operate it under a contract by which the latter was to furnish limestone by the cask. *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663, *Affirming* (1899) 93 Me. 17, 44 Atl. 121.

k. *Persons operating mills.*

In *Burbank v. Bethel Steam Mill Co.* (1883) 75 Me. 373, 46 Am. Rep. 400, where the plaintiff's barn was destroyed by fire communicated from a mill which, while in the possession of a contractor, was set on fire by the furnace of the steam engine, the court laid it down that if the steam engine and mill were not in fact a nuisance, when they were delivered by the defendant to be used in the performance of the contract, and the plaintiff's injury was occasioned by the negligence of the contractor in not keeping them in proper repair, the defendant was not liable.

l. *Master tradesmen and craftsmen.*

A master rigger employed by the owner of a sugar refinery to bring certain heavy machinery from a railroad train into the refinery was held to be an independent contractor, as he had the exclusive direction and control of the manner in which the work was to be done. *Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 609.

In another case the question whether a master rigger employed to do certain work on a building, who hired his own men and furnished his own tools, and received a specified price *per diem* for the services of his men and the use of his tools, was an independent contractor or a servant, was not specifically decided, as the defendant was held not to be liable under either theory. *Harkins v. Standard Sugar Refinery* (1877) 122 Mass. 400.

On the ground that the evidence showed that the person employed to make repairs on the roof of a church was left entirely free to do the work as he pleased, it has been held that a person carrying on the business of slating roofs, and having a shop of his own and men constantly in his employ to execute the orders received by him, was an independent contractor. *McCarthy v. Second Parish* (1880) 71 Me. 318, 36 Am. Rep. 320.

m. *Persons who furnish teams and men to do various kinds of work.*

The independence of the contract was not disputed in a case where the evidence was that the person by whose negligence in hauling timber the

plaintiff was injured, was not in the defendant's general service, but was engaged for the particular piece of work in question, and brought his own horse for it. *Dalton v. Bachelor* (1857) 1 *Fost. & F.* 15. Persons who undertake to haul the boats of a coal company on a canal, with their own captains, hands, and horses, and are paid a specified price for every ton of coal on the boats, are independent contractors with relation to the company. *Blattenberger v. Little Schuykill Nav. R. & Coal Co.* (1839) 2 *Miles (Pa.)* 309.

Where the owner of a sawmill makes an agreement with the owner of teams that the latter shall haul to the mill and place on rollways logs taken from a lot from which they have jointly contracted to cut, saw, and deliver the standing timber, the owner of the teams is an independent contractor in hauling the logs. The court observed that the nature of the relation depended upon the character of the arrangements between the defendant and the party hauling the logs, not upon the character of the agreement between them and the landowner.

That the negligent employee was an independent contractor is a necessary inference, where the contract, as proved, only shows that the defendant agreed with a man engaged in an independent employment to haul sand for it, and to pay him for such service a stipulated price per load, and that no control over him in reference to the mode and manner he was to execute the work he agreed to perform was reserved in the contract; and there is also testimony submitted, to the effect that there was no stipulation with the employee as to how he should dig the sand. *Fink v. Missouri Furnace Co.* (1884) 82 *Mo.* 276, 52 *Am. Rep.* 376.

n. Draymen, truckmen, carters, etc.

The owner of a team and his drivers occupy the position of independent contractor toward a person whose goods are hauled by the teams under an agreed price per week, and a proportionately less price if both teams work less than a full week, where the owner has the exclusive care, control, and management of the teams, and all details as to route and speed are left to such owner and his drivers. *Wadsworth Howland Co. v. Foster* (1893) 50 *Ill. App.* 513, *Affirmed in* (1897) 168 *Ill.* 514, 48 *N. E.* 163.

One who does teaming work for a person who merely directs him what to haul and where to, and leaves all details of the work to the employee, is a contractor, not a servant. *McCarthy v. Muir* (1893) 50 *Ill. App.* 510.

The following also, when they are employed to do work at a certain stipulated price, are regarded as independent contractors, unless there is specific evidence that control was exercised over them: A licensed public drayman. *De Forrest v. Wright* (1852) 2 *Mich.* 368. A licensed public carman. *McMullen v. Hoyt* (1867) 2 *Daly*, 271. A truckman. *Riedel v. Moran F. Co.* (1894) 103 *Mich.* 262, 61 *N. W.* 262; *Kueckel v. Ryder* (1900) 54 *App. Div.* 252, 66 *N. Y. Supp.* 522. *Affirmed in* (1902) 170 *N. Y.* 562, 62 *N. E.* 1096. In the last-cited case it was held to be an inference of law that the contract was an independent one, where a truckman employed by merchants to move paper from the second to the fourth floor of a warehouse not belonging to them (such work requiring skill and judgment and being one which the truckman is competent to perform) was given 65 *L. R. A.*

no instructions by the merchants concerning the manner of performance, and employed other men to assist him, paid them for their labor, and sent his bill to the merchants.

The fact that a man engaged by an undertaker to drive a carriage at a funeral was the owner of the carriage and horses which he brought was held to be conclusive proof that he was not the servant of the undertaker. *Boniface v. Relyea* (1868) 6 *Robt.* 397.

The question whether the tortfeasor was an independent contractor or a servant, is for the jury where there is testimony on the one hand that he supplied his own men and horses, and was hired by the hour to do all of defendants' trucking, and, on the other hand, that he was under the control of their foreman and subject to his orders and direction, both as to what to do and how to do it, and that the foreman had authority over his men. *Brophy v. Bartlett* (1888) 1 *Stiv. Ct. App.* 575, *Reversing* (1885) 37 *Hun*, 642.

o. Keepers of livery stables.

A jobmaster who lets out horses and carriages is an independent contractor. *Laugher v. Pointer* (1826) 5 *Barn. & C.* 547, 3 *Dowl. & R.* 550, 4 *L. J. K. B.* 300; *Quarman v. Burnett* (1840) 6 *Mees. & W.* 499, 9 *L. J. Exch. N. S.* 308, 4 *Jur.* 969.

p. Drivers.

In one civil action a licensed driver was held to be a person carrying on a distinct employment, and therefore *prima facie* an independent contractor. *Milligan v. Wedge* (1840) 12 *Ad. & El.* 737, 4 *Ferry & D.* 714, 10 *L. J. Q. B. N. S.* 19.

The same doctrine has also been applied in prosecutions for embezzlement. Thus, where a man employed to drive pigs to a certain place appropriated the proceeds and absconded, it was held that he could not be convicted of larceny, on the theory that he had possession of the animals as the servant of the prosecutor, where the evidence was that, while he was paid the expenses of the cattle, and the customary mode of the remuneration of such employees was by the day, he was a drover by trade, and, according to the general usage with regard to drovers, had the liberty to drive the cattle of any other person. *Reg. v. Hey* (1849) 2 *Car. & K.* 985, 1 *Den. C. C.* 602, *Temple & M.* 209, 3 *Cox. C. C.* 582, 14 *Jur.* 154. To the same effect see *R. v. Siffidge* (1853; *New South Wales*) *Legge's Rep.* 793.

In *Hey's Case*, Lord Wensleydale doubted whether an earlier case (*Rex v. M'Namee* [1832] 1 *Moody. C. C.* 368), in which it had been held that the possession of a drover is the possession of the owner of the cattle driven, although such drover is a "general drover" had been correctly decided—at least if he was paid by the day.

Another case, *Rex v. Hughes* (1832) 1 *Moody. C. C.* 370, in which it was held by all the judges that a drover who had been employed in a single instance to drive two cows to a purchaser had been properly convicted of embezzlement, was distinguished on the ground that it was a prosecution under the statute 7 & 8 *Geo. IV.*, chap. 29, § 47, which declares embezzlement by "a servant, or person employed in the capacity of a servant," to be felony.

As between the owner of cattle and a man carrying on the business of a drover, the relation of master and servant cannot be inferred from the mere fact that the cattle were delivered

to him with a power of sale. *Reg. v. Goodbody* (1838) 8 Car. & P. 665.

q. Persons who undertake various operations connected with the handling of timber.

See also *supra*, VI. m.

A person who agrees to cut standing trees into lumber at a specified price per 1,000 feet, and hires and pays the workmen by whose labor the work is carried out, is an independent contractor. *Knowlton v. Holt* (1891) 67 N. H. 155, 30 Atl. 346.

Testimony to the effect that the negligent person was employed to cut down a certain tree for the sum of \$10, that he employed men to assist, and that they were under his control and paid by him, does not even tend to show that the relation of master and servant existed between him and his employer. *East St. Louis v. Giblin* (1878) 3 Ill. App. 219.

One who agrees to cut timber on another's land, at a certain price, and deliver at the mouth of a specified river, using the employer's dams in driving the logs, if he chooses, is an independent contractor. *Carter v. Berlin Mills Co.* (1876) 58 N. H. 52, 42 Am. Rep. 572.

The relation of master and servant does not exist, where an employer makes a bargain with his employee to cut all the logs the employer had on certain land, and to deliver them to the employer at a place named, the employer having no interest in the running of the logs until they reached the point of delivery, and not rendering any assistance, pecuniary or otherwise, in the cutting or running of the logs. *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209; *Easter v. Hall* (1895) 12 Wash. 160, 40 Pac. 728.

Defendants, or the firms of which some of them were members, severally, cut and placed on the ice in the R river saw-logs, to be floated down the river to their respective mills during the high water in the spring. They or their firms, severally, entered into a written contract with S & D, by which the latter agreed to take the logs, drive them down, and put them in the booms of the respective owners. Other parties also placed logs in the river to be floated down, and employed servants to drive them. It was held that S & D were contractors exercising an independent employment. *Pierrepont v. Lovelless* (1878) 72 N. Y. 211.

Whether a man employed to drive logs on a river was an independent contractor is a question for the jury, where there is evidence tending to prove that he had the full control of the dam and the drive at the time, that he employed all the men and obtained all the supplies, and that the defendants were merely to pay him a compensation for driving their logs. *Carlson v. Stocking* (1895) 91 Wis. 432, 65 N. W. 58.

r. Persons employed to clear land.

A person who undertakes to clear a certain piece of land at a specified price per acre or for the whole tract is an independent contractor. *Black v. Christchurch Finance Co.* [1894] A. C. 48, 63 L. J. P. C. N. S. 32, 6 Reports, 394, 70 L. T. N. S. 77, 58 J. P. 332, *Reversing*, but not on this point (1891) 10 New Zealand L. R. 238; *Threlkeld v. White* (1890) 8 New Zealand L. R. 513; *Wright v. Holbrook* (1872) 52 N. H. 120, 13 Am. Rep. 12. 65 L. R. A.

The relation of employer and independent contractor was held to be inferable, as a matter of law, where the defendant had leased to H certain lands to work on shares, and agreed to pay the latter a specified sum per acre for clearing so much of the land as he should choose to clear. *Ferguson v. Hubbell* (1884) 97 N. Y. 507, 49 Am. Rep. 544. The court said: "He [i. e. the person employed] could perform his contract by carting the wood and brush away from the lot, or by burning it upon the lot. The defendant had no right to interfere in the work. Hammond was to employ his own help, and he could control and direct them, and choose his own time, and the defendant had no right to direct or control him in the manner in which he should do the work. He was, therefore, in no sense the servant of the defendant so that the doctrine of *respondet superior* could apply. The defendant was entitled to the results of his labor, and could enjoy its fruits, but he could not direct the manner in which it should be performed."

s. Persons cultivating land on shares.

Such persons are not servants or agents of their landlords. *Duncan v. Anderson* (1876) 56 Ga. 398. See also *Ferguson v. Hubbell*, cited in *supra* VI. r.

t. Persons engaged in scavenging work.

Persons who undertake to remove in a specified manner the carcasses of all animals that may die within a certain city, but are not under the control of any person or body representing the city, are independent contractors. *Hilsdorf v. St. Louis* (1809) 45 Mo. 94, 100 Am. Dec. 352. Where a certain person contracted with a city to carry all the garbage and refuse collected within it to some point in Lake Michigan, not less than 15 miles from the city and there dump it into the lake, reserving to itself the right to relet the contract in case of "improper or imperfect performance," the person employed was held to be an independent contractor, on the ground that the city had no right to control the mode or manner of doing the work or to fix the precise place where the dumping should be done. *Kuehn v. Milwaukee* (1896) 92 Wis. 263, 65 N. W. 1030.

u. Railway companies operating cars on private lines.

Where the defendant, a mining company, constructed and kept in repair a switch track over which cars were run by a railroad company to haul coal from the defendant's mine, it was held that the relation of the former company to the latter was that of shipper to carrier, not that of master and servant, and that the former was not liable to one of its employees injured by a train running on the switch track. *Coal Run Coal Co. v. Strawn* (1884) 15 Ill. App. 347.

The court, after adverting to the fact that the coal company had given permission to this railroad company to carry over its track, so far and for such purposes as it did, whether by contract or mere license, and that none of the witnesses had stated any fact tending to prove that appellant had in law or pretended to exercise any control over or interference with the owner in running and operating its trains, proceeded thus: "It handled only coal cars, and them only so far as it was necessary in order to load them."

On the other hand, it fairly appears that as to the manner of operating and managing the train in all its details, in getting these cars to and from the place where they were loaded, the railroad company acted independently, with its own machinery and by its own servants. All of the train hands were in its employ. Downs, its yardmaster, gave the signal to move the train that ran upon the deceased, and its engineer obeyed it, both acting for said company in the performance of its proper independent contract work, which was to carry the coal of the appellant."

v. Persons assisting in public entertainments.

A company which contracts with a city to purchase and set off fireworks for a designated sum to be paid for the entire service stands in the relation of an independent contractor in erecting a scaffolding necessary to the display of the fireworks. *Heidenwag v. Philadelphia* (1895) 108 Pa. 72, 31 Atl. 1063.

A balloonist at a pleasure resort is an independent contractor where his agreement provides that he is to furnish and pay for all the material and appliances used in making the ascensions, and in addition thereto is to employ and pay all of the men required to conduct the ascensions, and that the owner of the resort is to have no part to perform except to furnish the field, pay the price, and name the hour for the ascension. *Smith v. Benick* (1898) 87 Md. 610. 42 L. R. A. 277, 41 Atl. 56.

w. Persons conducting departments in stores.

A contract by plaintiff to conduct a "department" in defendant's store does not create the relation of employer and employee so as to render the former's absence without the latter's consent a breach, where it treats the plaintiff as the principal of the department, makes him the responsible purchaser of the merchandise purchased for it, leaving the defendant merely a guarantor, charges him with store rent and office expenses and with one half of all losses arising from bad debts, reserves to the defendant, as profits, merely a commission upon net sales and interest upon the goods purchased for the department, and requires him to render accounts to the plaintiff. *Lord v. Spielmann* (1898) 29 App. Div. 292, 51 N. Y. Supp. 534.

x. Stevedores.

In several cases it has been laid down, or assumed, that a master stevedore who agrees, according to the usual practice, to load or unload a ship for a gross sum, and for this purpose to use his own men and appliances is, as matter of law, an independent contractor, where no evidence is introduced which tends to show that he and his men worked under the control and direction of the owner of the ship. *Linton v. Smith* (1857) 8 Gray, 147; *Sweeny v. Murphy* (1880) 32 La. Ann. 628; *Riley v. State Line S. S. Co.* (1877) 29 La. Ann. 791, 29 Am. Rep. 349; *Rankin v. Merchants' & M. Transp. Co.* (1884) 78 Ga. 230, 54 Am. Rep. 874.

In *Murray v. Currie* (1870) L. R. 6 C. P. 26, 40 L. J. C. P. N. S. 26, 23 L. T. N. S. 557, 19 Week. Rep. 104, Bovill, Ch. J., said: "Kennedy, the stevedore, undertook to execute the work of unloading the Sutherland, and for that purpose a steam winch belonging to the ship was placed at his disposal. The work of unloading was done by Kennedy under a special contract. He

was acting on his own behalf, and did not in any sense stand in the relation of servant to the defendant. He had entire control over the work, and employed such persons as he thought proper to act under him." The language of Willes, J., is to the same effect: "I am of the same opinion. It is to be observed that this is not a question arising between ship-owners and charterer. The employment of stevedores has grown out of the duty of the owner to load and unload the ship. This duty used formerly to be executed by the crew; but, in dealing with large cargoes, the exigencies of modern commerce have created a necessity for the employment of persons skilled in the particular work of stowing cargo. The stevedores, however, are not the servants of the owner of the ship; but they are persons having a special employment, with entire control over the men employed in the work of loading and unloading. They are altogether independent of the master or owner. In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants. They are not put in his place to do an act which he intended to do for himself."

In another case a ship was being discharged of a cargo of sulphur, which was received into lighters of the plaintiff through the "shoot" referred to, which was erected by the men who actually did the work. The defendants were paid by the merchant for discharging his ship; and the case for the plaintiff was that it was to be inferred from this fact that the men who did the work and erected the "shoot" were in the employ of the defendants; but Martin, B., held that this was not a legitimate inference, whether of law or fact; and that the above fact was not sufficient evidence to support it, for the work might have been done by men under some subcontract. Upon its being shown by the evidence of the stevedore, who was called as a witness, that the work had actually been done on this footing a nonsuit was directed. *Woodward v. Peto* (1862) 3 Fost. & F. 389.

In Pennsylvania, however, the character of the relation between a stevedore and his employer has been held to be one for the jury in two cases where the question was whether the crew of the ship and the stevedore's workmen were coservants. *Hass v. Philadelphia & S. Mail S. S. Co.* (1879) 88 Pa. 269, 32 Am. Rep. 462, following *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2. In the first cited of these cases a steamship company made a special contract with a stevedore to unload and load its vessels. Neither the master of the vessel nor his crew had anything to do with the work, which was in the exclusive charge of the stevedore, who employed his own men and used his own machinery and cargo planks. A seaman on one of the company's steamers, while on duty as a night watchman, having stepped on one of these planks, which tilted, he was thrown overboard and seriously injured. He brought suit against the company for damages which he alleged were occasioned by the negligence of the company's servants. Held, that the questions whether the stevedore was an agent of the company or an independent contractor, and whether the plaintiff was a fellow servant in a common employment with the stevedore and his servants, were properly submitted to the jury.

y. Construction and repair of ships.

That a "lumper" was an independent contract-

or was held to be a necessary deduction from undisputed evidence that he employed and paid a gang of mechanics, and that by the terms of his agreement he was to erect a specified scaffold, to grave the vessel, put on the felt, and run the metal, and was to receive 4 cents for every sheet that went on the ship. *Butler v. Townsend* (1891) 120 N. Y. 105, 26 N. E. 1017.

z. Transfer agents doing business on railway trains.

It cannot be said as a matter of law that a member of a firm of transfer agents, permitted by a railroad company to check baggage on its trains, is an employee of the railroad company, within the meaning of the Kentucky statute relating to the recovery of damages in case of a fatal accident. *Mefford v. Louisville & N. R. Co.* (1892) 14 Ky. L. Rep. 327, 20 S. W. 263.

zz. Contractors not within purview of statutes relating to servants only.

On the ground that an information laid under the same statute showed that the plaintiff and defendant "stood in the situation of contracting parties" for the making of the road in question, it was held that a charge to the effect that the plaintiff had contracted with B to build a wall for a certain price, within a certain time, and, having performed part of the work, refused to complete it, was insufficient to sustain a conviction. *Lancaster v. Greaves* (1829) 9 Barn. & C. 628, 7 L. J. Mag. Cas. 116. Bayley, J., said: There is a very plain distinction between becoming the servant of an individual, and contracting to do certain specific work. The same person may contract to do work for many others, and cannot, with any propriety, be said to have contracted to serve each of them.

This subdivision may be appropriately concluded with a citation of the cases which illustrate the principle that contractors are neither entitled to the benefits conferred, nor subject to the burdens imposed, by legislation which, upon a reasonable construction of its provisions, must be taken to be appreciable only to servants.

A contract to weave certain goods at the house of the weaver is not a contract to serve, within Geo. IV. chap. 34, so as to give jurisdiction to a magistrate to commit the weaver, for neglecting his work after commencing upon the same. *Hardy v. Ryle* (1820) 4 Mann. & R. 295, 9 Barn. & C. 603, 7 L. J. Mag. Cas. 118 (holding that a conviction could not be sustained which was based upon an information charging that the employee had "contracted and agreed" to weave, etc.).

In a Canadian case it was held that a medical officer was not within the purview of an act by which the salaries of "servants" and "employees" were exempted from attachment (37 Vict. chap. 13, § 1). *Macfie v. Hutchinson* (1887) 12 Ont. Pr. Rep. 167. O'Connor and Armour, JJ., were of opinion that, upon the true construction of the statutes under which the defendant was appointed, his duty was to exercise his professional and scientific skill and judgment independently, free from the control or direction of any other person; and that he was therefore not a "servant," nor a clerk, as such a position implies control and direction. They also considered that he was not an "employee," since he was appointed, not employed, to perform the functions of his office. *Wilson, Ch. J.*, thought that he was embraced within 65 L. R. A.

the word "employee" but conceded that he was not a "servant."

A person who agrees to manufacture an indefinite or specified quantity of a certain article for which he is to be paid according to the amount produced, and who is not bound by his contract to do any part of the work personally, is not within the scope of the English truck act. See *Ingram v. Barnes* (1857) 7 El. & Bl. 115, Affirmed in 7 El. & Bl. 132, 26 L. J. Q. B. N. S. 319, 3 Jur. N. S. 861, 5 Week. Rep. 726, and the other cases cited in *infra*, XII. b.

In *Sleeman v. Barrett* (1864) 2 Hurlst. & C. 934, 33 L. J. Exch. N. S. 153, 10 Jur. N. S. 476, 9 L. T. N. S. 834, 12 Week. Rep. 411, it was held that this act was not applicable to a "butty collier," i. e., a man who contracts for the digging of coal by the day, the ton, or the piece, and employs others to assist him.

On the other hand, such a person has been held to be a "servant" of the mine-owner within the meaning of the embezzlement statutes. *Reg. v. Thomas* (1853) 6 Cox, C. C. 403.

VII. *Liability arising from employment of tug.*

a. *English doctrine as to relation between owner of tug and its tow.*

In England the courts have taken the position that "the tug is in the service of the tow; the tow is answerable for the negligence of her servant." *Union S. S. Co. v. The Aracan* (1874) L. R. 6 P. C. 127, 43 L. J. Prob. N. S. 30, 31 L. T. N. S. 42, 22 Week. Rep. 927, 2 Asp. Mar. L. Cas. 350.

In one case it was argued specifically that the relation of the tug owner to the tow owner was that of an independent contractor, and therefore that the principle of the case of *Quarman v. Burnett* (1840) 6 Mees. & W. 499, 9 L. J. Exch. N. S. 308, 4 Jur. 969, was applicable, so that the tow owner and his vessel would not be responsible for the negligence of the tug owner and his servants. The *Niobe* (1888) L. R. 13 Prob. Div. 55, 57 L. J. Prob. N. S. 33, 59 L. T. N. S. 257, 86 Week. Rep. 812, 6 Asp. Mar. L. Cas. 300. In rejecting this contention, *Hannen, P.*, said: "It appears to me that the authorities clearly establish that the tow has, under the ordinary contract of towage, control over the tug. The tug and tow are engaged in a common undertaking, of which the general management and command belongs to the tow, and in order that she should efficiently execute this command it is necessary that she should have a good lookout, and should not merely allow herself to be drawn, or the tug to go, in a course which will cause damage to another vessel. As Dr. Lushington has pointed out, it is essential to the safety of vessels being towed that there should not be a divided command, and convenience has established that the undivided authority shall belong to the tow. The pilot, if there be one, takes his station on his tow, and the officers of the tow are usually, as in the present case, of a higher class and better able to direct the navigation than those of the tug. The practice which experience has dictated has received the sanction of many legal decisions, and has been recognized in the House of Lords, in *Spaight v. Tedcastle* (1881) L. R. 6 App. Cas. 217, 44 L. T. N. S. 580, 29 Week. Rep. 761, 4 Asp. Mar. L. Cas. 406, where Lord Blackburn says that it is the duty of the tug to carry out the directions re-

celved from the ship, and in the privy council, in *The American* (1874) L. R. 6 P. C. 127, 43 L. J. Prob. N. S. 30, 31 L. T. N. S. 42, 22 Week. Rep. 927, 2 Asp. Mar. L. Cas. 350. Although in this latter case it was held from the special circumstances that the command belonged to the tug, and not to the tow, I may observe that it is clear, from the evidence in this case, that it was perfectly well understood by the captains of the tug and tow that the latter had the control of their movements, and that it was the duty of those navigating the tow to keep a lookout and check the tug if it were going wrong. But it was argued that, whatever the relation of the tug and tow may generally be, they were reversed in this case by special circumstances: First, by the contract of towage between the parties. But there is nothing in the contract but a bare agreement to tow. Secondly, by the fact that the towage was at sea with a long scope of hawser, and that this gives rise to different duties on the part of the two vessels to those which exist on a river towage with a shorter scope of cable. I agree that in a towage at sea with a long scope it is more difficult for the tow to communicate with the tug. If it had been shown that the *Flying Serpent* had, by some sudden maneuver, which those on board the *Niobe* could not control, brought about the collision, I should have held the *Niobe* blameless. Thus, in *The Stormcock*, 4 Asp. Mar. L. Cas. 410, I held the tug to be responsible, because the tug, which was originally steering a safe course, so suddenly departed from it that the tow could not check her or follow without striking another vessel. I think that the same result would follow in a river towage in like circumstances. But in the present case the action of the *Flying Serpent* was not sudden, and might have been prevented by those on board the *Niobe*, if they had done their duty."

That some at least of the English judges are not entirely satisfied with the doctrine thus established is indicated by the following passage in an opinion delivered by Hannen, J.: "As to the liability of the tow, it seems to have been admitted by both the learned counsel that the tow was responsible for the negligence of the tug. I confess I have been somewhat astonished to find to what extent that principle has been carried by my learned predecessors. But for those decisions, apparently based, according to Dr. Lushington, on considerations of expediency, that there should not be a divided command, I myself should have been inclined to think that the decisions of the American courts establish a rule more in accordance with my own ideas of justice; that is, the particular circumstances should be looked at in each case to see whether the tug or the tow, or both, are liable. But I accept the decisions of Dr. Lushington, treating the tug as the agent or servant of the tow." *The Stormcock* (1885) 5 Asp. Mar. L. Cas. 470, 53 L. T. N. S. 53.

This doctrine is based on the principle that the "motive power" is in the tug, and the "governing power" in the ship towed. *The Cleadon* (1860) 14 Moore, P. C. C. 97, Lush. Adm. Cas. 158, 4 L. T. N. S. 157.

The situation thus contemplated is presumed to exist, unless the evidence discloses conditions different from those which are ordinarily incident to the performance of such contracts. Such a case was held to be presented where a steamer had taken in tow another steamer

which had been disabled on the high seas, and, so far as appeared, the "governing power" lay wholly with the tug. *Union S. S. Co. v. The Aracan* (1874) L. R. 6 P. C. 127, 43 L. J. Prob. N. S. 30, 31 L. T. N. S. 42, 22 Week. Rep. 927, 2 Asp. Mar. L. Cas. 350.

The tug and the tow are sometimes said to constitute together one vessel in the intendment of law. *The Cleadon* (1860) 14 Moore, P. C. C. 97, Lush. Adm. Cas. 158, 4 L. T. N. S. 157.

But this doctrine of identification cannot be invoked for the purpose of enabling the owner of a tow which is in charge of a licensed pilot to escape liability for the negligence of the crew of the tug, on the ground that the employment of the pilot was compulsory. The exemption accorded in cases where the employment is of that character is not applicable to the tug as well as the tow.

"The root of the exemption in the case of compulsory pilotage is that the pilot is not the servant of the owner of the towed ship, but a person forced upon him by the statute; but the relation of the owner of the ship to the tug is very different. The tug is his servant, voluntarily taken and employed by him for the occasion. The law implies, when the tug is employed, a contract between the owner or master of the tug and the owner of the ship to the effect that the tug will obey the directions of the shipowner and act as his servant; but this contract does not affect third parties, and the principle which exonerates the ship in the case of the pilot does not apply to the tug. It has been said, indeed, in various cases, that the tug and the vessel she has in tow are to be regarded as one vessel; but this rule has only been laid down for the purpose of rendering a ship in tow subject to the rules of navigation applicable to steamers; in that sense only can they be treated as one vessel. The master of the tug has a separate contract and a separate responsibility from the pilot. In one sentence, it is by the exercise of free will that the ship takes the tug; by compulsion of law that she takes the pilot." *The Mary* (1879) L. R. 5 Prob. Div. 14, 48 L. J. Prob. N. S. 66, 41 L. T. N. S. 351, 28 Week. Rep. 95.

Where a ship in charge of a pilot whose employment is compulsory is being towed by a steam tug, and the steam tug, without waiting for orders from the pilot, suddenly adopts a wrong maneuver, and so causes the ship to come into collision, the owners of the ship are responsible. *The Siquasi* (1879) L. R. 5 Prob. Div. 241, 50 L. J. Prob. N. S. 5, 43 L. T. N. S. 768, 4 Asp. Mar. L. Cas. 383.

b. *American doctrine.*

In America the owner of a tug is regarded as being, under ordinary circumstances, an independent contractor, whose negligence is not imputable to the owner of the tow.

In an early Massachusetts case it was held that, as the owner of a steamboat engaged in towing vessels up and down a river for a certain toll or hire was following a trade which was as much a public and distinct employment as that of freighting or carrying passengers, the owner of a ship which was being towed was not liable for a collision caused by the negligence of the crew of the steamboat. *Sproul v. Hemmingway* (1833) 14 Pick. 1, 25 Am. Dec. 350.

The relation of a towing company owning a tug employed to tow a canal boat by a charterer of such boat, to such charterer, is that of an independent contractor, where such company is engaged in the business of towing. *McLoughlin v. New York Lighterage & Transp. Co.* (1894) 7 Misc. 119, 27 N. Y. Supp. 248.

In the following passage from the judgment of the Supreme Court of the United States in *Sturgis v. Boyer* (1860) 24 How. 110, 18 L. ed. 591, the nonliability of the owners of the tow is deduced from the fact that the crew are not their servants; but this fact itself is manifestly an inference from the assumed ultimate fact, that the owners of the tug are, under ordinary circumstances, independent contractors: "The only remaining question of any importance is whether the ship and the steam tug are both liable for the consequences of the collision; or, if not, which of the two ought to be held responsible for the damage sustained by the libellants. Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as, when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as, when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessel from one point to another, and both vessels are exclusively under the control, direction, and management of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of principal. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, 65 L. R. A.

properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation. Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care, or skill on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel; and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation."

In a later case the same court remarked that the effect of this decision is to charge the tug with the sole responsibility, "where the tug, under the charge of her own master and crew, undertakes to transport another vessel from one point to another, which, for the time being, has neither her master nor crew on board, as in that case her officers and crew direct and control the navigation of both vessels." *The Mabey & Cooper* (1871) 14 Wall. 204, 20 L. ed. 881.

Two years later the difference between the English and American doctrines was thus discussed in one of the Federal circuit courts: "The simple rule of the English law is not capable of application in this country. In the first place, the usual course of business here is for the tugboat to take the actual charge of the navigation, and whatever faults are committed are usually by her officers or crew. Besides this, a very considerable part of the towing is done on the great rivers, such as the Hudson and the Mississippi, where the tow often consists of many vessels belonging to different owners. In some of the reported cases there have been thirty or more barges or canal boats in tow of a single steamer, and, of course, it cannot be that they are all principals. This difference of trade has brought about a different mode of regarding the responsibility of the parties. . . . It has come to be the general practice in this country to consider the tug responsible, unless it can be proved that the actual fault was in the navigation of the tow." *The*

Belknap (1873) 2 Low. Dec. 281, Fed. Cas. No. 1,244.

This passage was apparently in the mind of the court in *Union S. S. Co. v. The Aracan* (1874) L. R. 6 P. C. 127, 43 L. J. Prob. N. S. 30, 31 L. T. N. S. 42, 22 Week. Rep. 927, 2 Asp. Mar. L. Cas. 350, when it explained as follows the rationale of the American doctrine: "It appears that, in the large American rivers and lakes, it is usual for a tug, which is spoken of as a public vessel, to take a number of small vessels in tow, some alongside of her, some astern. She assigns to each of these vessels its place, and they are under her direction. Under these circumstances, the American courts have held that a vessel towed is not liable for the negligence of the tug, because the 'governing power' is in the tug, not in her." The passage itself, however, as well as the decisions cited above, show that the reason thus emphasized is at most only a co-ordinate one, and that the difference between the doctrines which prevail in the two countries is due to the fact that diverse theories are entertained by the courts as to the ordinary nature of the relation between the owners of the tug and her tow.

The decisions above cited override the effect of an earlier one, *Smith v. Creole* (1853) 2 Wall. Jr. 485, Fed. Cas. No. 13,033, in which the English doctrine was adopted with respect to vessels towed in and out of harbors, and the nonliability of the owner of the tow was restricted to cases where canal boats, or other like vessels, are towed by steamboats. The theory of the court with regard to vessels of the former description was that the tug "in the exercise of its physical power is bound to obey the orders of the master or pilot who has command or control of the ship."

c. Liability of harbor commissioners.

The relation which a board of harbor commissioners bears to persons who undertake to furnish tugs for the purpose of towing ships in and out of the harbors which they control is the same as that which an employer ordinarily bears to an independent contractor.

By an act for improving and maintaining a harbor, commissioners were empowered to build or provide steam tugs for towing vessels into or out of the harbor, and to receive for the use of such vessels such reasonable compensation as they should fix. The commissioners entered into an arrangement with the proprietors of steam vessels to perform this duty for them at certain rates of charge; the commissioners paying them in addition a sum annually, and the vessels being placed under the direction and control of the harbor master. A vessel having sustained damage in consequence of the negligence and want of skill of the master and crew of a tug, while being towed into the harbor, the owner brought an action in a county court against the commissioners, and under the direction of the judge recovered a verdict. The court, on appeal, set aside the verdict, holding that the decision of the judge could not, upon any "inference which could be legitimately drawn from the facts" before him, be correct in point of law. *Cuthbertson v. Parsons* (1852) 12 C. B. 304, 16 Jur. 860, 21 L. J. C. P. N. S. 165.

VIII. Liability arising out of certain other contracts of an independent nature.

So far as regards the nonliability of the contractor

for the torts of the contractor, the judicial situation is essentially the same as that which is exemplified by the situations so far cited, where the relations of the parties are fixed by a contract which is not one of employment, but which contemplates as one of its incidents the performance of a given piece of work, or the carrying on of certain continuous operations. To this category belong leases of railways, which are demised with a view to their being kept up as going concerns. In all such cases the general rule (see *Woodfall, Land. & T.* pp. 793, *et seq.*), that the lessor is not liable for the torts of his lessee, produces the same results as if the position were considered with direct reference to the fact that the contract is in effect one for the performance of work by a person not in the service of the contractor.

In *Harper v. Newport News & M. Valley R. Co.* (1890) 90 Ky. 359, 14 S. W. 346, the lessor company was held not to be liable, where a man was run over owing to negligence of servants of the lessee company. For the rule in cases where the right of recovery depends on the validity of the lease, see VI., c. 2, of *note* to *Anderson v. Fleming*, 66 L. R. A. —, on liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer.

The above remark is applicable to leases of mines. *Samuelson v. Cleveland Iron Min. Co.* (1882) 40 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499. It is also applicable to leases of mills: It has been held that the lessees of mills in possession and control, and operating them, cannot be held to be "in the employ" of the owner and lessor, nor can the agent of the owner and lessor be held as the "owner" or "occupant" of the mills, under the Maine statute 1868, chap. 448, for throwing slabs and refuse into Penobscot river. *State v. Coe* (1881) 72 Me. 456.

It likewise applies to ferries: *Duncan v. Magistrates of Aberdeen* (1877; Ct. of Sess.) 14 Scot. L. R. 603; *Bowyer v. Anderson* (1831) 2 Leigh, 550; *Blackwell v. Wiswall* (1855) 24 Barb. 335 (Affirmed on appeal, see note at end of this report); *Norton v. Wiswall* (1858) 26 Barb. 618, cited in *Crusselle v. Pugh* (1881) 67 Ga. 430, 44 Am. Rep. 724, in support of the general rule that a lessor is not liable to a servant of the lessee for damages resulting from the negligence of the latter, unless some duty remained upon the lessor from a failure to perform which the injury arose.

In *Felton v. Deall* (1850) 22 Vt. 170, 54 Am. Dec. 61, the legislature of this [New York] state had granted to Deall the right, for a specified time, to maintain and use a ferry across Lake Champlain. Having established the ferry, the licensee entered into a contract with one H, by which he was to keep and manage the ferry, at his own expense of labor, for one year. The expenses of repairs were to be equally borne by the parties, and the receipts of the ferry were to be equally divided between them. H further agreed that he would not allow any but a faithful, honest, obliging and temperate man to attend the ferry, and that he would be responsible for damages occasioned by wilful misconduct or neglect in its management. While H had charge of the ferry under this contract the boat was upset and the plaintiff and his property injured. It was held that the con-

tract being such as to vest the occupancy and control of the ferry in H, as the tenant rather than the servant of the defendant, the defendant was not responsible for his acts.

Other cases in which the contract was not one of employment except in the secondary sense that it involved the performance of some specific kind of work, and in which the contractee was held not to be liable for the torts of the contractor, are those which involve sales of various commodities.

Where a city purchases lumber, and the vendor in delivering it wrongfully piles it in the street, such vendor is not the agent of the city, but an independent contractor, for whose negligence the city is not responsible. *Evansville v. Senhenn* (1898) 151 Ind. 42, 41 L. R. A. 728, 734, 68 Am. St. Rep. 218, 47 N. E. 634, 51 N. E. 88.

The owner of a building is not answerable for the negligent manner in which a coal company having a contract to furnish the owner with all the coal necessary for running his machinery performs its contract in delivering the coal through a scuttle-hole in the sidewalk. *Benjamin v. Metropolitan Street R. Co.* (1896) 133 Mo. 274, 34 S. W. 590.

A person who sells and delivers stone for the purpose of repairing a road is a contractor within the meaning of the statute of Upper Canada, 16 Vict. chap. 190, declaring "contractors" to be liable for leaving materials so as to obstruct a road. *Lennox v. Harrison* (1858) 7 U. C. C. P. 496.

Compare with these decisions the ruling that one engaged in selling and delivering wood to the proprietor of a mill at so much per cord is not an employee of the proprietor so as to put him in the situation of one who takes the risk upon himself of negligence of those running the mill. He stands towards the proprietor "precisely as any other man stands who, in consequence of his business wants, had occasion to visit the mill." *Wadsworth v. Duke* (1873) 50 Ga. 91.

A shipowner is not liable for the torts of one who charts his ship on a footing which devests him entirely for the time being of the control of the ship and her crew. *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L. J. K. B. 309, per Littledale, J., *arguendo*; 3 Kent, Com. *138; *Parsons, Shipping & Adm. chap. VIII. § 2*; *Abbott, Shipping*, p. 58, *et seq.*

A bailor is not liable for the torts of the bailee or of the bailee's servants. *New York, L. E. & W. R. Co. v. New Jersey Electric R. Co.* (1897) 60 N. J. L. 338, 43 L. R. A. 854, 38 Atl. 828, Affirmed in 61 N. J. L. 287, 43 L. R. A. 849, 41 Atl. 1116.

A licensor who has surrendered to a licensee the possession of a portion of his premises, to be used for a lawful purpose, is not liable for injuries caused by a nuisance which the licensee has created or suffered to exist on the property thus transferred to his control.

Gwathney v. Little Miami R. Co. (1861) 12 Ohio St. 92, where a foot passenger fell through a railway bridge which the public were permitted to use, upon a track which a licensee company had built to connect its own system with that of the defendant. Whether the licensee company created the nuisance, and had the sole possession and use of that track thenceforward until the occurrence of the injury complained of, was held to be a question of fact 65 L. R. A.

which was properly left to be ascertained by the jury, from the evidence.

The existence of the rule was assumed in *Reg. v. Gibbs* (1855) Dears. C. C. 445, 24 L. J. Mag. Cas. N. S. 62, 1 Jur. N. S. 118, 6 Cox, C. C. 455.

IX. Effect of reservation of a limited power of control.

a. In general.

To every agreement by which one person undertakes to produce certain concrete results for the benefit of another, there is manifestly attached an implied condition that the latter person shall have the right of refusing to accept the results finally obtained, if they do not constitute a satisfactory execution of the agreement. As a matter of ultimate analysis this conception may be regarded as the basis of the well-settled doctrine, that the independence of a contract is not destroyed by the inclusion of provisions which, although they entitle the employer to exercise a certain measure of control, go no further than to enable him to secure the proper performance of the work.

"Was there a control or direction of the person in opposition to a mere right to object to the quality or description of the work done? Where this element of personal control is found, then responsibility, either for malfeasance or nonfeasance, for fault or negligence, will attach, not only to the servant or workman (he is always liable), but to him who had the personal control over him, who was his superior in the sense of the maxim [*i. e. respondeat superior*]. On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly done, but has no power over the person or time of the workmen or artisan employed, then he will not be their superior in the sense of the maxim, and not answerable for their fault or negligence." *Stephens v. Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 542. This statement of principles was quoted with approval in *Saunders v. Toronto* (1899) 28 Ont. App. Rep. 265.

If the other provisions of the contract are such as render the person employed an independent contractor, he will not be converted into a servant by the insertion of stipulations reserving to the employer "the right to change, inspect, and supervise to the extent necessary, to produce the result intended by the contract." *Upplington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91.

In other words the relation of master and servant is not inferable from the reservation of powers which do not "deprive the contractor of his right to do the work according to his own initiative, so long as he does it in accordance with his contract."

A phrase used by Rigby, L. J., in *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 353, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196.

In a Canadian case *Osler, J. A.*, expressed the opinion that the legal criterion for determining the question whether the relation of master and servant existed was whether the alleged master had the power of controlling the work which the alleged servant was doing for him "in respect to anything not necessarily involved in the proper doing of the work." *Saunders v. Toronto* (1899) 26 Ont. App. Rep. 265.

For the purpose of exemplifying the operation of this rule, it will be convenient in the first place to state *in extenso* the effect of a few typical contracts which have been discussed by the courts, and afterwards to show in detail the result of the decision dealing with each one of the specific provisions which are found in these or other contracts.

In *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196, the contract under review, which was one for laying gas pipes, contained the following clauses, among others:

(1) "The contractor to execute the whole of the work in the most workmanlike and substantial manner, particular attention being paid to any directions or instructions of the inspector (or of the board), which may be given by him from time to time as the work proceeds, and, if any difference of opinion shall arise as to the description, quality, and quantity of materials or workmanship, or anything relating to the works, the opinion of the inspector shall be final and binding on all parties concerned."

(2) "The contractor shall give or provide all necessary personal superintendence during the execution of the works, and shall employ competent foremen to superintend the same during their progress, and, should any such foremen, or the contractor's workmen, at any time disobey the orders of the inspector, or conduct themselves improperly, or be in his opinion incompetent, the inspector shall have full power to discharge them forthwith."

(3) "The inspector shall have power to stop the works, or any portion thereof, absolutely at any stage, to enlarge, diminish, modify, alter, or vary the works, or any part thereof, and also to alter or vary the description of the materials to be used from time to time, and such alterations shall not annul or invalidate the contract, which shall, nevertheless, remain in full force and effect."

(4) "The care of the entire works until their completion shall remain with the contractor, who shall be held responsible for all accidents and damages to persons or property arising therefrom from any cause whatsoever. . . . The contractor shall, at his own expense, protect all walls, buildings, gas pipes, water pipes, or other property which may be laid bare or otherwise interfered with, and make good any such property which may be . . . injured during the progress of the works or in consequence thereof; and shall also make good all damage occasioned by delay or neglect, or carelessness, deficiency in strutting, fencing, watching, or lighting, either to the works or to the buildings or premises adjoining or near thereto, whether such damage or defects be discovered during the progress of the work, or appear or become known after the completion thereof. . . . In case of any claim, action, suit, or proceedings being brought or taken against the local board, or any of their officers or servants, in respect of any loss, damage, or injury caused by the works, or consequent thereupon, the contractor, or his sureties, shall fully indemnify them and each of them therefrom."

(5) "Where gas or water pipes are found in the line of the sewers, care shall be taken that no breakages occur. Where needful the contractor shall place strong timbers across the trench and sling the gas or water pipes to them by wrought-iron chains of sufficient strength." 65 L. R. A.

(6) "Where in the opinion of the inspector it is desirable so to do, the contractor shall lower the timbers and slings to or below the level of the adjacent surface and build up concrete walls thereunder; in such cases the contractor will be paid the value of the timbers, slings, concrete, and labor, provided he has, as is herein provided, obtained the written certificate of the inspector, or his written order, for such extra work."

By *Lindley and Smith, LL. J.*, it was held that there was nothing in the provisions of the contract from which the existence of the relation of master and servant could be inferred. *Rigby, L. J.*, dissented as to this point. He considered that, independently of the wide general provisions contained in paragraphs (1), (2), (3), and (4), it was made plain by paragraphs (5), and (6) that the defendant's inspector was to have full control over the means adopted for the protection of the gas and water pipes out of which the accident arose. The difference of opinion thus disclosed is not surprising, for the contract is couched in terms which, to say the least, rendered it very difficult to say that the contractor could act with greater freedom or independence than a hired servant could do.

In *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32, a contract for the construction of a sewer provided that the defendant borough was authorized by its engineer, or such other person or persons, or in such other manner as it may deem proper, to inspect the materials to be furnished and the work to be done under the agreement, and to see that the same corresponded with the specifications. In the specifications were the following provisions: That the work should be backed in carefully, rammed and packed in and around the sewer, with proper tools, by trusty persons, "approved by the engineer," and no tunneling would be allowed, "except by written permission of the engineer;" that if, in excavating for any sewer or branch thereof, any water pipe, gas pipe, or other obstruction be met with, that "in the judgment of the engineer should be avoided," then the party of the second part (the contractors) after the same should have been measured by the engineer, should immediately fill such excavation; that the work should be prosecuted at and from as many different points in such part or parts of the avenues or streets on the line of the work as the engineer might from time to time, during the progress of the work, determine; that plank foundations should be laid, when necessary in the opinion of the engineer; that all work to complete drainage should be done according to the plans, etc., and "in accordance with all the directions of the engineer of said sewer committee;" that, "in cases of rock blasting, the blast was to be carefully covered with heavy timber, according to the ordinances of the court of burgesses relative to rock blasting, which shall be strictly observed;" that certain rock should be excavated with as little blasting as possible, and "under the immediate supervision and direction of the engineer or his assistant;" that, if any person employed by the contractor on the work should appear to the engineer to be incompetent or disorderly, he was to be discharged immediately, on the requisition of the engineer, and such person was not to be again employed upon them without permission of the engineer; that if any materials or implements should be

brought to the ground which the engineer might deem to be of improper description or improper to be used in the work, the same should be removed forthwith.

Discussing the effect of this contract, the court said: "These provisions, and others of similar import in the contract and specifications, certainly denote that a high degree of power to be exercised in the supervision of the work and to insure its performance by the contractor, was reserved by the defendant borough to its agents, acting in its behalf; and, when coupled as it is with other provisions providing for the responsibility of the contractor 'for all damages which may happen to neighboring properties, or in any way from neglect,' and that he shall at his own expense, 'shore up, protect, restore, and make good, as may be necessary, all buildings, walls, fences, or other properties which may be disturbed or injured during the progress of the work,'—fairly indicate that an intention existed on the part of the borough to reserve such control as in the judgment of its advisers was inconsistent with such immunity from liability as is now claimed in its behalf. But on the whole we are inclined to think that the weight of authority upon this question justifies us in holding that the reservations of control, being but partial, and existing in certain respects only, did not prevent the existence of the relation of contractee and independent contractor; that the general control over the work, as to the manner and method of its execution, the oversight and direction of the performance of the actual manual labor, especially in the particulars in the execution of which the plaintiff claimed that the injury to its property was caused, notwithstanding the prescribed limitations, remained in the contractor; that the persons doing the work were his servants, not those of the defendant; and that these considerations, relating to general control, constitute the true test by which to determine whether the relation be that of employer and contractor or that of master and servant."

The contract in *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411, which was also for the construction of a sewer provided, among other things, that the contractor was "to furnish all the materials except as hereafter specified, and do all the work according to the plans and specifications" set out; that the excavation was to be "made true to the line and grade as given to the contractor," and, if the material was unsuitable for forming the bottom, a further depth was to be excavated "as directed by the superintendent or inspector in charge;" that only such length of trench was to be opened at once "as directed by the inspector;" that the earth excavated was "to be compactly placed along the trench, so as to be as little annoyance as possible to abutters, . . . and no obstruction to be placed upon the sidewalks;" that the trenches and banks were to be kept lighted and fenced as provided in the city ordinances; that the contractor was to be "responsible for all damages arising from, or in consequence of, the construction of the sewer;" that all sewers or drains were to be connected with the work "as directed by the superintendent or inspector;" that the earth was to be removed and the street cleaned up as the work proceeded, "to the satisfaction of the inspector;" that certain notice was to be given by the contractor to any railroad corporation before entering on its location, "and every provision

for safety required by them, or by the inspector, to be complied with;" that certain notice was also to be given to any street railway corporation, in crossing or in opening trenches beneath its tracks, and the work performed so as to permit the passage of cars, "unless by special direction of the superintendent;" and that the work was to be finished by a date named. The contract also contained the following clauses; "The work to be kept perfectly clean from dirt, brick-bats, etc., as built, and the whole done to the satisfaction and acceptance of the superintendent of sewers, and subject to his inspection and direction at all times." It was held that none of these provisions destroyed the independence of the contract.

In *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91, another contract for the construction of a sewer provided that "the city engineer was to 'have the right to regulate the excavation,' and not 'more than 400 feet of trench' was to be opened at one time without his permission, while the commissioner of city works was authorized to 'change at his discretion the amount of all the various kinds of work and materials and structures.' The contractors were required to observe all the ordinances of the common council in relation to obstructing the streets, and 'in all cases of rock blasting the blast' was 'to be carefully covered with heavy timber, according to the ordinances of the common council' relating to the subject, 'which ordinances shall be strictly observed.' If any person employed by the contractor should 'appear to the engineer to be incompetent or disorderly' he was to be discharged, and not employed again without permission. The engineer, with the consent of the commissioner, had power 'to vary, extend, or diminish the quantity of work during its progress without vitiating the contract.' It was also provided that 'all explanations and directions necessary to the carrying out and completing satisfactorily the different descriptions of work contemplated and provided for under this contract will be given by said engineer. The city had the right to inspect the work and materials to see that they corresponded with the specifications. Any materials or implements brought upon the ground which the engineer 'should deem to be of improper description or improper to be used in the work,' were to be removed forthwith. The contractors were to have charge of and be responsible for the entire line of work until its completion and acceptance, and were not to be paid for any part thereof until the whole sewer was finished. The specifications contained many provisions relating to details of the work that are usually found in municipal contracts for the building of sewers." It was held that there was nothing in the terms of the contract that required the conclusion that the contractor was a servant.

In a case where the relation of a railway company to one who had contracted for the building of the road was in question, the provisions upon which the plaintiff unsuccessfully relied, for the purpose of establishing his contention that the contractor was a mere servant, were thus grouped together by the court: The work was to be done "subject to the approval of the chief engineer." The company was to retain regularly in its service an assistant engineer to direct the execution of the work. The contractor was to increase the force, "when-

ever required by the chief engineer." If he failed to complete the work within the time stipulated, the company might hire hands to complete it at his expense. He was to discharge any employee who should, "in the judgment of the chief engineer, or assistant in charge of the work," be unfaithful, unskillful, or remiss in the performance of the work, or guilty of riotous, disrespectful, or other improper conduct. He was to be responsible for damages as between himself and the company. All trees, logs, bushes, and other perishable material were to be removed to the outer limits of the clearing or burned up. Reviewing these stipulations, the court said: "We suppose, if the contract had not contained the conditions and limitations above, that it could hardly be contended that Hardin was not an independent contractor. Do these conditions destroy and negative that feature? We think not, for the reason that they do not apply to the mode and manner of having the work done, nor do they in any way take said work out of the hands of Hardin [the contractor]. They are nothing more than certain rules under which the work was to be done by Hardin, and intended to guaranty the faithful execution of the specified work. We do not see why one working under specified rules may not be an independent contractor, as without such rules. One contracting to build a house according to specifications and plans drawn by an architect, and under the inspection of the architect, which is usually the case, would, none the less, be an independent contractor, because of the presence and inspection of the architect. The point is, Who is doing the work? Is the company doing it by its employees, or is the contractor by his? The company certainly had the right to see that the contractor was doing the work according to the contract, and that he employed skillful and proper laborers, and the regulations above were, as it appears to us, intended to accomplish this end—nothing more." *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059.

In *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461, where the contract contained the following provision, it was held that the right of direction reserved to the engineer related only to the quantity of work to be done in the construction of the road, or to the condition of the work when completed, and not to the mode or manner of doing the work:

(1) The work of grubbing and clearing, excavation, embankment, is to be done as described in the specifications, and agreeably to the directions of the said engineer or his assistants.

(2) Clearing. The entire ground on which embankments or excavations are to be made, and such additional width, not exceeding 50 feet on each side, as the engineer may direct, shall be cleared of all trees. The fences on the line of the road which are not removed by the owner shall be cleared off by the contractor and piled up and preserved for the use of the owner, on the direction of the engineer.

(3) Earth work. In grading the roadbed increased width shall be made for passing places or side-tracks, "at such places as the engineer may direct."

(4) Excavation will include all cuttings necessary to or connected with the railroad, "and which shall be directed by the engineer." Excavations will be "of such width and depth, 65 L. R. A.

and with side slopes of such inclination as the engineer may direct."

(5) Earth from roadway excavations is to be hauled into embankments, as far as the engineer directs, not exceeding 2,000 feet. Spoil banks are to be so formed as to slope backward from the roadbed excavation in such a manner as the engineer shall direct. Rock excavations will be 14 feet in width at grade, "with such side slopes as the engineer shall direct."

(6) Embankments for roadbed or for whatsoever purpose incidental to or connected with the construction of the railroad, and which "may be required by the engineer in charge, shall be built at his direction."

(7) The form and dimensions of embankments "shall conform to the stakes and directions of the engineer," and embankments which will be required about masonry "shall be built at such time, and in such manner, and of such material, as the engineer shall direct." Embankments shall be built of such height and width as will, "in the opinion of the engineer," leave them of full size when they shall have become fully settled and compact. Borrowed earth to form embankments will be taken from such place as may be selected by the engineer.

(8) All of the work shall be done in a neat, substantial, and workmanlike manner, and in all respects fully completed, "to the satisfaction of the engineer in charge."

(9) The work embraced in the contract "shall be prosecuted with such force as the engineer may deem adequate to its completion within the time specified;" and if at any time the contractor shall refuse or neglect to prosecute the work, with a force sufficient in the opinion of the said engineer to secure its completion within the time specified, the engineer, or such other agent as he may designate, may, on ten days' notice, proceed to take possession of, and use in completing the work, the tools, etc., belonging to the contractor, and employ such number of men as may in his opinion be necessary to insure the completion of the work, within the time specified, charging the expenses so incurred to the contractor. And if the contractor shall fail to prosecute the work with an adequate force, or to comply with the directions of the engineer in regard to the manner of performing it, or in any other way neglect the requirements of the agreement and specifications, or if he shall do any portion of the work embraced in this contract, in an unfaithful an unworkmanlike manner, "the engineer may, at his discretion, declare this contract, or any portion or section embraced in it, forfeited."

b. Clauses relating to supervision of work.

In applying the rule enunciated in the preceding section the courts have held that a provision of the following tenor may be inserted in a contract without destroying its independent character,—that the employer's agent shall have the right of supervising, inspecting, or superintending the work for the purpose of seeing that it is done according to the specifications.

In one case we find the broad rule laid down that the mere right of the defendant to supervise the work so far as to see whether it was done according to contract does not throw the responsibility, if any, of the contractor on the employer. *Welsh v. Lehigh & W. Coal Co.* (1886; Pa.) 3 Cent. Rep. 386, 5 Atl. 48.

"It is now an accepted rule that supervision

of such work, [i. e. the building of a railway] may be retained without interfering with the independent action or liability of contractors who have engaged to perform it or subdivisions of it." *Larson v. Metropolitan Street R. Co.* (1892) 110 Mo. 234, 16 L. R. A. 330, 33 Am. St. Rep. 439, 19 S. W. 416.

"Although the employer may have had an agent, who supervised the work for the mere purpose of seeing that it was done in conformity to the contract, without interfering as to the particular method in which it was done or the means by which a given result was to be accomplished, that would not be in law a control and direction of the work by her; and she would not be responsible for the manner in which the work was done." *Harrison v. Kiser* (1887) 79 Ga. 588, 4 S. E. 320 (language of headnote prepared by the court).

An employer cannot be held liable for the acts of a contractor merely because his engineer has a general supervision of the work, where the power of such engineer is "limited to the manner of its accomplishment, and the time within which it should be finished, rather than the means to be used." *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

A contract is none the less independent because the employers' representative has the right to see that the work is properly done. *Murphy v. Ottawa* (1887) 13 Ont. Rep. 334.

In *Reedie v. London & N. W. R. Co.* (1849) 4 Exch. 244, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N. S. 65, a provision by which the employer reserved a general power of watching the work was treated as immaterial. In fact it was not even contended by counsel that it changed the relation of the parties to that of master and servant.

To the same effect see the following cases: *St. Louis, A. & T. R. Co. v. Knott* (1891) 54 Ark. 424, 16 S. W. 9; *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Nevins v. Peoria* (1866) 41 Ill. 502, 89 Am. Dec. 392; *Pfau v. Williamson* (1872) 63 Ill. 16; *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. E. 17; *Bayer v. Chicago, M. & N. R. Co.* (1896) 68 Ill. App. 219; *Cary v. Chicago* (1895) 60 Ill. App. 341; *Fitzpatrick v. Chicago & W. I. R. Co.* (1889) 31 Ill. App. 649; *Gelst. v. Rothschild* (1900) 90 Ill. App. 324; *New Albany Forge & Rolling Mill v. Cooper* (1891) 131 Ind. 363, 30 N. E. 294; *Hughbanks v. Boston Invest. Co.* (1894) 92 Iowa. 267, 60 N. W. 640; *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411; *Gorham v. Gross* (1878) 125 Mass. 232, 28 Am. Rep. 234; *Morgan v. Smith* (1893) 159 Mass. 570, 35 N. E. 101; *Crenshaw v. Ullman* (1892) 113 Mo. 633, 20 S. W. 1077; *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Hawke v. Brown* (1898) 28 App. Div. 37, 50 N. Y. Supp. 1032; *Jaskoe v. Consolidated Gas Co.* (1901) 83 Misc. 700, 67 N. Y. Supp. 976; *Gardner v. Bennett* (1874) 6 Jones & S. 197; *Clare v. National City Bank* (1875) 8 Jones & S. 104; *Reed v. Allegheny* (1875) 79 Pa. 300; *Wray v. Evans* (1875) 80 Pa. 102; *Welsh v. Parrish* (1892) 148 Pa. 599, 24 Atl. 86; *Simonton v. Perry* (1901) Tex. Civ. App. 62 S. W. 1090; *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163.

The courts have also held that the independent nature of the contract is not destroyed by

a provision providing that suitable material is to be furnished, and a specified structure erected, subject to the daily approval of the employer's engineer. *Casement v. Brown* (1893) 148 U. S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672. In which case the court said: "This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the companies and do whatever their employers called upon them to do, but they contracted for only a specific work. The functions of the engineers were to see that they complied with this contract. . . . They were to see that the thing produced and the result obtained were such as the contract provided for."

Neither is the independent nature of the contract destroyed by a provision that the work is to be "under the supervision and subject to the approval" of the employer or his agent. *Vowbeck v. Kellogg* (1899) 78 Minn. 176, 80 N. W. 957; *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430; *Thomas v. Altona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215; *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Alabama Midland R. Co. v. Martin* (1893) 100 Ala. 511, 14 So. 401; or by a provision that the work is to be "done to the satisfaction" of the employer's representative (*Harding v. Boston* [1895] 163 Mass. 14, 39 N. E. 411; *Eldred v. Mackie* [1901] 178 Mass. 1, 59 N. E. 673; *Powell v. Virginia Constr. Co.* [1890] 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; *Smith v. Milwaukee Builders' & T. Exchange* [1895] 91 Wis. 380, 30 L. R. A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041).

The liability of the employer was denied where the contractor had offered to do the work of excavation for "\$645, lump job," and the defendant had accepted the offer in a letter in which, among the other terms given, it was stated that "the excavation was to be done absolutely in accordance with the drawing," and "to the full satisfaction of the architect," and that the lines of the excavation were to be given by their engineer. *Hunt v. Vanderbilt* (1894) 115 N. C. 559, 20 S. E. 168.

For other cases in which similar stipulations were involved, see *infra*, IX. c.

Likewise, the independent nature of the contract is not affected by a provision that the employer or his agent is to have the right to reject improper or defective materials. *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 353, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196, per Rigby, Jr., *arguendo*; *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Fitzpatrick v. Chicago & W. I. R. Co.* (1889) 31 Ill. App. 649.

c. *Clauses providing that the work shall be done under the direction of the employer.*

Other still more striking illustrations of the extent to which the courts have gone in refusing to infer the existence of the relation of master and servant are to be found in those cases where it is not merely provided that the work shall be done under the general supervision of the employer or his agent, but that

whole work, or certain parts thereof, shall be done "under the direction" of the employer or his agent.

That there was at first a disposition on the part of the judges to construe such a stipulation to the disadvantage of the employer may perhaps be inferred from some remarks of Lord Denman in *Allen v. Hayward* (1845) 7 Q. B. 960, 4 Eng. Ry. & C. Cas. 104, 15 L. J. Q. B. N. S. 99, 10 Jur. 92. Referring to a provision of the contract which required that all such parts of the work as were not specified and described in the contract or plans and specifications should be executed in such manner as the surveyor of the works should direct, he said that this passage appeared to take power from the contractor, and keep it in the hands of the commissioners, or their surveyor. But it was held not to be applicable to the facts under discussion, and its actual effect was not determined.

The rationale of these cases is that the question whether the person employed was an independent contractor or a mere servant is not to be determined by the retention of a certain kind or degree of supervision by the employer, but by the contract as a whole,—by its spirit and essence, and not by the phraseology of a single sentence or paragraph. If the result of applying this test is to render it reasonably certain that the intention of the parties was to enter into an independent contract, the words above specified will be construed as being one which relates to the results contemplated, and not to the methods employed. For decisions embodying or recognizing this doctrine, see *Foster v. Chicago* (1902) 197 Ill. 264, 64 N. E. 322, Aff'd (1901) 96 Ill. App. 4; *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461; *Ridgeway v. Downing Co.* (1900) 109 Ga. 591, 34 S. E. 1028; *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 322; *Humpton v. Unterkircher* (1896) 97 Iowa, 509, 66 N. W. 776; and the following decisions.

This principle of interpretation has been deemed to warrant the inference that a contract is none the less independent in its character because it contains a provision that the work is to be done "under the direction and to the satisfaction" of the employer's representative." *Kelly v. New York* (1854) 11 N. Y. 432; *Slater v. Mersereau* (1876) 64 N. Y. 138; *Frassl v. McDonald* (1898) 122 Cal. 400, 55 Pac. 139, 772; *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. E. 17, Aff'ming (1897) 69 Ill. App. 659; *Foster v. Chicago* (1902) 197 Ill. 264, 64 N. E. 322; *Indiana Iron Co. v. Cray* (1897) 19 Ind. App. 565, 48 N. E. 803; *Ridgeway v. Downing Co.* (1900) 109 Ga. 591, 34 S. E. 1028.

Construing a contract which provided that the work was to be done "under the direction of the defendants and their architect, and to their entire satisfaction, approval, and acceptance," the court said: "It is manifest that this direction, approval, and acceptance had reference to the time within which it should be performed with reference to other parts of the work, and to the results to be accomplished, and not to the method or manner in which it should be performed. Defendants had no control over the men who should be employed by either of these contractors. They could not say who should be employed or who discharged. They had the right, under their contracts, to say what should be done, but not how it should be brought 65 L. R. A.

about, or who should do it. Appellant relies largely upon the use of the word 'discretion,' as employed in the contracts referred to. We do not regard this as in any sense conclusive. When we look at the whole contract, it is apparent that the only direction the architect or the owner could give was as to what should be done to accomplish the ends aimed at by the contract. He could not dictate the means or methods to be employed. This is the interpretation which has uniformly been placed upon such contracts." *Humpton v. Unterkircher* (1896) 97 Iowa, 509, 66 N. W. 776.

A provision in a building contract, that the work shall be performed in accordance with the plans and drawings, and executed under the direction and to the satisfaction of the owner's architect, does not authorize the latter to modify the plans so as to relieve the contractor from doing the work called for by the contract; and the owner cannot be held liable for injuries to an employee of a subcontractor from the fall of the building during erection, owing to a change in the specifications by the architect. *Burke v. Ireland* (1898) 26 App. Div. 487, 50 N. Y. Supp. 369.

Neither is the contract rendered less independent by reason of a provision that the work is to be performed "under the immediate direction and superintendence" of the employer's representative, and "to his entire satisfaction, approval and acceptance." *Foster v. Chicago* (1901) 96 Ill. App. 4, Aff'ming in (1902) 197 Ill. 264, 64 N. E. 322. In an opinion adopted by the supreme court as being a correct statement of principles, the court of appeals said: "The requirement that the time and manner of doing the work must be satisfactory to the city's commissioner of public works does not include the means employed, and is limited by the provisions of the contract. The direction and superintendence provided for do not relieve the contractor of responsibility, nor permit the city to change or modify the terms of the written instrument. The contractor agrees to do all work necessary to fully complete the sewer in the manner required by the contract as well as in a manner satisfactory to the city. Provided he reaches a satisfactory result in building such a sewer as the contract calls for, the contractor is not prevented from using his own methods. The specifications require the sides of a trench like that where the caving occurred 'to be effectually supported with suitable planks and timbers by the contractor without expense to the city.' The method of using such planks and timbers for such purpose is left to the contractor. The contract does not include the direction, management, and control by the city of every detail of the work. The contractor was not required to take his orders, day by day, from the city. He was to be guided by the contract and the specifications constituting a part thereof. He was not a mere servant and employee. He was an independent contractor, the city retaining such supervisory power as it might, from time to time, find it necessary to exercise to insure compliance with the contract and to obtain the result called for thereby."

Nor is its independence affected by a provision that certain portions of the work are to be done "as directed" by the inspector or superintendent of the employer, and that the whole work is to be done "subject to the direction" of the superintendent at all times (*Harding v. Boston*

[1895] 163 Mass. 14, 89 N. E. 411); or by a provision that one designated portion of the work is to be done according to the plans, and "in accordance with the directions" of the employer's engineer, and another portion "under the immediate supervision and direction" of such engineer (*Norwalk Gaslight Co. v. Norwalk* [1893] 63 Conn. 495, 28 Atl. 32).

Likewise, a provision that the employer shall have the right of superintending and supervising, by its agents, execution of work under a contract, and of giving directions in relation thereto, does not render it less independent. *Weber v. Buffalo R. Co.* (1897) 20 App. Div. 292, 47 N. Y. Supp. 7.

The same has been held with regard to a provision that the employer's agent is to "superintend the work, and give such instructions from time to time during the progress as the necessities of the work shall demand." *Robinson v. Webb* (1875) 11 Bush, 464. And also with regard to a provision that the employer's engineer may declare the contract forfeited "for noncompliance with his directions in regard to the manner of constructing" the railway in question. *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215. The trial judge, in an opinion adopted as correct by the supreme court, said: "Noncompliance with the directions of the engineer must be construed in connection with other parts of the contract. It evidently means noncompliance with his directions in such matters as under the agreement he had the right to direct. It does not, either expressly or by inference, give him the right to interfere with the means he chose to use to accomplish the work. Such right is not reserved in the agreement, and it is not within the contemplation of the parties that the engineer could compel a forfeiture of the agreement by assuming at his will to give directions in matters over which the agreement did not give him jurisdiction." And likewise with regard to a provision that the work is to conform to such further directions as shall be given by the employer's agents. *Pack v. New York* (1853) 8 N. Y. 222. In which case the court said: "This clause . . . is nothing more than a stipulation for a change of the specification of the work as stated in the contract at fixed prices provided therein. It does not, as the court below held, make Riley [a subcontractor] the immediate servant of the defendants or give to them any control over him as to the manner or otherwise in which he should conduct the blasting. The defendants may change the grade by new specifications from that provided in the contract, and the duty is then imposed upon Foster to make his grade accordingly; but as to the manner in which he shall proceed in his blasting to make the grade, or do the work, he is as perfectly independent of the defendants as a man ever was while engaged in doing his own work."

And the same holding has been given with regard to a provision that the materials and work are to be furnished and done "according to the plan and under the direction and supervision" of the agent appointed by the owner (*Allen v. Willard* [1868] 57 Pa. 374); that the work shall be done "as described in the specifications and agreeably to the direction, from time to time" of the employer's agent (*Hughes v. Cincinnati & S. R. Co.* [1883] 39 Ohio St. 461). The court said that, when the whole contract (see IX. a, *supra*) was considered, it was quite clear that "the directions of the engineer or his assistants" 65 L. R. A.

thus referred to were those only which were specially named in the specifications.

And a like holding has been given with regard to a provision that the work is to be done "in accordance with the plans and specifications and instructions furnished" by the employer "or such persons as he may appoint" (*Hunt v. Pennsylvania R. Co.* [1866] 51 Pa. 475). The court held that the word "instructions," used in the agreement, referred to the kind of structure, design, materials, combinations, and all matters pertaining to the planning of the building to be erected, but that as to the mode of accomplishing the work which the contractor undertook he was left to his own skill and judgment.

And the holding has been the same with regard to a provision that the engineer in charge is to have power to prescribe the order in which the materials are to be placed, and that the work is to be done and materials furnished as directed by him (*Callan v. Bull* [1896] 113 Cal. 593, 45 Pac. 1017).

The independent nature of the contract has also been sustained where it contained a provision that the employer is to have the right of fixing the points to or from which the materials or articles handled by the contractor shall be conveyed, or the points at which such materials or articles are to be placed.

In *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461, the court, in discussing paragraph (5) of the contract set out in IX. a, *supra*, said: "The power of the engineer to direct, under this clause, is limited to cases where waste earth from an excavation is thrown out over the top slope of the excavation, into spoil banks, and as to the manner in which such spoil banks shall be made to slope backward from the excavation. Conceding that the railway company would be liable for an injury from the mode and manner in which such spoil banks might be constructed, under the direction, or without the direction, of the engineer, it is not claimed that the plaintiff was so injured. In wasting the earth, which resulted in plaintiff's injury, the contractors were acting on their own responsibility without any control or right of control on the part of the engineer as to the mode or manner of doing the work."

One employed, with his horse and cart, by a city, to remove street scrapings, who is free from the control and direction of the city, except that he is directed where to load and where to unload, is not a servant of the city so as to render it liable for injuries negligently inflicted by him upon a third person while he is taking a load to the dumping ground. *Saunders v. Toronto* (1899) 26 Ont. App. Rep. 265, *Reversing* (1898) 29 Ont. Rep. 273.

Where a person enters into an absolute contract with a railway company to draw its cars, and furnishes the horses and drivers, and assumes the entire control, the fact that the company can direct what cars are to be hauled and to what stations does not disprove the independence of the contract. *Schular v. Hudson River R. Co.* (1862) 38 Barb. 653.

The fact that the owner of a store points out the goods to be carted and their destination to a man in the employ of a cartage company which is under contract to do all the cartage of the former at a specified price does not show that the owner of the store exercised control over the manner in which the goods were to be transferred to the trucks, or over the route by which they were to be taken to their destination.

Riedel v. Moran F. Co. (1894) 108 Mich. 262, 61 N. W. 509. To the same effect, see *Wadsworth Howland Co. v. Foster* (1893) 50 Ill. App. 513.

Where the contract between a telephone company and one K provided that K should furnish "all necessary labor, skill, material, apparatus, supplies, and machinery" to construct and complete the line, that the "telephones and switch boards were to be installed, located, and placed as and where directed" by the telephone company, and that the work should be under the supervision of the company and its agent, it was held that K was an independent contractor at least in respect to stringing the wires on the poles. *Vosbeck v. Kellogg* (1899) 78 Minn. 170, 80 N. W. 957.

Where it has been shown, in an action against A for the negligence of B, that A was working under a contract to haul sand at so much a load from B's lot, a witness cannot be asked by whose orders A left off drawing sand from another lot of B, and whether B could have directed A to stop hauling from the lot in question. Such evidence has no tendency to show that the employer reserved control over the manner of doing the work. *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376, *Reversing* (1881) 10 Mo. App. 61.

Likewise, the independent nature of the contract has been sustained where it contained a provision that an engineer, who is to superintend construction work shall have the right to give directions as to the quantity of work to be done. *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

The fact that a subcontract for the laying of a railway track contains a provision to the effect that the track is to be laid as far as it shall be ordered by the chief engineer of the general contractor does not render the general contractor liable for the negligence of the subcontractor. *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691.

It has also been sustained where the contract contained a provision that such work shall be conformed by the contractor to the lines and levels given by the employer's engineer (*Murphy v. Ottawa* [1887] 13 Ont. Rep. 334; *Harding v. Boston* [1895] 163 Mass. 14, 39 N. E. 411; *Hughes v. Cincinnati & S. R. Co.* [1883] 39 Ohio St. 461; *Thomas v. Altoona & L. Valley Electric R. Co.* [1899] 191 Pa. 361, 43 Atl. 215; *Callan v. Bull* [1896] 113 Cal. 593, 45 Pac. 1017); and likewise it has been sustained where the contract contained a provision that the employer's agent shall have the power of fixing the times and places at which such work shall be prosecuted (*Norwalk Gaslight Co. v. Norwalk* [1893] 63 Conn. 405, 28 Atl. 32; *Erie v. Caulkins* [1877] 85 Pa. 247, 27 Am. Rep. 642 [see next note]; *Foster v. Chicago* [1902] 197 Ill. 264, 64 N. E. 322, *Affirming* [1901] 96 Ill. App. 4).

The independence of the contract has been affirmed even in cases where it was specifically provided that the directions of the employer should be followed in respect to the manner or method in which the work was done, or the methods by which it was done.

In *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642, the contract contained this provision: "All work to be commenced and carried on at such times, and in such places, and in such manner as the engineer shall direct." The trial

judge held that this stipulation clause created the relation of master and servant, this conclusion being based upon a remark made by Strong, J., in *Painter v. Pittsburgh* (1863) 46 Pa. 213, to the effect that a certain clause there under review only gave the employer "the power to direct the results of the work, without any control over the manner of performing it, which control, alone, furnishes a ground for holding the master or principal for the act of a servant or agent." The supreme court, however, said: "The word 'manner,' in the above quotation, is evidently considered as not having a meaning so general as to reduce the contractor to the grade of a mere servant or agent. Manner must, in such case, mean the power to control the work, not only as to its character, but also as to the particular means used to accomplish it. This must needs be so; for, as we have seen in the case of *Reed v. Allegheny* (1875) 79 Pa. 300, a stipulation for general supervision of the work does not reduce the contractor to the grade of an agent, although necessarily, in such case, the engineer must, to some extent, control the manner in which the contract is performed. It is quite obvious that the word 'manner' must be construed with reference to the contract in which it is found. By the agreement under consideration, the work was not only to be done in such manner, but at such times and in such places as the engineer shall direct; if this were the whole of the contract the matter would be of easy solution; but, turning to the body of the contract, we find that G was bound to begin the work on or before the 25th of October, and to finish it by the 25th of December following, so that the engineer's directions as to time must be limited by the periods thus expressed. So as to place; that is fixed between certain points on S street, and whilst the engineer might direct that the work should be done on either side or in the middle of that street, as he might think would best subserve the public welfare, his directions that the work should be done on some other street, or even beyond the points indicated on S street, would be utterly nugatory. Just so with reference to the manner in which the work is to be performed, that is carefully prescribed in the specifications, and within these prescriptions the engineer may direct, but not beyond them. If he does require and direct something which is not found therein, he must then sit as arbiter between the contracting parties, and fix the rate of compensation for the work thus required, and that rate becomes part of the contract. This, in itself, exhibits two independent contracting parties who have provided themselves with an arbiter to settle their disputes. It is not thus with mere agents or servants, for they themselves are but parts of the means used by the master to accomplish his design, and that he may choose to alter the theory or plan of the work before it is begun or during its progress is of no moment to them. This contract contemplates the accomplishment of a certain result; the means, so far as they are deemed necessary to give the work its proper character, are carefully specified; the province of the engineer was to see that these means were properly applied, in other words, to see that proper materials and methods were used to produce the required result. But in all this the contractor was supreme, for he had but to comply with his contract in delivering to the city a good job according to the terms of that contract."

In *Callahan v. Burlington & M. River R. Co.* (1867) 23 Iowa, 562, a contract for the grading of a railway provided that certain perishable materials in the right of way should be removed "as the engineer might direct." The court said: "The clearing of the ground was the work to be done, the end to be attained, and could be done in one of two modes at the option of the defendant. In the exercise of that option, burning was chosen as the mode of accomplishing the end. But with the manner of burning, defendant had nothing to do, and over it exercised no control. It could not direct that the combustible materials should be gathered in large or small heaps, or on one side of the roadway or the other, or that the act of burning should be prudently and carefully done, and proper precautions of watchfulness be exercised in order to prevent danger to the property of others, all relating to the manner of doing the work required by the contract to be done."

d. Effect of other clauses.

The following provisions, although they are expressive of the fact that the contractor was in some degree under the control of the employer, have also been held not to be inconsistent with the conclusion that the contract was an independent one.

A provision that a person undertaking contract work in the streets of a city shall comply with the provisions of the municipal ordinances or by-laws relating to such work was treated as an immaterial element in *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411.

A provision that the employer shall have the power to "modify, alter, or vary the works from time to time" does not destroy the independent nature of the contract. *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 106.

And a provision that the employer's representative is authorized to "change at his discretion the amount of all the various kinds of work and materials and structures" does not destroy the independent nature of the contract. *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91.

Neither does a provision that the employer shall have the right at any time during the progress of the work "to make any alterations, deviations, or omissions from the contract" destroy its independent nature. *Frasell v. McDonald* (1898) 122 Cal. 400, 402, 55 Pac. 139, 772.

And the independent nature of the contract is not affected by a provision that without the consent of the employer or his supervising agent, the contractor is not to sublet any part of the work. *Robinson v. Webb* (1875) 11 Bush. 464; *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N. J. L. 17, 10 Am. Rep. 205.

Neither is this independent nature of the contract affected by a provision that, if the contractor shall at any time neglect or refuse to provide a sufficiency of materials and workmen to execute the work properly, the employer may himself furnish such materials and workmen, proceed with the execution of the work, and charge to the contractor the expenses thus incurred. 65 L. R. A.

Pioneer Fireproof Constr. Co. v. Hansen (1898) 176 Ill. 100, 52 N. E. 17; *Wray v. Evans* (1875) 80 Pa. 102; *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461; *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215; *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059.

Likewise, a provision that the employer shall have the right to demand and procure the discharge of any of the contractor's workmen who may be disobedient, unskilful, negligent, or in any other way unfit to participate in the work does not affect the independent nature of the contract. *Reedle v. London & N. W. R. Co.* (1849) 4 Exch. 254, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N. S. 65, where Rolfe, B., remarked that, in spite of such a stipulation, the workman is still the servant of the contractor only; and the fact that the defendants might have insisted on his removal, if they thought him careless or unskilful, did not make him their servant. *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 106; *Atlantic Transp. Co. v. Coneys* (1897) 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Bayer v. Chicago, M. & N. R. Co.* (1896) 68 Ill. App. 219; *Blumb v. Kansas* (1884) 84 Mo. 112, 54 Am. Rep. 87; *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Schular v. Hudson River R. Co.* (1862) 38 Barb. 653; *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N. J. L. 17, 10 Am. Rep. 205; *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059.

In one case it was remarked that the fact that the discharge is to be accomplished through a request to the immediate employer of the workman instead of by the direct act of the principal himself rather repels than creates the inference that the principal possessed the right to discharge. *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103.

In another case the court, in commenting upon the fact that by the specifications the contractor was required to dismiss, from his employment, all incompetent or unfaithful persons, said: "In this we may observe that the statement, that the city had a general power over the men employed by the contractor is too broad, for the contract is that he shall dismiss, from his employment, incompetent or unfaithful employees. Herein the fact of his superior and independent control over the workmen is recognized; for if the city retained this power, why contract with G for the doing of that which it could at any time, do itself." *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642.

And the independent nature of the contract is preserved although it contains a provision that the employer shall have a right to object to the employment of any particular person by the contractor, if there is reason to suppose that such a person would not be suitable. *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103.

And the fact that it contains a clause forbidding the contractor to employ as his workmen any persons except those resident in a specified locality does not affect its independent character.

A municipal corporation which requires a person to employ only its own citizens does not

thereby deprive him of the character of independent contractor so as to render itself liable for the acts of his employees. *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411.

X. Effect in general of reservation of full power of control.

Since the rationale of the doctrine by which an employer is exempted from liability for the torts of an independent contractor is that, *as hypothesi*, the latter is not under the control of the former with respect to the execution of the details of the stipulated work, it is clear that this doctrine is not applicable in cases where, as a matter of fact, the situation thus supposed does not exist. If the employer has reserved the right of exercising control, the person employed is in law regarded as a servant, even though his calling may for some purposes be independent.

"Where the employer retains the control and direction over the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor or his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent." *Cincinnati v. Stone* (1855) 5 Ohio St. 38.

"The terms 'independent contractor' and 'servant,' as applied to the subject in hand, are somewhat unsatisfactory, but are used for want of better ones. The word 'servant,' as used in this connection, is applicable to any relation in which, with reference to the matter out of which the alleged wrong has sprung, the person sought to be charged had the right under the contract of employment to control, in the given particular complained of, the action of the person doing the alleged wrong. In every case the decisive question in determining whether the doctrine of *respondet superior* applies is, Had the defendant the right to control in the given particular the conduct of the person doing the wrong? If he had, he is liable. On this question the contract under which the work was done must speak conclusively,—in every case reference being had, of course, to surrounding circumstances. If defendant had such control, the mere fact that the agent who did the injury carried on a separate and independent employment will not absolve his principal from liability. If this control existed, it makes no difference whether the person doing the injury was the 'servant' of the defendant, in the popular sense of that word, or a person merely employed to do a specified job or piece of work." *Rait v. New England Furniture & Carpet Co.* (1890) 68 Minn. 76, 68 N. W. 729.

In a case where plaintiff's counsel contended that the circumstances brought it within an alleged exception to the general rule,—*viz.*, "that the employer is liable where he does not release the entire charge of the work to the contractor, but retains supervision of its construction,"—the court observed: "This is nothing more than saying that where the contractor is not an independent contractor, but is under the control of his employer, the employer is liable. In other words, instead of its being an exception to the admitted doctrine above, it seems to be nothing more than stating it in different phraseology. Or rather, while recognizing the doctrine, it states a certain condition where the employee would not be an independent contractor, to wit, 65 L. R. A.

where the employer had not released the entire charge of the work to him." *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059.

"The element essential to the discharge of the contractee from responsibility is that he shall not reserve control over the work." *Faren v. Sellers* (1887) 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363.

"The employer may also make himself liable by retaining the right to direct and control the time and manner of executing the work." *Atlanta & F. R. Co. v. Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277.

If the employer had "the right to control the conduct of the wrongdoer," . . . either as to the time, place, or manner of doing the act, he cannot absolve himself from liability for the negligence of the wrongdoer on the ground of independent relation, even though such wrongdoer was a competent and fit person to do the work, and was acting under a contract to do the specific act, and not as an ordinary employee." *Corrigan v. Elsing* (1900) 81 Minn. 42, 83 N. W. 492.

"It may be regarded as settled that, if the employer keeps control of the mode of the work, his liability for the acts of a contractor and servant is the same." *Reynolds v. Braithwaite* (1889) 131 Pa. 416, 18 Atl. 1110.

The employer may be held liable for injuries inflicted, where, although the work has been let to an independent contractor, he has "retained control of the manner of doing it, so that he has the right to give directions as to the steps which shall be taken to produce the result." In that case, as the employer "has control of the acts done by the contractor, and may prevent any negligence on his part," he is held to be liable for any negligence which contractor is guilty of, because he has not prevented it. *White v. New York* (1897) 15 App. Div. 440, 44 N. Y. Supp. 454.

The following instruction has been given: "If you find that the defendant reserved the control of the place of the excavation, or the control of T [the person employed], or the right to direct him in the construction of the work, or did control him or direct him in the doing of the work, then he was the mere agent or servant of the defendant, and it would be liable for his negligence and carelessness, the same as if the defendant did it itself." *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875.

In a recent case before the English court of appeal, the finding of the trial judge to the effect that the plumber whose negligence caused the injury was not an independent contractor, but that he acted under the supervision of the defendants, who retained the control of the work, was held to be fatal to the defendants. *Holliday v. National Teleph. Co.* [1899] 2 Q. B. 392, 68 L. J. Q. B. N. S. 1016, 81 L. T. N. S. 252, 47 Week. Rep. 658.

For other explicit recognition of the doctrine that, unless the employer relinquishes his control over the work, the person employed is his agent or servant, see *Wilson v. White* (1883) 71 Ga. 506, 51 Am. Rep. 269; *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404; *Morgan v. Bowman* (1856) 22 Mo. 538; *Veazie v. Penobscot R. Co.* (1860) 49 Me. 119, and many of the cases cited in the succeeding subdivisions.

In one case it was said to be "an important test of liability, that the employer reserves the power, not only to direct what shall be done,

but how it shall be done." *New Orleans, M. & C. R. Co. v. Hanning* (1872) 15 Wall. 649, 657, 21 L. ed. 220, 223. But the authorities show very plainly that this is not merely an "important," but a conclusive, test.

If in respect to one particular portion of the work the person employed is subjected by the terms of the agreement to the control of the employer, the necessary inference is that the employer acts as a master in exercising the power so reserved.

The reservation, by a railroad company, in a contract for the construction of its road, of the right to designate the points at which crossings shall be put in on public or private roads, the contractors having no right to even close up a road until it has been passed upon by the company's engineer, makes it responsible for injuries to the traveling public from the improper construction of a crossing designated by it in the exercise of its reserved power. *Dublin v. Taylor, B. & H. R. Co.* (1899) 92 Tex. 535, 50 S. W. 120. The court remarked: "While it is true that a reservation of control over that part of the work would not alone make the railroad company liable as master for the whole work, yet in respect to crossings at intersections of all roads it acted as master in exercising the reserved powers, and will be held responsible for the consequences." By the decision on the former appeal (1895) 88 Tex. 642, 32 S. W. 868, the company's liability was put upon the ground of a breach of a nondelegable duty. A later appeal before the court of civil appeals is reported in *Taylor, B. & H. R. Co. v. Warner* (1900; Tex. Civ. App.) 60 S. W. 442.

The intentment is that the plaintiff is seeking to recover on the ground of the existence of a contract of service, where he alleges in his declaration that the negligent person was working "under the direction" of the defendant (*Mann v. O'Sullivan* [1899] 126 Cal. 61, 77 Am. St. Rep. 149, 58 Pac. 375); or "under the superintendence, control, management, and direction" of such defendant (*Hunt v. Vanderbilt* [1894] 115 N. C. 559, 20 S. E. 168). Discussing the consequence of ascribing this meaning to the complaint, the court said: "This language is so used that it distinctly qualifies and controls any matter alleged in the nature of inducement or explanation, which sometimes, under the very liberal construction of code pleading, is held sufficient to avoid a variance; and it clearly imports that the defendant is sued for the conduct of B, as the defendant's servant, and not otherwise. The testimony discloses that B was not the servant of the defendant, but an independent contractor; and as the principles of law upon which the defendant may be liable for the conduct of B in these distinct capacities are, in some very essential particulars, widely different, and really constitute different causes of action, we have but little hesitation in deciding that the evidence falls to sustain the cause of action set forth in the complaint."

XI. Matters negating independence of contractor.

a. Effect of specific terms of contract.

In the following subdivisions are collected a large number of cases in which the phraseology used by the parties to the agreement was held to preclude the reference that the person employed was an independent contractor. Upon a comparison of the provisions which have re-

ceived such a construction with those which are reviewed in *supra*, IX., it seems impossible to avoid the conclusion that there is in not a few instances an essential conflict of judicial opinion respecting the extent to which an employer is entitled to retain the power of directing the work without subjecting himself to the duties and liabilities of a master.

1. Work on railroads.

In *New Orleans, M. & C. R. Co. v. Hanning* (1872) 15 Wall. 649, 21 L. ed. 220, the agreement was that the person employed should furnish the timber, etc., necessary for the rebuilding of the defendant's wharf, with such mooring-posts, cluster-piles, etc., "as the company, through their engineer, might require;" that the engineer "should supervise and direct the work," and that the work "should be done to his satisfaction;" that the old wharf should be "made as good as new, and the new wharf in the best workmanlike manner." The defendant railway company was held to be liable for the negligence of the person employed, the argument of the court being as follows: "The company do not yield to Carvin [the contractor] the possession or control of the wharf. They may direct the number of mooring-posts, cluster-piles for fenders, rows of piles, slips, and inclines, paying according to the number of square feet covered. They are at liberty to direct how such material shall be used and how it shall be laid to make the old wharf as good as new, and to make the new the best workmanship. They are to supervise the work to be done. They are to direct how it shall be done. This includes the power of controlling and managing the entire performance of the work, within the general limits mentioned. . . . Here the general management and control of the work was reserved to the company. Its extent in many particulars was not prescribed. How and in what manner the wharf was to be built was not pointed out. That rebuilt was to be as good as new. The new was to be of the best workmanship. This is quite indefinite and authorizes not only, but requires, a great amount of care and direction on the part of the company. The submission of the whole work to the direction of the company's engineer is evidence, although not conclusive, that the company retain the management and control. The reservation of authority is both comprehensive and minute. The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All the details are to be completed under their orders and according to their direction. The contractor undertakes in general terms to do the work well. The company reserve the power, not only to direct what shall be done, but how it shall be done. This is an important test of liability." This ruling is not easy to reconcile with the general trend of opinion which is evidenced by the decisions cited in *supra*, IX.

Those decisions are still more distinctly in conflict with an intimation in another case that a contract by which a railroad company employed a contracting company to do certain blasting at the top of a cut at the end of a tunnel did not of itself show that the contracting company was an independent contractor, as the terms of the contract (not stated in the report) showed that the railroad company reserved the

right to determine the extent of the excavation to be made, and undertook to furnish a locomotive and train crew to transport the material removed. *Louisville & N. R. Co. v. Tow* (1901) 23 Ky. L. Rep. 408, 63 S. W. 27.

The defendant railroad company made a contract with one M by which he was to take entire charge and control of defendant's freight business at the St. Louis station, load and unload cars, switch them back and forward in the yard, make up freight trains, and do all other yard service necessary in the transaction of defendant's freight business. He was also, when requested, to haul freight from the levee for the defendant; to prepare, execute, and receive all necessary freight bills; to keep all necessary books of account, collect freight money, and generally act as and discharge all the duties of a station agent. To enable him properly to discharge his duties he was to have control over the grounds, yards, and buildings, engines, and cars of defendant at the station. Defendant was to furnish the necessary engines and keep them in repair and supplied with fuel, etc., and to employ the engineers and firemen who were to be under M's control and were to be paid by him. For his services M was to be paid monthly at the rate of 15 cents for each ton of freight received or delivered and 50 cents for each car hauled from the levee. The contract was to continue for five years. The business was to be done under the control of defendant's superintendent and to his satisfaction, and if not so done defendant could revoke the contract on twenty-four hours' notice. M performed no service for any other person than defendant. In an action against the defendant for injuries received through the negligence of trainmen in the employ of M, it was held that M was the servant of defendant, and not an independent contractor. *Speed v. Atlantic & P. R. Co.* (1879) 71 Mo. 303.

The independence of a contract is destroyed by a stipulation that the work is to be done "according to the plans and directions of the chief engineer of said company," who is "to be employed and paid by the company." *Veazie v. Penobscot R. Co.* (1860) 49 Me. 119.

Where it was stipulated that, in an agreement between a railway company and a contractor, certain passenger trains operated by the latter were to be "run under the direction of the company, and under their control," the company was held liable for the value of a horse which was run over by a train. *Wyman v. Penobscot & K. R. Co.* (1858) 46 Me. 162.

2. Construction of buildings.

In a case where a workman employed by the agent of one M was injured by a defective appliance the question to be determined was whether M was or was not the agent of the defendant, by virtue of a certain contract for the construction of several buildings. This contract contained some provisions which are not common in contracts of agency. It required him to make all contracts for material and labor in his own name, and made him responsible under such contracts, in the first instance, to the persons with whom he should contract. It also authorized the defendant company to retain, from sums which should become due for labor and material, \$40,000, for which M was to accept capital stock of the company. To that extent, therefore, he might be regarded as having

advanced his own money for the payment of labor and material. On the other hand, the agreement recited that the company was about to construct business blocks in Sioux City, and desired to employ M in their construction as therein stated. It provided for the letting of contracts for all necessary work and material excepting the carpentry work and material to the lowest bidder subject to the approval of the company, and required M to furnish the material and labor necessary for the woodwork. He was required to superintend the entire construction of the buildings, and to examine and supervise the material furnished, and to give his exclusive attention to those subjects. He was to furnish the company with a statement of the actual cost of all work and material, and the company reserved the right to approve all contracts he should enter into, and to make changes in the building. In consideration of the performance of the agreement on his part, M was to receive 10 per cent of the cost of certain labor and material "in full for all his services in looking after the execution of said contracts, for material and labor and superintending the entire construction of said buildings." The court said: "An examination of the entire agreement leads us to the conclusion that for the purposes of this case M must be regarded as an agent of the company. It may be claimed that as to the carpentry work he was an original contractor; but the contract, considered as an entirety, shows that his work, in addition to letting contracts and providing materials, was of a supervisory character. He was not required to work as a carpenter, but was obliged to furnish material and labor for the woodwork. He was not allowed a separate sum for that labor and material, but the actual cost of it was to be paid by the company, which reserved 'the right to determine the prices to be paid for all material and labor for said buildings.' The contract gave to the company not only the right to fix prices, but also the right to approve the labor done and material furnished, and M was subject to its direction and control in all things." *Hughbanks v. Boston Invest. Co.* (1894) 92 Iowa, 267, 60 N. W. 640.

Commenting upon the words of an instruction (not stated), in a case where the existence of a contract of service was held to have been properly inferred, the court said: "Here, although D was erecting the walls under a contract, he was, by its terms, to carry forward the work under the control of the superintendent, and 'to remove all improper work or materials upon being directed so to do by the superintendent,' to whose judgment, both as to work and materials, he agreed to submit, and whose acts the owner agreed to recognize. The owner also reserved the right to change his plan, and the architect was declared to be the superintendent for the owner." *Schwartz v. Gilmore* (1867) 45 Ill. 455, 92 Am. Dec. 227.

3. Demolition of buildings.

In a charge to a jury, which was held by the supreme court to be a correct statement of principles, the trial judge thus commented on a contract which provided, in substance, that one E was to take down the entire building or so much thereof as the employer might request, and that all of the work was to be done carefully, and under the direction and subject to the approval of the employer: "This contract gives the de-

fendants the right to control and direct the action of E. It is not simply a provision that the work must finally meet their approval before they pay him, but it is a provision that, in the first instance, he is to take down just so much of it as they desire, and that he is to do the work of taking down under their direction. There is no other mode of construing it than so as to mean that he, by this contract, was subject to their orders as to the time and manner and mode of doing the work; that they had the right to step in and say to him, 'You are not doing this as we directed you to do it. We direct you thus and so, and we direct you to do this in the other way.' That seems to me, as far as the contract is concerned, to bring the case within the relation of master and servant, so far as E and the defendants are concerned." *Linnenhau v. Rollins* (1884) 137 Mass. 123, 50 Am. Rep. 287.

A written contract to demolish a building, containing a clause that "the work is to be done according to the direction of the supervising architect, whose decisions on all points shall be final," creates the relation of master and servant. *Faren v. Sellers* (1887) 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363 (workman injured). The court said: "The nature of the work was such that nothing else but the method of doing it required the supervision of the architect. . . . If the architect had directed or permitted L to strip the building as actually done by defendants, before removing the spans, L would have been the servant of defendants *quoad* the adoption of this method, and they would have been responsible for any injury resulting therefrom. *A fortiori* are they responsible when they themselves adopt this method and do this part of the work themselves. . . . It is perfectly clear that the stripping of the building by the removal of the purlines and braces was an essential part of the work covered by the contract; that the time, order, and manner of their removal formed important elements of the method to be adopted in effecting the demolition; that the adoption of the particular method here pursued was the direct act of defendants themselves; that it was a vicious, faulty, and dangerous method, and, if the injury to F happened as a direct result or consequence of this fault, defendants cannot shield themselves from responsibility under the doctrine of independent contract."

4. Street Improvements.

A provision in a contract entered into with the district council for the leveling and paving of a road, that the contractor shall execute all the works mentioned in the specifications and certain plans, according to such explanatory drawings and instructions as may be furnished to him by the district council's surveyor, gives the district council complete control over the work and the manner of its performance, and it is responsible for personal injuries caused by the negligence of the contractor in performing his contract. *Penny v. Wimbledon Urban Dist. Council* [1898] 2 Q. B. 212, 67 L. J. Q. B. N. S. 754, 78 L. T. N. S. 748.

The city of Cincinnati having given a contract to a person to regrade and repave a street, and provided in the contract for the work to be "done under the direction" of the city civil engineer, or agent appointed by the city council for the same, who should have "entire control over

the manner of doing and shaping all or any part of the same," and whose directions were to be strictly obeyed, etc., the contractor carelessly and improperly left piles of stones and materials for the work at a place near or about the gutter of the street, where a nuisance was likely to be created, the result being that, when rain fell, the water was obstructed, and flowed back and spread over the premises and building of the complainant. Held, that the city was liable for the damage so caused. *Cincinnati v. Stone* (1855) 5 Ohio St. 38.

That a contract for putting in a sewer was an independent one was denied in a case where it contained the following provision: The word "engineer," as herein employed, shall be construed to mean such person as shall be designated by the city council, whose duty it shall be to superintend the work in all its details, pass upon, and reject such material as may not be in conformity with these specifications, designate when work shall begin, and how it shall be conducted, discharge incompetent or disobedient employees, and pass upon all questions as to the intent and meaning of these specifications. The engineer, subject to approval of the sewer committee, may appoint, and place upon the work such inspectors as he may see fit, fully authorized to act for him in his absence. *Scott v. Springfield* (1899) 81 Mo. App. 312.

By an agreement for the construction of a sewer the contractor undertook to perform the work under the direction of the defendant corporation's street commissioner and a surveyor. In executing the contract, he negligently caused the excavated earth to be piled on the sidewalk, over the plaintiff's vault, and the arch of the vault was broken down by the weight of the superincumbent mass, and the plaintiff's property contained in the vault was destroyed. The court was of opinion that the contractor was the agent of the corporation in building the sewer and that a nonsuit had been erroneously directed. *Delmonico v. New York* (1848) 1 Sandf. 222.

In a case where an overflow resulted from an obstruction created by the earth which had been thrown out of a trench dug by a contractor for a pipe sewer, the retention by the defendant municipality of a supervisory control over the work was held to be a necessary inference where a power had been reserved to make alterations in the manner, extent, and plan of the work, as it progressed, and to relet the work in case the terms of the contract were not complied with, and, among other reservations of authority and control over the work, was the following: "The contractor shall commence the work at such points as the engineer and sewer committee may direct, and shall conform to their directions as to the order of time in which the different parts of the work shall be done, as well as to all the engineer's other instructions as to the mode of doing the same, including the length of street or alley that may be taken up in advance of the back filling." *Denver v. Rhodes* (1886) 9 Colo. 554, 568, 13 Pac. 729.

In *Nashville v. Brown* (1871) 9 Heisk. 1, 24 Am. Rep. 289, the court seems to have considered that the fact of its having been provided by a contract for a certain street work that it was to be done "under the direction of the city engineer, and to the satisfaction of the street committee," was an element which in itself showed that the relation created was that of master and servant. But the main ground of

the decision was the rule which declares the keeping of a street in a safe condition to be a nondelegable duty. See subd. IV. of the note to *Anderson v. Fleming*, — L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from the nonperformance of absolute duties of employer*.

5. Construction of canals.

From provisions of a contract which showed that the city retained a supervisory control over the work, and had power to dismiss any person employed by the contractors on the work, and that the dismissals made by the board of public works, who represented the city, were final and conclusive in every case that might arise under the contract, the court drew the inference that there was "dependence" and "serviency" in the contractors. *Chicago v. Joney* (1871) 60 Ill. 383 (obstruction created while the canal was being deepened caused an injury to a person using it).

6. Laying of pipe lines.

A contractor is not deemed to have full control of the work of excavating a trench for a pipe line across a highway, where the agreement provides that if the work is not done in a manner satisfactory to the superintendent of the contractee, he may put men in the trench at the expense of the contractor to make the necessary change; and also that if the contractor fails to prosecute the work with due diligence, the contractee may finish the same and charge it to the contractor. *Washington Natural Gas Co. v. Wilkinson* (1885; Pa.) 1 Cent. Rep. 637, 2 Atl. 338.

Where the contract for laying a line of pipes provided that they "were to be deposited in such continuous lines as might be pointed out, in such manner as not to interfere with the traffic, and to the satisfaction of the officer who might be present," and the plaintiff was injured by falling over a pipe which had been deposited by a carter in such a manner as to project over a crossing, one of the judges was of opinion that the public board which had made the contract for the distribution of this and other pipes along the highway had retained a discretionary power to indicate, by the direction of their officer, the places at which the pipes were to be deposited. *O'Brien v. Board of Land & Works* (1880) 6 Vict. L. Rep. (L.) 204, 2 Australian Law Times, 22.

7. Work in mines.

A contract of service is established where the undisputed evidence of the plaintiff's father, the party who made the contract, is that he hired the plaintiff to work in the mines for the appellant; that the contract between him and the appellant was that his two sons, including plaintiff, were to cut coal for 42½ cents per ton for all the coal they could dig; that he (the father) was to furnish the tools and powder and stuff; and that the bank boss was to have control of the work. *Drennen v. Smith* (1896) 115 Ala. 396, 22 So. 442 (where the question was whether the plaintiff was entitled to sue, as a servant, under the employers' liability act of Alabama).

Mine owners are responsible for the safety of the mine, not only to the servants directly hired by them, but to the servants of contractors, who 65 L. R. A.

have practically no discretion as to the planning of the mine or the selection of their working ground, and who are employed merely for the purpose of stripping a lode of its ore, the mine owners reserving the power of determining when and where dangerous rock shall be removed, and of giving directions as to where supporting pillars shall be left and timbers shall be placed to prop the walls. *Lake Superior Iron Co. v. Erickson* (1878) 39 Mich. 492, 33 Am. Rep. 423.

8. Scavenging work.

A man employed by the police commissioners of a town to remove rubbish was held to be a servant, not an independent contractor, where the contract contained provisions to the following effect: (1) That certain specified drains should be swept as often as required by the inspector; (2) that the commissioners should be entitled, as occasion might arise, to require the use of an additional cart or carts; (3) that the contractor should be bound to remove any nuisance upon receiving written orders from the commissioners; (4) that the work should be performed to the entire satisfaction of the commissioners or their inspector; and (5) that the contractor should be under the immediate order of the inspector or, in his absence, of the clerk of the commissioners. *Stephens v. Thurst* Police Comrs. (1876) 3 Sc. Sess. Cas. 4th series, 542 (plaintiff held entitled to recover for injuries caused by stumbling over a heap of rubbish left in a street without a light).

9. Work in manufacturing establishments.

In a case where the question was whether the jury were justified in finding that the negligent person was the agent or servant of defendants, it appeared by the uncontradicted evidence that one S took the work of which he had charge by the piece. Defendants paid him a fixed price for a specified amount of work, and he hired the employees under him, paid them himself, and retained the profits or suffered the losses which were the difference between the fixed contract price which he received and the amount of wages which he paid. He carried on his operations in one room of the defendants' factory. They furnished him the machinery, the power, and the material; and the defendants testified on cross examination that their superintendent had a right to direct when things should be done and how they should be done, and that if the employee did not obey orders he could be discharged. The court held that while the undisputed evidence showed that S was to some extent a contractor, yet the jury were justified in finding, from the whole evidence, that he was not so far an independent contractor that defendants were exempt from liability for his acts. *Barg v. Bousfield* (1896) 65 Minn. 355, 68 N. W. 45.

Whether one who is supervising a department of a factory is a servant of the owner or an independent contractor is a question for the jury where he testifies that he was paid by the gross for articles turned out of his department, and paid his subordinates out of the sum thus received, but also states that he was only the foreman for that department, and under the superintendent. *Latorre v. Central Stamping Co.* (1896) 9 App. Div. 145, 41 N. Y. Supp. 99.

It is proper to refuse a charge framed on the hypothesis that there was no evidence tending

to show that the negligent person was the defendant's servant, where there is testimony to the effect that that person had contracted to bale hulls of cotton seed at a specified price per bale, using the machinery and power of the defendant; that the defendant employed and paid the hands assisting in the work; that the negligent person was a negro, who had no other occupation, and was irresponsible financially; that he considered himself to be a foreman, and not an independent contractor; and that the company, by its superintendent and other officers, did actually exercise authority and control over him, over the machinery, and over the hands employed by him, to a degree inconsistent with the supposition that his work was under his control. *Wallace v. Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S. W. 399, Affirming in part and Reversing in part (1897; Tex. Civ. App.) 38 S. W. 1137.

10. Sale of commodities.

The provisions of a contract with a person employed to solicit orders for a commodity, and the reasons for the conclusion arrived at, are thus stated in a decision by the Supreme Court of the United States: "The contract between the defendant and C, upon the construction and effect of which this case turns, is entitled 'Canvasser's Salary and Commission Contract.' The compensation to be paid by the company to C, for selling its machines, consisting of 'a selling commission' on the price of machines sold by him, and 'a collecting commission' on the sums collected of the purchasers, is uniformly and repeatedly spoken of as made for his 'services.' The company may discharge him by terminating his contract at any time, whereas he can terminate it only upon ten days' notice. The company is to furnish him with a wagon; and the horse and harness to be furnished by him are 'to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business.' But what is more significant, C 'agrees to give his exclusive time and best energies to said business,' and is to forfeit all his commissions under the contract if, while it is in force, he sells any machines other than those furnished to him by the company; and he further 'agrees to employ himself under the direction of the said Singer Manufacturing Company and under such rules and instructions as it or its manager at Minneapolis shall prescribe.' In short, C, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating, not only what business he shall do, but the manner in which he shall do it; and might, if he saw fit, instruct him what route to take, or even at what speed to drive. The provisions of the contract, that C shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment." *Singer Mfg. Co. v. Rahn* (1899) 132 U. S. 523, 33 L. ed. 442, 10 Sup. Ct. Rep. 175.

In *Gahagan v. Aermotor Co.* (1897) 67 Minn. 252, 69 N. W. 914, the first paragraph of the contract was as follows: "Said sales agent agrees as follows: 1st. To do all the business pertaining to selling aermotors, . . . to re-

ceive all goods shipped to him under this agreement, to pay freight and expressage on such goods from Chicago, and to keep them well housed and in good order until sold, free of taxes and all charges to said company, and to be governed by the printed instructions on the back of this contract, which are hereby referred to and made part of this contract, and the instructions of the Aermotor Company." Commenting upon this contract the court said: "Many of its provisions tend to indicate that its object was to constitute F a factor to sell on commission, upon the terms and subject to the conditions and limitations therein specified, but otherwise to leave him to carry on the business in his own way, free from any right of control or direction on the part of the defendant. But the last clause of the first paragraph will not reasonably admit of any other construction than that F was to be governed by any instructions which the defendant might give as to the manner in which the business should be conducted,—in other words, that under this contract of employment the defendant had a right to direct the action of F by any instructions it might give as to the manner in which he should conduct the business, not inconsistent, of course, with the express terms of the contract itself. If this was so, then defendant had the right to control and direct his acts as to the manner in which the mills should be advertised, as, for example, setting up samples to attract public attention to them. . . . If the defendant had, under its contract with F, the right to control his action in the matter of setting up sample mills, then it is liable for his negligence. Under the evidence this was a question for the jury." It was accordingly held that damage might be recovered for injuries received by a child who meddled with a sample wind-mill which had been set up in a street and set in motion by the wind.

The persons whom it was sought to hold liable were wholesale dealers in millinery, and had in their service as a salesman and traveling agent one W, who was hired by the year on a salary. W's duties required him to stay in the store, or travel, soliciting orders for goods and making collections, as his employers might direct. When in the store he paid his own board; when traveling his expenses were allowed to him, and paid by his employers. At the time of the transaction in controversy he was traveling in the course of his employment; but he had no particular instructions, nor was he under any orders as to the route or mode of travel he should adopt. Commenting upon this evidence, the court said: "In the present case W, in respect to his employment, was at all times subject to the will of his employers, and could not, consistently with his duty to them, refuse to obey their directions in the performance of the service for which he was engaged. It was not necessary that they should, in fact, exercise such control. If they had the authority to the extent indicated, the fact that they chose to leave the details to his discretion would not alter the relation of the parties. We think W was a mere servant or agent, and cannot be regarded as a contractor within the meaning of the cases bearing on the subject. . . . His contract of employment did not bind him to produce any given result. His time belonged to his employers, and he was entitled to be paid irrespective of results." *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55 (plaintiff's buggy and

horses were injured by the negligence of Wright).

b. Effect of provisions of statute applicable to the circumstances.

If the contract has been framed with reference to the express provisions of a statute which regulates the manner in which the work in question is to be carried out, those provisions become an implied term of the contract, and if they declare that the contractor is to be under the control of the contractee or his representative, the relation created will be that of master and servant. This situation is illustrated by several cases dealing with contracts in which the clauses of a city charter determine the extent of the supervisory powers reserved.

The independence of a contract with a city for the building of a sewer was held to be negated where the contract was let pursuant to the provisions of a statute, by virtue of which the board of public works had full and complete control of the manner of the performance of the work by the contractor, during the progress thereof, and it was the duty of that board to reserve, in the contract for building the sewer, the right to determine finally all questions as to the proper performance thereof, or the doing of the work therein specified, and in case of imperfect or improper performance, to suspend the work, to order a reconstruction thereof, or to relet the work to some other party (*Wis. Private & Local Laws 1869, chap. 309, §§ 11, 17, chap. 401, § 12*). *Harper v. Milwaukee* (1872) 30 Wis. 365 (earth dug from a trench was left in such a position that the water in a drain was obstructed and diverted onto the plaintiff's premises); *Kollock v. Madison* (1893) 84 Wis. 458, 54 N. W. 725. In the first-cited case the court, not having the contract before it, entertained the presumption that it was made in accordance with the requirements of the statute.

The charter of the city of Seattle, which was in force at the time when the contract in question was entered into, conferred upon the board of public works the management and control of public streets and alleys of the city; also the superintendence of streets, the making of the improvements therein, and the management, building, and repairing of all sewers and connections therewith. It further provided that such improvements as were made by contractors should be made under the management of the board of public works. The contract and specifications in the case under consideration contained these provisions, among others: (1) That the improvement should be under the superintendence of the city engineer, and any orders and directions given by him or his duly appointed representative should be respected and immediately and strictly obeyed by the contractor or any overseer of the work; (2) that whenever the contractor was not present on the work, orders would be given to the superintendent or overseer who might have immediate charge thereof, and should by them be received and strictly obeyed; (3) that, if any person employed on the work should refuse or neglect to obey the directions of the city engineer or board of public works in anything relating to the work, or should appear to be incompetent, disorderly, or unfaithful, he should, upon the requisition of the engineer, be at once discharged, and not again employed upon any part of the work. It was held that, under the provisions of this contract, 65 L. R. A.

the persons employed were practically placed to work under the control, direction, and management of its engineer, and therefore were not independent contractors within the meaning of the rule which exempts a city or other employer from liability for an injury caused by negligence in the prosecution of the work. *Cooper v. Seattle* (1897) 16 Wash. 462, 58 Am. St. Rep. 46, 47 Pac. 887 (water main burst in consequence of the manner in which an excavation was made around it).

To the same effect, see *Smith v. Seattle* (1890) 20 Wash. 613, 56 Pac. 389 (grading caused removal of lateral support); *Seattle v. Buzby* (1890) 2 Wash. Terr. 25, 3 Pac. 180 (similar facts).

"The intention of the legislature that the city of St. Paul should 'retain that supervisory and directory power over the details of the work and the manner of its performance which is so valuable to the citizen in protecting his person and property against the carelessness of irresponsible contractors,' was held in the case cited to be a necessary inference, for the reason that the charter provided as follows: 'The said street commissioners shall have power to order and contract for the making, grading, repairing, and cleansing of streets, alleys, public ground, reservoirs, gutters, and sewers within their respective wards, and to direct and control the persons employed therein.' *St. Paul v. Selts* (1859) 3 Minn. 297, 74 Am. Dec. 753, Gil. 205 (plaintiff fell into an excavation made in the course of the grading of a street).

c. Effect of direct evidence that employer exercised control over the work.

In estimating the proper import of the testimony submitted, the essential question to be determined is not whether the employer actually exercised control over the details of the work, but whether he had a right to exercise such control.

"It is this unlimited right of control, whether actually exercised or not, which, in my opinion, is the condition for inferring the responsibility of a master." *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 353, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196, per Elgby, L. J.

"The tendency of modern decisions is . . . not to regard as an essential or absolute test so much what the owner actually did when the work was being done as what he had a right to do." *Atlantic Transp. Co. v. Coneys* (1897) 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177, where it was held that a carpenter engaged in repairing the fittings of a steamer for cattle and freight is not an independent contractor, where the captain and superintendent have the right to direct the extent and manner of the alterations and repairs, although such right is not often exercised because of the confidence in the ability of such carpenter and his knowledge of what will be required, and separate bills are made out for the separate kinds of work upon each vessel and the materials furnished for each job.

In another case it was laid down that, in order to constitute the employee a servant, "It was not necessary that his employers should, in fact, exercise such control," and that, "if they had the authority to the extent indicated, the fact that they chose to leave the details to his discretion would not alter the relation of the parties." *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55.

In another case it was remarked that, while defendants might not have exercised power of control over the work of S, the alleged contractor, yet if they retained the right to exercise such power during the progress of the work, then, within the authorities, he was their servant, and not their contractor. *Goldman v. Mason* (1888) 18 N. Y. S. R. 376, 2 N. Y. Supp. 337.

In a charge by a trial judge, which was approved by the court of review as being a correct statement of principles, the following remarks were made with reference to the evidence which had been introduced as to the actual control which the employers exercised over the work: "That is all proper and competent evidence for you in considering the matter, yet that the absolute test is not the exercise of power of control, but the right to exercise power of control. If, for instance, there was nothing in the case but this contract, and there was no question that the parties were acting under it, if that is the view you take of it, and that the injury was occasioned by the negligence of E, then, although the trustees should be across the Atlantic, nevertheless, under the instructions I give you, if they retained the power to control and direct the work, they would be liable; because it is the possession of the right of interference, the right of control, that puts upon a party the duty of seeing that the person who stands in that relation does his duty properly." *Linnehan v. Rollins* (1884) 187 Mass. 123, 50 Am. Rep. 287.

The same doctrine is recognized in *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Hawke v. Brown* (1898) 28 App. Div. 37, 50 N. Y. Supp. 1032.

Clearly, however, evidence which shows that the employer did, as a matter of fact, interfere with or give directions regarding the work, must necessarily have a material bearing upon the question of his liability. Such evidence is susceptible of two constructions according to circumstances:

(1) It may be regarded as tending to establish either the general conclusion that the employer had reserved the right to control all the details of the work, and consequently occupied the position of a master in regard to the person employed. To negative the inference that the person employed was an independent contractor, it is not necessary, in this point of view, that the directions actually given should have embraced every detail in the execution of the work (*Sullivan v. Dunham* [1898] 35 App. Div. 342, 54 N. Y. Supp. 962). (2) It may be regarded as tending to establish the special conclusion appropriate only to cases in which the injury was the direct result of the employer's interference or directions, that he was a principal tortfeasor, and responsible as such, whatever may have been the character of the contract as a whole.

The second of these aspects of the evidence will be considered in subd. VI. of note to *Louisville & N. R. Co. 66 L. R. A.* —, on *Liability of employer for injuries occurring in performance of work by independent contractor where employer's own act is a proximate cause of the injury*. That the former aspect is illustrated by most, if not all, of the decisions cited in the following subdivisions, would seem to be a reasonable inference from facts involved and the language used in the opinions. But in some instances there may be a doubt as to the precise standpoint of the court.

65 L. R. A.

1. Work on railways.

In one case the court thus commented on the evidence which, in its opinion, negatived the contention of the defendant that the laborers whose carelessness produced the injury were independent contractors: "The proof shows that these graders were employed directly by the railroad company and were paid by the company at the rate of so much per cubic yard of earth removed, and an agreed price for all stumps removed. The graders were common laborers and the defendant company seems to have been carrying on the general work of constructing its road within itself, and not, as is often customary, through the instrumentality of an independent contractor for the various branches of its work. Its witness, C. R. Knight, who was its engineer, as he says, 'in charge' of the extension of the road to Palatka, undertakes in his evidence to represent these graders as being independent contractors; but he testified that their work was staked out for them by the engineer in sections, and the 'yardage' computed, and that then a 'foreman' let out the sections to those who applied for the grading of them; and that the next duty of the foreman was to accept or reject the work upon its completion, and, in case of doubt as to whether the work was well done, he called on the engineer for the levels necessary to determine the doubt as to whether the grader has 'properly and faithfully, and in accordance with his contract, done his work.' He testified further that the foreman had the right to take the work away from them when for any cause they neglected to perform it within a reasonable time, and to relet any uncompleted portion paying *pro rata* for the part performed; and that whenever the foreman's attention was called to any specific violation of the 'contract,' he had the right to annul the contract or to compel the grader to do the work as he had contracted to do it, and that the foreman pointed out to the grader the 'amount and nature' of the work, directing him as to the width and height of the embankment, and where the earth was to be taken from, etc., etc. In other words, what this witness termed the 'stipulations of the contract' with the graders were evidently nothing more than directions from the foreman and engineer to the graders as to the mode and manner of doing their work, and if it was not done in accordance with those directions, the grader was forced to comply with them, or else be dismissed without pay for the uncompleted or imperfect work. Under these circumstances we think that these graders, instead of being independent contractors in the sense that would relieve the employer company from responsibility for their negligence, are sunk to the level of ordinary laboring servants to the company who was their master, and that the company was properly held to be liable for the damage resulting from their negligence in the performance of the work they were put by the company to perform for its use and benefit." *St. Johns & H. R. Co. v. Shalley* (1894) 33 Fla. 307, 14 So. 890 (fire negligently started damaged property of adjoining landowner).

In another case where, after a construction company had partially performed its contract for the building of a railroad, the contract was abandoned by the parties in many material respects, and the railroad company, by its own officers and servants, took charge of and supervised the work, gave directions as to how the

roadbed should be constructed, and assumed general management and control of the enterprise. It was held that the railroad company could not relieve itself of liability for injuries occasioned by negligent or improper construction, but was primarily responsible. *Savannah & W. R. Co. v. Phillips* (1892) 90 Ga. 829, 17 S. E. 82 (fireman of construction train injured by defective track).

Evidence that the defendant's representative hired other laborers in a gang besides its foreman, that he had previously discharged and taken back the whole gang, that he refused employment to some men, that he directed men when to go on and stop work, will warrant a jury in finding that the defendant was the master of the foreman and the laborers on the gang. *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 102, 16 N. E. 690.

Men who were employed to load coke on the cars of a railway company, and who were paid by the number of cars loaded, and who, as the undisputed evidence showed, did their work under the immediate supervision and control of the company's superintendent, were held not to be independent contractors. *Holmes v. Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465, 22 So. 403 (laborer threw a heavy board down into the street without looking).

One who has made with the owner of a street-car line a contract under which for a specified amount per month he is to haul a car over the line once a day each way, and to furnish a driver, is a servant of the owner, and not an independent contractor. *Jensen v. Barbour* (1895) 15 Mont. 582, 39 Pac. 906 (boy was thrown off the front platform by a jolt and run over). The court based its decision on two grounds: (1) That the reservation of a power of control was indicated by the fact that the defendant's agent was accustomed to give directions for the protection of property, and to warn the driver not to allow boys to ride on the car; and (2) that there was no force in the contention of defendant's counsel, that the person employed represented the will of his employer only as to the result of his work, and not as to the manner of its performance; or in other words that he contracted to deliver to his employer the result of putting the car over the track once a day by his own methods. In answer to the latter point, the court said: "So it might be argued that one's coachman contracts to produce the result of conveying his master from his house to his office, or wherever he may wish to go, or one's cook contracts to produce the result of placing before his master his daily food. But such is not the sense in which the word 'result' is used in the rule. We think that the word 'result,' as so used, means a production or product of some sort, and not a service. One may contract to produce a house, a ship, or a locomotive; and such house, or ship, or locomotive produced is the 'result.' Such 'results' produced are often, and probably generally, by independent contractors. But we do not think that plowing a field, mowing a lawn, driving a carriage, or a horsecar, for one trip or for many trips a day, is a 'result' in the sense that the word is used in the rule. Such acts do not result in a product. They are simply a service."

2. Construction of buildings.

In a case where a person rightfully on the defendant's premises was injured by the collapse

of a wall it appeared that, in order to support the wall during the process of undermining, pieces of timber, denominated "needles," were extended through it, intended to rest upon firm earth on both sides. The negligence as alleged, and as the proof tended to show, consisted in the failure to extend them through sufficiently to enable them to rest on solid ground on the inside of the wall. This work was not provided for in the original contract; and the mode of supporting the walls while being undermined was directed by the architect, who was employed to superintend the erection of the building. It was held that, as it was proved that the defendant had the ultimate power, as owner, to order how this work should be done, he was liable although the mode was left to the judgment and direction of the architect. *Campbell v. Lunsford* (1887) 83 Ala. 512, 3 Am. St. Rep. 758, 3 So. 449.

In a case where the fall of a building on adjacent premises was caused by digging a trench too long and deep alongside the wall, the contract declared that "the excavation should be carried to such general depth as might be indicated by the engineer;" and that "excavations for the trenches and piers should be made as required from time to time in the progress of the work, and to such an extent as might be indicated by the engineer." There were also statements that the engineer was "in charge of the work," and that men who refused or neglected to obey his orders were to be discharged by the contractors. The court said: "The very act complained of here is the digging of the trench too long and too deep in the circumstances. That act is charged as negligence. It was ordered by defendant's representative on the spot, acting for the chief engineer who had express power to direct 'by his authorized agents,' as well as personally. The work was done precisely as ordered. Thus it was the exercise of the discretion or judgment vested in the supervising authority, which caused the catastrophe; and for that exercise of judgment defendant must respond." *Larson v. Metropolitan Street R. Co.* (1892) 110 Mo. 234, 16 L. R. A. 330, 33 Am. St. Rep. 439, 19 S. W. 416.

In a case where the evidence showed that the defendant had contracted to erect a brewery, and that he let out to one W the contract for general work, including the hoisting into position of the iron required in the building; that W employed and discharged his own mechanics and laborers; and that the defendant communicated with him, and not with the men employed by him,—the court remarked that, nevertheless, there was upon the one hand an uncertainty as to the precise limitations of the contract, and upon the other a certainty that the defendant was continually on hand, and in control, even though his directions as to how the work should be done were given to W. The conclusion arrived at, therefore, was that W was not an independent contractor in such a sense as to relieve the defendant of liability for his conduct in the prosecution of that work. *Moffet v. Koch* (1901) 106 La. 871, 31 So. 40 (iron truss, being placed in a dangerous manner without proper bracing, tilted over and fell to the ground).

In a case where the goods of the tenants of a building were injured through the negligent manner in which an employee of the landlord has repaired a gutter over a party wall, the evidence relied upon as showing that the employee

was under the control of the defendant, and therefore in "legal contemplation" his servant, comprised the following facts: That the job was a light one, that the defendant had not surrendered the premises while the work was being done, that he had instructed the employee not to do the work when rain was threatened, and that he had ordered the employee to "go ahead" when the latter explained what he thought best to be done. *Mumby v. Bowden* (1889) 25 Fla. 455, 6 So. 453.

In *Hart v. Ryan* (1889) 3 Illv. Sup. Ct. 415, 6 N. Y. Supp. 921 (removal of lateral support damaged a building), it was held that the trial judge properly refused to hold upon the evidence that the defendants, the principal contractors for the erection of the building, were not liable by reason of their arrangement with one K as to the excavations, the evidence being to this effect: That K was to be paid by the yard for such excavations as he made; that it was his duty to follow the directions of the defendants from time to time, as to where and when he should dig; that they supervised the work; and that B gave directions to the men there. Under these circumstances, it was considered that, if K made the excavations which caused the damage upon the plaintiff's land, it was with the knowledge and apparently with the direction of the defendants. Hence if, upon all the evidence, the jury found that the footing-course was erected upon the plaintiff's land, K, as well as the defendants, became trespassers upon the plaintiff's premises.

A landowner who continues to manage and control the work of excavating under the wall of an adjoining building, is liable, notwithstanding a contract with a third person for its performance, for damages resulting from the work. *Dunton v. Niles* (1892) 95 Cal. 494, 30 Pac. 762; *Watson Lodge, No. 32, I. O. O. F. v. Drake* (1895) 16 Ky. L. Rep. 369, 29 S. W. 632.

It was held that one who had contracted to supply a building with an automatic fire extinguisher and had sublet the making of the tank to responsible and competent builders, was liable to third parties for damages caused by their negligence, where his agent had general supervision of the work and caused the damage by directing the plaintiff's servant to let water into the tank without ascertaining whether it would hold water. *Butts v. J. C. Mackey Co.* (1893) 72 Hun, 562, 25 N. Y. Supp. 531, Affirmed in (1895) 147 N. Y. 715, 42 N. E. 722.

An employer who is sued for a personal injury received by an employee from the falling of an ice-house cannot escape liability on the ground that he reserved no control over the erection of the building, where the evidence shows that before the contract was let he consulted with the builder and determined on the materials to be used and plan of construction, and was around the premises constantly while it was under construction. *Meier v. Morgan* (1892) 82 Wis. 289, 33 Am. St. Rep. 39, 52 N. W. 174.

In *Camp v. Church of St. Louis* (1852) 7 La. Ann. 321, it was held by one half of an evenly divided court that, as the defendants had retained a "continuous and active control" over the work of erecting a building, the case was not within the purview of § 2739 of the Civil Code of Louisiana, which declares that "the undertaker is responsible for the deeds of the person employed by him." The construction put upon this provision was that, under ordinary

circumstances, the undertaker was alone responsible.

The inference that a man employed to make an excavation for a cellar, at a specified price, *per diem* and commissions on the outlay, was a contractor, and not a servant, cannot properly be drawn, where the evidence of the employer himself shows that he was exercising control over him in respect to the manner in which the earth should be removed, so as to secure the safety of a house on the adjacent lot. *Mound City Paint & Color Co. v. Conlon* (1887) 92 Mo. 221, 4 S. W. 922.

The fact that a landlord, when employing a plumber to make some repairs, informs him that a tenant on the premises will show him what to do, has no tendency to prove that the defendant reserves the right to direct how the work shall be done. *Burns v. McDonald* (1894) 57 Mo. App. 599.

3. Work in streets.

In a recent English case, where the injury was caused by the negligence of H, a master plumber employed by a telephone company to connect the pipes which it was laying in a street for its wires, the evidence was that, according to the usual course of business, H was sent for, and either came in person or sent one or two men, generally, and did the work as soon as he could. But there was no agreement that he should come at any specified time. On the occasion in question H's brother came to do the work alone, as H was otherwise engaged. The defendant's local manager visited the work several times a day to see that the joints were properly made; and he stated in evidence that, if the work were not satisfactory, he could put an end to the contract. A finding by the city of London court that H was a servant was held by the divisional court not to be justified by the evidence; but the court of appeal was of opinion that the finding should be allowed to stand. *Holliday v. National Teleph. Co.* [1899] 2 Q. B. 392, 68 L. J. Q. B. N. S. 1016, 81 L. T. N. S. 252, 47 Week. Rep. 658, Reversing [1899] 1 Q. B. 221, 68 L. J. Q. B. N. S. 302.

4. Clearing of land.

The independence of the contract is negatived where the evidence is that a person agreed to clear a piece of land at a certain price per acre, but that the employer watched the progress of the work, gave advice as to the setting of the fire to burn the timber and brushwood, and, when he was told that a certain fence which extended to the plaintiff's land might take fire, said that it made no difference. *Johnston v. Hastie* (1870) 30 U. C. Q. B. 232.

In a case where one J had made a contract with the defendant for removing trees, the former testified that he was to furnish teams and men for a certain price, and that either he or one D was to be present and act as foreman under the direction of one W, who was the defendant's foreman, and was to do the work pursuant to his direction. W was present a part of the time while the work was progressing and pointed out what was to be done. The witness said: "We did not usually do anything that W did not first tell us to do." The directions given by W consisted in pointing out the particular piece of work to be done, such as the excavation for the foundation of a barn and construction of a ditch. For new pieces of work

D and J went to W; he directed them to take the trees out whole. The defendants D and J received pay as foremen, at a given price per day, and the men, material, and expenses were paid for at cost, and bills rendered therefor with a certain percentage added as profit. On the other hand the defendant stated, in effect, that he sold a good deal to W on the subject of giving directions to D and J, "as to the manner or method and means of doing this work, before I left; also while I was there, before I had made my plans for going." The defendant was present when the work began, but while it was in progress he went away, and subsequently communicated with W in reference to the work. The defendant also testified that he gave no directions, either himself or through W, to D or J, except in the expansion of the work, and in additional items of work to be done. The court thus commented on this evidence: "If the arrangement was that Dunham was simply to give directions as to the work to be done, and did not give or had no authority to give direction as to the manner in which it should be done, or as to the means to be used in performing it, then he would not be liable for any injury resulting from the method of its performance, as there would be no relation of master and servant. But the evidence authorized a different inference from this. As we have seen, Dunham said that he did give directions as to the manner, method, and means of doing the work, and W carried out this view when he directed that the trees should be taken out whole, and he gave such direction in relation to blasting the particular tree out of which the injury arose. It was not necessary that the directions should embrace every detail in doing the work." *Sullivan v. Dunham* (1898) 35 App. Div. 342, 54 N. Y. Supp. 962 (tree which was blasted out whole fell on plaintiff).

5. Work in manufacturing establishments.

A "boss roller" employed to manufacture iron and steel at his own expense, with motive power furnished by the employer, at a certain amount per ton, to be distributed to him and his assistants, who are employed by him and subject to be discharged by him, as well as by his employer,—is not an independent contractor, but a foreman only, and therefore the relation of master and servant exists between his employer and his assistants, notwithstanding that their compensation is fixed and paid directly by him, where he has no duty or right to repair the machinery, and the manufacturer exercises some control of the manufacture between the delivery of the material and the acceptance of the product, although the details are left to him. *Indiana Iron Co. v. Cray* (1897) 19 Ind. App. 565, 48 N. E. 803.

6. Work done with teams.

One who is engaged in delivering coal for a fuel company, who is paid weekly by the ton, and who owns the team and the running gear of the wagon, the company furnishing the wagon box, his employment being continuous until suspended, is a servant of the company, and not an independent contractor; and the company is liable for injuries from his negligence in replacing the cover of a coal opening so insecurely as to be dangerous to persons passing along a sidewalk. *Waters v. Pioneer Fuel Co.* (1892) 52 65 L. R. A.

Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52. The testimony relied upon by the court was that he had worked for the company about three months, hauling coal daily, that he had in the meantime rendered service for no one else, that he appeared to be subject to its orders, and that he was treated as one of its teamsters or drivers.

7. Unloading of ships.

In a case where the injury was caused by the negligent manner in which a truck used for hauling lumber from the wharf on which it was being unloaded from a ship to a shed where it was being stored, it was held that the question whether the defendant was liable had properly been left to the jury, where there was evidence going to show that the negligent person was employed as an assistant by one of three men who on previous occasions had often been engaged as ordinary dock laborers by the defendant, but had in this instance undertaken to unload the timber and place it on trucks, for a specific compensation, estimated with reference to the amount handled; and the defendant's foreman had admitted, on cross-examination, that, if he had seen that a truck was not properly loaded, he would have spoken to the contractors themselves, or, if none of them had been present, to the men who were loading the truck. Lord Esher said that, when the foreman's evidence came to be looked at, it showed that, under certain circumstances, he would have interfered with the men engaged by the contractors, if they were doing their work wrongly, and that, taking into consideration this fact, and all the circumstances under which the dock company carried on its business, it was impossible to say that a jury would not be justified in finding for the plaintiff. *Ruth v. Surrey Dock Co.* (1891) 8 Times L. R. 116.

That the alleged contractor was a servant, and that he was paid, not as a master workman, but as a foreman of the defendants, was held to be a justifiable conclusion, where he had testified that he was a "lumper" working at the wharves along the river side; that the terms agreed upon between himself and the defendants were that he should get the barge in question discharged and should be paid at the rate of 1s. 9d. for every ton that was unloaded, he managing everything necessary to perform the work; that he selected, as he liked, the men who were to work under him; but that they were to work as if he were foreman; and that the nature of the employment was such that he could not dismiss any workman without reference to the defendants. *Charles v. Taylor* (1878) L. R. 3 C. P. Div. 492, 38 L. T. N. S. 773, 27 Week. Rep. 32, per Brett, L. J.

8. Sale of commodities.

If the control, which is the diagnostic mark of the relationship of master and servant, was, as a matter of fact, exercised over him—and this is primarily a question for the jury—a commercial traveler, even though he is paid by commission, is a "servant" within the meaning of the embezzlement statutes. *Reg. v. Tite* (1861) Leigh & C. C. 29, 30 L. J. Mag. Cas. N. S. 142, 7 Jur. N. S. 556, 4 L. T. N. S. 259, 9 Week. Rep. 554, 8 Cox, C. C. 458; *Reg. v. Carr* (1811) Russ. & R. C. C. 198; *Reg. v. May* (1861) Leigh & C. C. 13, 30 L. J. Mag. Cas. N. S. 81, 7 Jur. N. S. 147, 3 L. T. N. S. 680, 9 Week. Rep. 256, 8

Cox, C. C. 421; Reg. v. Bailey (1871) 12 Cox, C. C. 56, 24 L. T. N. S. 477.

Other cases in which the circumstance that the employer did, in point of fact, interfere and control the employees in the course of their work, have been adverted to as a cumulative element supporting the conclusion that they were mere servants, are *Sérandat v. Salsse* (1866) L. R. 1 P. C. 152, 35 L. J. P. C. N. S. 17, 12 Jur. N. S. 301, 14 Week. Rep. 487; *Wallace v. Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S. W. 399.

d. Effect of character of stipulated work.

The ground upon which some decisions may be said to have proceeded was that, in view of the humble industrial status of the persons employed, and the simple character of the work to be done, the only admissible inference was that the employers intended to retain the right to give directions in regard to the details of the work. In other words, it was considered that, although the persons employed might be exercising an independent calling in the sense that they held themselves out as being prepared to do certain kinds of work for such parties as might engage them, the relation which they bore to those parties, during the progress of such work as might be undertaken by them, was in law that of a servant.

In *Sadler v. Henlock* (1855) 4 El. & Bl. 570. 3 C. L. Rep. 760, 1 Jur. N. S. 677, 24 L. J. Q. B. N. S. 138, 3 Week. Rep. 181, defendant directed P to cleanse out a drain on his land. P was not otherwise in the employment of the defendant; he was a common laborer, who had originally made the drain. P executed the work with his own hands, and charged the defendant 5 shillings for the job, which the defendant paid. The defendant was not shown to have interfered with the work, or to have seen the way in which it was executed, or to have given any specific directions. P, in clearing out the drain, took up the part of the highway under which the drain passed. After completing the work, he replaced the soil of the highway, but imperfectly, and with insufficient materials; and, in consequence, it gave way, while a horse belonging to the plaintiff, and on which plaintiff was riding at the time, was passing over it; and the horse, by falling into the hole thus made, was injured. Upon this evidence it was held that P was a servant for whose negligence the defendant was responsible. Lord Campbell, Ch. J., said: "Had P been the domestic servant of the defendant, and the defendant had said to him, 'Go and clean out the drain,' no doubt P, by doing the work negligently, would have made the defendant liable. Then, what difference can it make that P was an independent laborer, to be paid by the job? The defendant might have said, 'Fill up the hole in the road, but not as you are now doing it, lest, when a horse goes over the place, he may be injured.' P was therefore the defendant's servant; and, if so, *cadit questio*." Coleridge, J., said: "If the work had been done by his own hand he would have been responsible. So he would if it had been done by his servant or by a common laborer whom he had employed. On what ground? Because the party doing the act would have been employed by him. Instead of this, he employs a person who seems to have been usually employed in such works. Such person is just as much his servant, for this purpose, as a domestic 65 L. R. A.

servant." Wightman, J., said: "Really the question is whether P is to be considered as the defendant's servant or as a contractor exercising an independent employment. The whole evidence shows that the former is the correct view. P was not a person exercising an independent business, but an ordinary laborer, chosen by the defendant in preference to any other, but not exercising an independent employment." Crompton, J., said: "The real question is whether the defendant and P stood to each other in the relation of master and servant. I decide, not on the ground that P did not employ the hands of another; for, if he was the defendant's servant, the defendant would be liable for the wrong doing of the person whom the servant employed; though it is true that such employment may sometimes be a test as to whether the employer was a servant or an independent contractor. The test here is whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstance of the man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee." The last-mentioned judge also remarked during the argument of counsel (p. 375): "Is not this rather a case where the employer maintains a control over the person whom he employs? A contractor chooses the mode in which the work is done and the persons who do it. I thought the principle of the cases, which are cases of difficulty, was that the contractor had this power of choice." In *Rait v. New England Furniture & Carpet Co.* (1896) 66 Minn. 76, 68 N. W. 729, the court inclined strongly to the view that this decision would have justified it in holding, as a matter of law, that a person whose general occupation was that of carpenter and builder and who was employed by a house owner to stop a leak in the roof of the house and, while engaged on the job, threw down some ice and snow on a passer-by, was a mere servant. But it was declared to be, at least, a question for the jury to say whether the defendant surrendered all control over the actions of the employee as to the manner of removing the ice and snow from the roof of the building. The construction thus put upon the English case is of very dubious correctness when it is considered that the work there involved did not require any special skill, as in the case before the court. Upon the facts the Minnesota ruling is inconsistent with another English case (*Welfare v. London, B. & S. C. R. Co.* [1869] L. R. 4 Q. B. 696, 38 L. J. Q. B. N. S. 241, 20 L. T. N. S. 743, 17 Week. Rep. 1065) cited in the following subdivision, but is sustained by some of the American cases there referred to.

In *Tucker v. Axbridge Highway Board* (1889; Q. B. D.) 53 J. P. 87, where a trap was capsized by striking against a heap of stones which had been left beside a road by a man who had been employed to repair it, the defendant was held liable on the general ground, as it would seem, that "if a person does merely menial work, then he is clearly a servant."

In a New Zealand case it was remarked *arguendo*: "There is yet another point of distinction which has been referred to in several of the cases and is, perhaps, here applicable; the employment of an ordinary laborer to do ordinary laborer's work by the piece and the employment of persons skilled in a particular business." *Threikeld v. White* (1890; C. A.) 8 New Zealand L. R. 513.

In *Sérandat v. Salase* (1866) L. R. 1 P. C. 152, 35 L. J. P. C. N. S. 17, 12 Jur. N. S. 301, 14 Week. Rep. 487, the respondent brought an action for injuries caused by a fire kindled on the appellant's land by laborers employed by him to clear the ground for agricultural purposes, which fire was so carelessly made that sparks and other burning particles were carried over and scattered upon the respondent's premises. The respondent grounded his claim for damage on the article 1384 of the Code Napoleon (the prevailing law of Mauritius, where the action was brought), which is in these words: "Les maitres et commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés." The respondent contended that the appellant and the men he employed stood in the relation of commettant and préposé, within the meaning of this article. From an examination of the authorities the conclusion was arrived at, that, subject to the qualification mentioned in the following sentence, the word "préposé" in the article means substantially a person who stands in the same relation to "commettant" as "domestique" does to "maitre," i. e., a person whom the commettant has intrusted to perform certain things on his behalf. It was observed, however, that the French lawyers, in their interpretations of the article, had qualified this construction by the doctrine that, in order to make the commettant responsible for the negligence of the préposé, the latter must be acting "sous les ordres, sous la direction et la surveillance du commettant." The evidence showed that there were two bands of Indian laborers employed and that the work was to be paid for at a certain price per acre, but left it doubtful whether the appellant was to pay the price to the head men of each band, or to them and the Indians in their respective bands. On this evidence the contention of the appellant, that he had severed himself from the execution of the work, and parted with all superintendence and control over the persons by whom it was performed, was rejected by the privy council on grounds explained in the following extract from the judgment: "Having regard to the nature of the work, and the condition of the men employed, it appears to us unreasonable to infer that the appellant had parted with the power of correcting, as the work went on, the mode in which it was to be performed, and of dictating what kind of brushwood and other growth was to be removed, and what was to be left standing, and how the weeds and brushwood which had been got up were to be dealt with, and where they were to be deposited; in other words, we think the evidence does not shew that the general control, direction, and surveillance of the operations was relinquished by the appellant by reason of the agreement he had made with the Indians. It may be observed that these men do not at all answer the description given by *Mirey* (Codes Annotés, vol. 1, p. 665) of 'ouvriers d'une profession reconnue et déterminée'; they were ordinary laborers characterized by the court below as 'a set of idle, careless semi-barbarians.' The view we have thus taken of the relation established by the agreement between them and their employer is corroborated by the evidence, which shews that in point of fact the appellant did interfere and control the men in the course of the work. For example, it was said by Joondine, 'Mr. Sérandat told me not

to put fire in the place where I was working;' . . . 'he told me to put fire in another place which he pointed.' Again, *Beesapa* says: 'The previous day Mr. Sérandat had come and told Joondine to leave that portion of ground which is \$50, and go and work in the interior of the field.' And the appellant's answer states that he had given orders five or six days before to burn some weeds, but that he also gave orders that the fire should be carefully extinguished. Looking, then, at the whole case, we are of opinion that the appellant and the Indian whose negligence caused the fire stood in the relation of 'commettant' and 'préposé.' And, as it has not been disputed that the negligent act was done by the 'préposé' in the course of his employment, it follows that the responsibility of the appellant is made out."

A man employed by the defendant to cleanse out, at certain intervals, the contents of his ash-pit, deposited them on one occasion in the street, preparatory to their being removed, and the plaintiff's vehicle was upset by the heap. The jury found that the contract was an entire one to remove the rubbish altogether, and not merely to take it to the street. It was held error to enter judgment for the defendant. On this finding *Blackburne, J.*, remarked that the nature of the subject-matter in such cases makes all the difference, and that, when regard was had to the act done in the very house occupied by the defendant, and under his wife's directions, it appeared to have been but the ordinary act of a servant. *McKeon v. Bolton* (1851) 1 Ir. C. L. Rep. 377, 3 Ir. Jur. O. S. 288.

Where a city was constructing a water-pipe trench, and a laborer employed under the direction of the city's inspector and superintendent was assigned to the excavation of a 12-foot section of the trench, but he had no authority or discretion as to his work, it was held that he was not, therefore, an independent contractor but a servant, and that the city was bound to provide for his safety against caving of the banks while performing the work. *Ft. Wayne v. Christie* (1900) 156 Ind. 172, 59 N. E. 385.

Where a landowner who is about to rebuild a house which has been destroyed by fire, contracts directly with a laborer to make the excavation for the foundation for a specified price, instead of letting out the whole work to one person, it is error to give an instruction which would exclude from the consideration of the jury the possibility that the laborer was hired as a servant. *Stevenson v. Wallace* (1876) 27 Gratt. 77.

In holding that a laborer engaged for 50 cents to drive an animal is a servant to the owner of the animal, and not an independent contractor, the court reasoned as follows: "There is nothing in the nature of the employment or in the contract to indicate that S [the laborer] was not subject to the control, supervision, and direction of B, had he seen fit to exercise such control over S's movements. Nor is there anything whatever in the testimony to prove that S exercised a distinct calling as did the colored teamster, S, in *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376, and the licensed drover described in an English case cited by appellant [*Milligan v. Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L. J. Q. B. N. S. 19]. S was doing any sort of ordinary work at that time. To constitute an independent contractor, so as to relieve his employer from liability for his conduct, it must at least appear that the

work to be performed was committed exclusively to the discretion of the contractor. The independence of the contractor may appear by the nature of the work sometimes, and at other times by the terms of the contract, or by the calling of the contractor. The nature of the work in question in this case, no less than the agreement itself, totally fails to establish a foundation for holding S to be an independent contractor in the matter of driving the cow to defendant's place of business. The fact that the work was to be paid for in one price is not decisive of the question." *O'Neill v. Blase* (1902) 94 Mo. App. 648, 68 S. W. 764.

A porter who was occasionally employed by a butter-factor to leave parcels at the house of purchasers, and was paid by the persons to whom the parcels were delivered, was held to be a "servant" of such factor within the meaning of the embezzlement statutes, and not a person following an independent employment. *Reg. v. Lynch* (1854) 6 Cox, C. C. 445.

In a New York case the court remarked *arguendo*: "Undoubtedly, one cannot shield himself under the doctrine of independent contractors by simply employing another person and giving him a general authority to procure others to assist in work which requires no care or skill or experience, but which is merely such as might be done by any person with sufficient physical strength." *Kueckel v. Ryder* (1900) 54 App. Div. 252, 66 N. Y. Supp. 522.

The authorities do not show distinctly the rationale of the presumption above referred to. Essentially it may perhaps be said to reflect merely the understanding of the courts as to the terms upon which work is ordinarily contracted for under the circumstances indicated. It must be admitted, however, that it is not easy to adopt this explanation to three Scotch cases in which the employer was held liable. But these decisions seem to be inconsistent with the English and American authorities reviewed in *supra*, VI.

In a case where the plaintiff was the proprietor of a mineral stratum which was damaged by fire which spread from the place where ironstone was being calcined, it was shown that the lessee of the ironstone workings had employed contractors to calcine it at so much per ton, payable at the end of every fortnight. These contractors employed and paid all the workmen, the lessee having no direct management in the calcining operations. The jury were charged by Lord President Boyle that, in point of law, the lessee was responsible for the acts of these contractors, as they were in no different position from any other laborers hired by a master to work by the piece. *Rankin v. Dixon* (1847) 9 Sc. Sess. Cas. 2d series, 1048.

In a later case arising out of the same occurrence the stipulations of the contract are set forth more in greater detail. The contractor agreed to employ the necessary number of miners, to pay them their wages, to furnish various implements necessary for the workings, etc. After the first two months the output was to be not less than 100 tons of calcined stone weekly, and a failure to perform this stipulation entitled the contractee to terminate the contract by giving a written notice of one month. The working was to be carried on regularly and fairly, and agreeably to the instructions of the contractee or his overseer. The contractor, after the first month, had the right to abandon the job upon giving one month's notice. It was held that, 65 L. R. A.

as between the lessee of the ironstone and his landlord, the contractor was to be regarded as a mere servant of the lessee. Lord Colonsay seems to have based his decision mainly upon the fact that, under the contract, the lessee had a control over the calcining operations. In the course of the opinion he said: "This is a case of injury done to a neighboring property by a person who held a mixed character, at least whose trade had not yet assumed such an independent character as entitles us to hold that the defenders can get rid of the responsibility which attaches to them by employing such a person as W and his gangers instead of laborers paid directly by themselves." The two other judges relied upon the existence of a nondelegable duty (see subd. XI. of note to *Anderson v. Fleming*, 66 L. R. A. — on *Liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer*). *Nisbett v. Dixon* (1852) 14 Sc. Sess. Cas. 2d series, 973.

In another case all the judges were of opinion that a master slater engaged to put up a chimney-can and top was not an independent contractor, although he had workmen in his employ and was to be paid not by days' wages, but at the ordinary rates chargeable for the work to be done. *Cleghorn v. Taylor* (1856) 18 Sc. Sess. Cas. 2d series, 664.

e. Effect of employment being general.

According to the supreme court of Massachusetts, the intention of the employer to retain the right of exercising control, and consequently to create the relation of master and servant, should always be inferred where it is shown that the employment was general, and not based on a contract to do a certain piece of work on certain specified terms in a particular manner and for a stipulated price.

Brackett v. Lubke (1862) 4 Allen, 138, 81 Am. Dec. 694, where it was held that the lessee of a building, who had employed a carpenter to repair an awning which extended from the building over a public way, was liable for an injury received by a passer-by in consequence of the carpenter's carelessness. The court said: "This seems to us to be a very clear case. The defendants are liable, because it appears that the negligent act which caused the injury was done by a person who sustained towards them the relation of servant. There was no contract to do a certain specified job or piece of work in a particular way for a stipulated sum. It is the ordinary case where a person was employed to perform a service for a reasonable compensation. The defendants retained the power of controlling the work. They might have directed both the time and manner of doing it. If it was unsafe to make the repairs or alteration at an hour when the street was frequented by passers, it was competent for the defendants to require the person employed to desist from work until this danger ceased or was diminished. If the means adopted to gain access to the awning were unsuitable, the defendants might have directed that another mode should be used. In short, if the work was in any respect conducted in a careless or negligent manner, the defendants had full power to change the manner of doing it, or to stop it, and to discharge the person employed from their service. The mere fact that the work was done by one who carried on a separate and independent employment does not absolve the defendants from liability. If

such were the rule a party would be exempt from responsibility even for the negligent acts of his domestic servants, such as his cook, coachman, or gardener. . . . If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms, in a particular manner and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor. But, on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient."

In *Dane v. Cochrane Chemical Co.* (1895) 164 Mass. 453, 41 N. E. 678, the negligent employee, received his orders for the carpentry work to be done, usually, from one of the defendant's superintendents. He hired the men to be employed in doing the work, superintended, paid, and discharged them. The defendant paid J \$2.50 a day for his work, and 25 cents a day for each man employed by him, in addition to the amount of the wages which he agreed to pay the man. So far as appeared, J furnished the tools, and the defendant the materials required to do the work. J drew money from time to time from the defendant on account of what was due to him, and at the end of each month the accounts between him and the defendant were usually settled. J paid his workmen every Saturday, but their names never appeared on the pay roll of the defendant; they never were paid by the defendant, and the defendant kept no account with them. Apparently J kept workmen in his employ whom he used in performing work for other persons as well as for the defendant. It was held to be competent for the jury to infer, from this testimony, that the defendant was liable for the negligence of J. The court said: "When there are no specifications in advance of what is to be done, and no round price agreed upon, and a carpenter is employed to make repairs and alterations to the satisfaction of his employer, to be paid according to the amount of work done by the carpenter and the men he employs, it would seem to be a reasonable inference that the employer retains the right to direct the manner in which the carpenter should do the work."

A similar view is perhaps indicated by several cases decided in other jurisdictions, but the precise grounds of the conclusions arrived at are not clearly defined. In two instances it may reasonably be supposed that the courts were, in some degree at least, influenced by the fact that the employment was not only general, but for an indefinite period. In a criminal case it was held that a jury would be justified in finding that a person who, upon his representing to the prosecutor that he had a little spare time which he would like to occupy in collecting debts, was engaged to do such work, was a "servant" within the meaning of the embezzlement act, 7 & 8 Geo. IV. *Queen v. Hughes* (1846) 2 Cox, C. C. 104.

In another case it was held that where the 65 L. R. A.

owner of a stone quarry hired a man to quarry, break, and pile up stone therein, at \$1 per perch, the employee to furnish the gunpowder and tools, the employer was liable to an adjoining proprietor for injury to a building by one of the blasts, although ordinary care was exercised in the manner in which the quarry was worked. *Tiffin v. McCormack* (1878) 34 Ohio St. 638, 32 Am. Rep. 408. The court said: "We are of opinion that the true relation between the city, as proprietor of the stone quarry, and A, was that of master and servant, instead of employer and independent contractor within the principle of the rule above stated. There was no 'job' or defined quantity of work contracted for. The services of A were subject to be determined at the pleasure of either party. The compensation was to be measured by the quantity of labor performed. It appears to us to have been an ordinary contract for work and labor, which creates, between the employer and employed, the relation of master and servant, within the meaning of the law in regard to that subject. It is true that the service, namely, the quarrying of stone in the employer's quarry, was to be done by the use of powder and tools furnished by the employee; but this condition in the contract did not affect the legal relation between the parties. It was significant only as a matter affecting the rate of compensation. And it is also true that the city 'had no other or further control over A in said work.' Whether this language means that the city exercised no other or further control, or that the city contracted with A that it would not exercise any other or further control over the work, makes no difference. If it were a mere failure to exercise control, it was the fault of the city. If it was part of the contract with the servant, that no other or further control should be exercised by the city, it is enough to say that a master cannot exonerate himself from responsibility to third persons, which the law imposes upon him, for injury resulting from the misconduct of his servant, by contracting with the servant that he will not exercise any control over him, and will not, therefore, be responsible for any injury that he may wrongfully inflict."

A part of the machinery in the defendant's mill was a "slasher," the sole use of which was to cut slabs and other material belonging to the defendant into proper lengths for shingles, lath, and pickets, which, when cut, were to belong to the defendant. The defendant kept this machine in running order, defrayed the expense of oiling and repairing it, and furnished the necessary power and light; but it contracted with B to do the manual work needed for the operation of the machine, giving him no authority to use it upon other material of his own, or for anybody other than the defendant. For doing this manual work, the defendant agreed to pay him a price measured by the product. While nominally B was to employ and pay for such assistance as he needed, the wages of the helpers were paid by the defendant, and deducted from the amount which otherwise should have been due to B.

The conclusion of the court was that, upon the facts stated, B was not an independent contractor, but a servant of the defendant, put in charge of a particular machine upon the terms stated, to operate it for the defendant, and that whatever duty there was to notify an inexperienced person engaged to work upon or about it, of the dangers incident to the em-

ployment, remained a duty of the defendant. *Nyback v. Champagne Lumber Co.* (1901) 48 C. C. A. 632, 109 Fed. 732.

Where a man who had agreed to trim certain shade trees in front of a house, and to receive the wood as compensation for the work, cut off a limb in such a manner that it fell on and bent down a telephone wire stretching across the street, and the wire, while in that position, damaged the top of a buggy, the court held that there was nothing in the case to suggest, in the remotest degree, that the man whom the defendant employed was in the exercise of an independent employment. It was observed that the circumstance that he was to cut the trees for the wood, instead of for cash, indicated merely the mode of his payment, and threw no new light upon the nature of his employment. If anything, the presumption arising from this mode of payment militated against the notion of an independent employment in respect to which the employer had surrendered all control, as the parts of the tree to be cut must have been at the election of the employer; otherwise the workman might take the whole tree as his compensation for trimming it. The court summed up its views as follows: "The facts agreed upon present, in the clearest manner, *prima facie*, a case of employment as master and servant. If the employer seeks to avail himself of the protection afforded him by the less intimate relation of employer and contractor, it is incumbent upon him, by proof, to establish the facts essential to the applicability of the rule of law he invokes." *State, Redstrake, Prosecutor, v. Swayze* (1889) 52 N. J. L. 129, 18 Atl. 697.

If a house owner employs a blacksmith to adjust and secure the cover over a coal-hole, the blacksmith, being subject to the direction and control of his employer and liable to be dismissed at any time, is not an independent contractor for whose negligence the owner would not be liable. *Dickson v. Hollister* (1889) 123 Pa. 421, 10 Am. St. Rep. 533, 16 Atl. 484.

The existence of the relation of master and servant was held to be inferable, where a person who had made a contract to put down a sidewalk executed a written document by which he agreed to furnish to another person, at the place where the work was to be done, the rough stone which, for a stipulated price, he was to cut, dress, haul, and set in the sidewalk. *Schweickhardt v. St. Louis* (1876) 2 Mo. App. 571.

In *Perry v. Ford* (1885) 17 Mo. App. 212, where the plaintiff fell into a privy vault which, while under repair, had been left without guards or lights, the only direct evidence as to the contract made by defendant for the repairing of certain water-closets was the testimony of the defendant himself, who said: "I gave the contract to repair this closet to Mr. C, and when he got ready to repair it, I went with him into the saloon and told Mr. A I was now ready to repair this closet." It was shown that the employees of C, a plumber, did the actual work of repairing, and that the defendant was frequently present while the work was being done. It was argued by counsel for defendant that the mere bare statement that defendant gave the contract for the work to C, raised a presumption that the relation between them was that of contractee and contractor, and not that of master and servant. This contention did not prevail. The court said: "Every

contract made by the owner of a building for repairs therein does not create the relation of contractee and contractor between the owner and the person contracted with. . . . If in this case the defendant could have directed the time and manner of doing the work; if it had been unsafe to do the work at a certain time or in a certain manner, and the defendant could have required C to desist, or could have altered the manner of doing the work. . . . The mere fact that C followed a certain trade or profession, or carried on a separate and distinct employment, does not change the rule. . . . It cannot then be presumed that C was a contractor, and not a servant, from the mere general statement by defendant, that he had given the contract to C. But if the defendant wants to relieve himself of liability as master in this case by reason of the relation of contractor, the defendant must prove the existence of that relation. If the defendant wishes to escape liability because by the terms of the contract his liability has been imposed upon C, he must prove the terms of the contract. From the evidence in this case the terms of the contract do not appear, and we cannot say that C was not defendant's servant. The presumption is that C was such servant. The evidence does not tend to rebut that presumption."

See also the Illinois cases cited in *infra*, XII. d, 2.

But there is a considerable weight of authority against the acceptance of the doctrine thus relied upon, in so far as it is put forward as one which, irrespective of the nature of the stipulated work and the industrial status of the person employed, furnishes an adequate and decisive test of the character of the contract.

In *Welfare v. Lond n, B. & S. C. R. Co.* (1869) L. R. 4 Q. B. 696, 38 L. J. Q. B. N. S. 241, 20 L. T. N. S. 743, 17 Week. Rep. 1065, Cockburn, Ch. J., in discussing the liability of the defendant company for injuries alleged to have been caused by a workman employed to repair the roof of one of its stations, said: "If it were necessary to determine that question, we should have to consider whether the case was improperly withdrawn from the jury on the ground that the plaintiff offered no evidence to show that this person was the servant of the company. I agree that, where a thing is being done upon the premises of an individual or a company in the ordinary course of business, it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done; but in the case of work of this description it seems to me that that principle would not apply, because it is a matter of universal knowledge and experience that, in a great city like this, persons do not employ their own servants to do repairs to the roofs of their houses or buildings; they employ a builder whose particular business is to do it. That being a matter of universal practice and of universal and common knowledge, I think this is a circumstance which the judge ought to take into account in determining whether there is evidence to go to the jury or not; but I do not think it is necessary to decide this case on this particular point."

In the same case *Blackburn, J.*, observed: "I quite agree with what my lord has said with reference to the normal state of things, that people who are employed to repair roofs are independent tradesmen, and not mere servants;

and the onus of proving that this man was the servant of the company was on the plaintiff, and he is not to be presumed to be so; it must be proved, because it is an exceptional case."

In New York it has been laid down that where a mechanic is employed by the owner of a building to make repairs, "without any specific arrangement as to conditions," his employment is independent. *Hexamer v. Webb* (1886) 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755.

So far as Massachusetts is concerned, it would almost seem permissible to infer from the reasoning of a recent decision that the original doctrine, as above stated, no longer prevails in that state, or that it has at least been somewhat modified. See *Dutton v. Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N. E. 405, in which the court held that the contract was an independent one, although the report of the auditor stated that the employment was general. See *supra*, VI. d.

f. *Effect of partition of work among several contractors.*

In a Pennsylvania case where the plaintiff, while passing along a street, fell into an unguarded excavation which had been made in the course of building operations, the court approved a charge of the trial judge to the effect that, where the work is split up in different contracts, and the owner undertakes to supply one of the contractors with materials to be used in the execution of his contract, and no provision is made for the supervision of the work or the erection and maintenance of guards around it, it is justifiable to draw the inference that the owner retained the supervision, and that his duty to protect the public has not been devolved on others. *Homan v. Stanley* (1870) 66 Pa. 464, 5 Am. Rep. 389.

In the argument of the court, in the above case, it is taken for granted that, under such circumstances as those involved, an employee may, by an express stipulation, devolve upon a contractor the duty of protecting the public—a doctrine which had been established in Pennsylvania by an earlier ruling, but which is discredited by the weight of authority. See subd. VI. of note to *Jacobs v. Fuller & H. Co. post*, —, on *Liability of employer for injuries caused by the performance of work by independent contractor, which is dangerous unless certain precautions are observed*.

In *Allen v. Willard* (1888) 57 Pa. 374, where a principal contractor was sued for an injury caused by the negligence of a subcontractor in leaving unguarded an excavation under a footpath, it was laid down that, although the defendant would not have been liable if he had committed to the subcontractor the entire control of the work of making the excavation, he should be held responsible for the reason that the evidence was insufficient to establish the conclusion that the control of the work had been thus transferred. But this ruling is contrary to the weight of authority. See note to *Jacobs v. Fuller & H. Co. post*, —, above referred to.

In most jurisdictions, therefore, the special consideration upon which the court relied would have no force, as the employer would have been held liable on the simple ground that a nondelegable duty had not been fulfilled, and irrespective of the question whether the work had been undertaken by one or several contractors. The present writer has found only 65 L. R. A.

one other case in which it has been intimated that the partition of the work among two or more contractors may be a sufficient reason for charging a principal with liability for their negligence. *McCleary v. Kent* (1854) 3 Duer, 27, where the remark was made, *arguendo*, with reference to the liability of a contractor for the negligence of subcontractors.

Such a limitation of the general doctrine seems to be quite arbitrary and irrational, and there are not wanting decisions in which it has been ignored or repudiated. In *Treadwell v. New York* (1861) 1 Daly, 128, it was held that a person who employs two independent contractors to execute different portions of the work of constructing a building is not liable to one of them for injuries caused by the negligence of the other.

In *Martin v. Tribune Asso.* (1883) 30 Hun, 391, the defendant was held not to be liable for the negligence of one of several mechanics who had been employed to do different parts of the work of constructing a building.

In *Potter v. Seymour* (1859) 4 Bosw. 140, Hoffman, J., remarked: "When we once arrive at the principle, that employment, control, and supervision, or the right to such, over the person whose neglect was the immediate cause of the injury, is to test all these cases, the logical result seems inevitable, that such rule is as applicable to contracts for distinct portions of a building as to a contract for the whole."

XII. *Nature of contract determined with reference to various factors.*

a. *Degree of skill or care required.*

The fact that the work to be done was such as required special skill for its proper performance is frequently referred to in cases where the contract was held to be independent. See, for example, *Murray v. Currie* (1870) L. R. 6 C. P. 24, 40 L. J. C. P. N. S. 26, 23 L. T. N. S. 557, 19 Week. Rep. 104; *Hexamer v. Webb* (1886) 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Kueckel v. Ryder* (1900) 54 App. Div. 252, 66 N. Y. Supp. 522; *Lawrence v. Shipman* (1873) 39 Conn. 586; *Morgan v. Bowman* (1856) 22 Mo. 538.

This circumstance may be regarded as one of those which has some tendency to show that the relation between the employer and the person employed was not that of master and servant. In *Threlkeld v. White* (1890) 8 New Zealand L. R. 513, it is referred to as an evidential factor of this quality.

But no case has been found in which it has been credited with a distinctly differentiating significance; and there are many instances in which it has been wholly disregarded. See especially *supra*, XI. d. e.

b. *Existence or absence of obligation to perform work in person.*

A natural deduction from the ordinary conception of an independent contractor, *viz.*, that he is essentially an employee who merely agrees to produce certain specified results by any means which he may think proper to select, is that, unless restricted by some express stipulation, he will always be entitled to use the labor of others in executing the work which he has undertaken. It follows, therefore, that if the terms of the contract are such as to indicate that the person employed may, if he so de-

sires, perform the stipulated work by deputy, it will usually be inferred that he is not engaged as a servant.

This rule is illustrated by the decisions which exclude from the scope of statutes specifically applicable to masters and servants all agreements under which the person employed is not obliged to perform the work himself. Thus it has been held that a person to whom a government contract for road work which is to be done according to certain specifications and paid for at so much per chain had been sublet was not a servant within the purview of the masters and servants act of New South Wales. *Ex parte Rathbone* (1892) 13 New South Wales, L. R. 56.

So also it has been held that the corresponding statute in Victoria is not applicable to an employee whose position is defined by the acceptance of his offer to paint a certain number of railway trucks to the satisfaction of the owner. Under such an agreement there is nothing to prevent the contracting party from getting the work done by deputy. *McElroy v. Australian Forge & Engineering Co.* (1899) 24 Vict. L. Rep. 953.

It is not irrelevant to mention in this connection that, in construing the English truck act (1 & 2 Wm. IV. chap. 37), the courts have held a person is or is not a "laborer" or an "artificer" within the scope of its provisions, according as he is or is not bound to execute in person the work which he has undertaken to do, the theory being that this term is intended to apply only to persons who are actually and personally engaged to perform the work. *Riley v. Warden* (1848) 2 Exch. 59, 18 L. J. Exch. N. S. 120; *Bowers v. Lovekin* (1856) 6 El. & Bl. 584, 25 L. J. Q. B. N. S. 371, 2 Jur. N. S. 1187, 4 Week. Rep. 600; *Ingram v. Barnes* (1857) 7 El. & Bl. 115, 26 L. J. Q. B. N. S. 319, 3 Jur. N. S. 861, 5 Week. Rep. 726; *Floyd v. Weaver* (1852) 16 Jur. 289, 21 L. J. Q. B. N. S. 151; *Sharman v. Sanders* (1853) 13 C. B. 166, 3 Car. & K. 298, 22 L. J. C. P. N. S. 86, 17 Jur. N. S. 765, 1 Week. Rep. 152; *Sleeman v. Barrett* (1864) 2 Hurlst. & C. 934, 33 L. J. Exch. N. S. 153, 10 Jur. N. S. 476, 9 L. T. N. S. 834, 12 Week. Rep. 411. See *Labatt on Master and Servant*, pp. 2063, 2064.

That this was the effect of the contract may perhaps be concluded in most instances, if the person employed did, as a matter of fact, execute the work by the hands of another. The somewhat guarded remark of Crompton, J., in a leading case, was that the fact of another person's having been engaged by the negligent employee to carry out the stipulated work "may sometimes be a test as to whether the employer was a servant or an independent contractor." *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 3 C. L. Rep. 760, 1 Jur. N. S. 677, 24 L. J. Q. B. N. S. 138, 3 Week. Rep. 181.

On the other hand, as the principle of the maxim, *Delegatus non potest delegare*, is understood to apply in its full force to a servant, it is perhaps permissible to lay down the doctrine that, if it should appear, either from the nature of the employment or the terms of the agreement, that the person employed is expected to do the work with his own hands, the appropriate inference will usually be that he is engaged as a servant. But there is very little judicial authority upon this specific point.

In *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 3 C. L. Rep. 760, 1 Jur. N. S. 677, 24 L. J. 65 L. R. A.

Q. B. N. S. 138, 3 Week. Rep. 181, while one of the counsel was arguing that the workman was not the personal agent of the defendant and that he might have employed a third person to do the work, Lord Campbell interposed the remark: "I doubt that. If I select a person in whom I place confidence, can he employ another?"

c. *Reservation of right to terminate contract of employment.*

The existence of the right of controlling an employee in respect to the details of the work normally implies that the employer has also the right to discharge him. Hence it is laid down that the relation of master and servant will not be inferred in a case where it appears that the power of discharge was not an incident of the contract of employment. *Pioneer Fire-proof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. R. 17.

The converse of this rule, however, holds only to a limited extent. According to the authorities, the conclusion that the person employed was not an independent contractor is indicated by evidence that he was liable to dismissal at any time, and the case is for the jury whenever such evidence has been introduced, and the rest of the testimony is either of an ambiguous quality or has itself a tendency to establish the same conclusion.

In a case where the plaintiff was injured by the fall of a shoot which had been negligently fastened by a coservant, it was held that a jury could not have properly found that the immediate employer of the injured person was an independent contractor, where the evidence was that certain ship owners had arranged to have the goods arriving in a ship delivered through their agents, a firm which was one of the defendants in the action; that these agents had made a contract with one J, who had been a foreman on the dock quay, and who himself worked on the quay; that this contract provided that the agents might at any moment stop J from going on with the work; and that after the accident the agents, in a letter to the plaintiff, had referred to J as their "foreman." The court seems to have considered the nonsuit proper even without reference to the last-mentioned detail. *Oldfield v. Furness* (1893; C. A.) 58 J. P. 102, 9 Times L. R. 515.

The same fact was emphasized in *Bernaer v. Hartman Steel Co.* (1899) 33 Ill. App. 491.

A received an injury by falling at night from the highway into an unfenced and unlighted sewer, which was being constructed under a written contract between B and certain local commissioners. A clause in the contract prohibited subletting without the engineer's consent. B contracted by parol with N, a competent workman, to do the excavation and brickwork, and the watching, lighting, and fencing, at an ascertained price per yard, while he supplied the bricks and carted away the surplus earth. B's name was on the carts, and also on a temporary office near the works. He did not interfere during the progress of the work, but admitted that he should have dismissed N if dissatisfied with the execution of the work. The clerk of the works was in the employment of the commissioners. Held, that there was evidence of B's liability. *Blake v. Thirst* (1863) 2 Hurlst. & C. 20, 32 L. J. Exch. N. S. 189, 11

Week. Rep. 1034, 8 L. T. N. S. 251. Martin, B., said: "The view which I take of this case does not rest upon the authority of *Hole v. Sittingbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 30 L. J. Exch. N. S. 81, 3 L. T. N. S. 750, 9 Week. Rep. 274. I think the relation of master and servant clearly existed between the defendant and N, within the principle established by the more recent decisions."

Bramwell, B., said: "The evidence, I think, showed that the defendant had a right to control the way in which the work was to be executed. Suppose the defendant had made two contracts with different persons,—with one, that he should dig the excavation; with the other, that he should light and watch it. It could not, I apprehend, be then contended that he would not be himself responsible. I think he is no less responsible here, though there is but one contract with a single individual."

The defendants' testimony tended to show that there prevailed in their factory a so-called "contract" system, and S was one of the contractors employed by them. He worked under agreements with the defendants to make seat-frames at an agreed price per piece, the work being done by him in their factory. They furnished him with the stock in the rough, with the machinery, the power, and the room to work in, and kept the machinery in repair. He worked for no one else, there was no fixed term to his employment, and it was liable to be ended at any time, at their instance. It was held that, although the jury should find that S agreed with the plaintiff as to his wages, there was testimony in the case which required the submission of the question to the jury, whether S was a contractor or servant. *Goldman v. Mason* (1888) 18 N. Y. S. R. 376, 2 N. Y. Supp. 337.

That a similar significance is to be attached to a clause in a written contract by which the employer reserves the power of revoking it at short notice, if the work should not be done satisfactorily, may perhaps be inferred from a case already cited in another connection. *Speed v. Atlantic & P. R. Co.* (1879) 71 Mo. 303. See *supra*, XI. a.

But it is well settled that if the remaining provisions of a contract show that it is an independent one, the mere fact that the employer has reserved the right to cancel, annul, or revoke it, or to suspend or relet the work, if there is some specific ground for dissatisfaction, will not cast upon him the responsibilities of a master. Provisions which have been held not to negative the conclusion that the person employed is an independent contractor are the following:

That the employer's engineer might declare the contract forfeited "for noncompliance with his directions in regard to the manner" of doing the work. *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215.

That, in the event of the work's being delayed, the architect supervising the work, as the representative of the employer, should have the right to employ another person to carry out the contract. *Robinson v. Webb* (1875) 11 Bush, 464.

That in case of "improper or imperfect performance," the contract may be relet. *Kuehn v. Milwaukee* (1896) 92 Wis. 263, 65 N. W. 1030; *Pioneer Fireproof Constr. Co. v. Han-*

sen (1898) 176 Ill. 100, 52 N. E. 17, affirming (1897) 69 Ill. App. 659.

That if, at any time, the contractors are not employing men, tools, implements, and machinery, in kind and quantity, to the entire satisfaction of the chief engineer of the company, and necessary, in his opinion, to prosecute the work with due diligence and expedition, the employer shall have the right to declare the contract annulled, after serving notice upon the contractor. *Burmeister v. New York Elev. R. Co.* (1881) 15 Jones & S. 264.

That, if the work is not done by a subcontractor to the satisfaction of the principal employer's engineer, the contract is to be forfeited on two days' notice. *Wray v. Evans* (1875) 80 Pa. 102. In this case the court said: "As long as Davis [the subcontractor] continued to progress with the work, in a manner satisfactory to the engineer of the gas company, W had no more power over the work than an entire stranger. Had he volunteered advice as to the care necessary to preserve the public from danger, it would have been to no purpose, as he had no power to enforce it. The matter was out of his hands; he could not assume the control of the work until the subcontract should be forfeited by nonperformance."

See also *Hughes v. Cincinnati & S. R. Co.* (1883) 30 Ohio St. 461, where clause (9) of the contract, as set out in *supra*, IX. a, 14, was held not to negative the independence of the contract.

In *Hillsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352, a provision reserving a power to annul the contract was also treated as immaterial.

In *Blumb v. Kansas* (1884) 84 Mo. 112, 54 Am. Rep. 87, the court rejected the contention that a conditional clause of this description was to be construed in such a sense that the defendant might be declared liable, as a matter of law, if its agent should be notified that the contractor's men were doing a part of the work in a negligent manner.

d. Surrender or retention of control of premises on which stipulated work is done.

1. Surrender of control.

With respect to that large class of cases in which the stipulated work is to be done on the premises of the contractor, it may be laid down as a general rule that, whenever it is understood, or expressly provided, that the possession and control of those premises are to be surrendered to the contractor while the work is in progress, the independence of the contract should be inferred, as a matter of law, unless there is some specific evidence which points to the opposite conclusion.

Two of the classes of cases in which the rule of *respondet superior* is not applicable are thus specified in a Michigan case: (1) Where a contract is made with another in respect of services upon property, when no power of direction or supervision is reserved by the principal, but the entire discretion as to the mode of execution of the contract, together with control of the property, is confided to the employee; (2) in case of a like contract, the contract prescribing the mode of its execution, when possession of the property is surrendered to the employee to enable him to execute the contract. *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209.

In a Georgia case the court laid it down that the owners "relieved themselves of all responsibility in the matter by making an absolute surrender for the time being of their possession of the building, and placing it under the complete control of independent contractors." *Butler v. Lewman* (1902) 115 Ga. 752, 42 S. E. 98.

"The employment of the contractor is, in its nature, just as independent of the will of the owner as the ordinary conduct of the tenant; and when the contract is for the construction of an entire building, the ground upon which the building is to be erected is just as truly in the occupation of the contractor, as the ground covered by a lease is in the occupation of the tenant. The possession, as necessary to the prosecution of the work to which the contract relates, is just as certainly vested in the contractor by force of his contract, as the possession of demised premises is vested in the tenant by force of his lease. It is said that the owner, whenever he may please, in the mere exercise of his own will, may remove the contractor from the possession, but if this power belongs to him as owner—which we neither affirm nor deny—it is not a power which he is bound to exercise, or can be justified in exercising, unless the known misconduct of the contractor has been such as to render its exercise a positive duty; and until it is exercised, the possession of the contractor is the possession of the owner, only in the same sense in which the possession of a tenant is, in judgment of law, that of his landlord. In each case, the possession is derived from the owner, and is held in subjection to his paramount title, but in both, the possession, so long as it continues, is exclusive. In our opinion, therefore, there is no reason whatever for holding that the responsibility of the owner for injuries to third persons during the continuance of this possession is greater in the one case than in the other." *Gilbert v. Beach* (1855) 4 Duer, 423.

In *Rome & D. R. Co. v. Chasteen* (1889) 88 Ala. 591, 7 So. 94, the court was equally divided in opinion upon the question whether undisputed evidence to the effect that the tortfeasor was engaged in building the road, and was in possession of, and using, the engine and cars for the transportation of rails and cross-ties and of freight and passengers, and that he employed and paid the workmen, was *prima facie* sufficient to show that the tortfeasor was an independent contractor.

Where a company operated a coal mine, and for convenience in shipping laid and kept in repair a railroad track from its shaft to the railroad, a distance of three quarters of a mile, the product of the mine being carried by said railroad company in trains operated by its own employees, the court, after laying it down that the relation of the mining company to the railroad company was that of shipper to carrier, said: "If there is a single circumstance which for a moment might seem to distinguish it, as shown in this case, from its purest form, it is that the shipper provided a portion of the carrier's facilities for the performance of its proper work, and a very important portion, namely, a railroad track for the short distance mentioned. This circumstance, however, does not so distinguish it even in appearance; for the shipper surrendered this track to the carrier for the time and purpose required, and the latter then had it as fully and exclusively as

if it had been its own." *Coal Run Coal Co. v. Strawn* (1884) 15 Ill. App. 347.

The defendants sold at public auction the building materials of a house then standing. By the terms of sale the building materials became the property of the purchaser, who contracted under a penalty to pull them down and cart them away within two months, leaving the site cleared to the satisfaction of the vendor. One B became the purchaser for the sum of £10. In pulling down the house he negligently caused injury to the adjoining house by throwing bricks and rubbish on to it, and omitting to prop it up while the work was in progress. By *Stowell, Ch. J., and Cowen, J.*, it was held that the contract was one essentially of sale which transferred to B for the time being the ownership of the house, and that while he was engaged in the demolition and removal of the building, he, and he alone, had all the responsibilities incident to ownership. By *Stephen, J.*, it was considered that the essential effect of the contract was that the contractor agreed to pull down the house and take away the materials, and that the sale and purchase of the materials was simply an incident in the contract, and the method of paying for the work done. The conclusion at which he arrived, therefore, was that the defendants were liable, for the reason that the contract was one likely to be dangerous to the adjacent owner. *Byrnes v. Western* (1896) 17 New South Wales L. R. 80.

In a case where the masonry and wood work of a building was let to contractors, but in respect to the remainder of the work, including the making of the excavations for cellars, areas, and coal vaults, there was no evidence tending to show that it was performed under the direction or control of anyone except the owner himself, and there was neither any stipulation giving the contractors the occupancy, possession, or control of the premises, nor any other evidence on the record which tended to show that they had, or were entitled to have, such occupancy, possession, or control, it was held that a requested instruction to the following effect was abstract, and had therefore been properly refused: "If the jury find from the evidence that the defendants had let the work of constructing the building and area in question to contractors, who were to do all the work and furnish all the materials on their own credit, with their own means, and that the defendants, while the work was in progress, had no possession or occupancy of the premises, and had no control of the mode or manner in which said contractors should do the work, other than to accept or reject the work as being in compliance or noncompliance with the contract, then the defendants are not responsible for any injury resulting to the plaintiff in consequence of the negligence of said contractors or any of their employees in not guarding the said area with proper protections or coverings." *Hamner v. Whalen* (1892) 49 Ohio St. 69, 14 L. R. A. 828, 29 N. E. 1049.

In *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334 (*supra*, VI. c.) and *Jefferson v. Jameson & M. Co.* (1897) 165 Ill. 138, 46 N. E. 272, *Reversing* (1895) 60 Ill. App. 587, the fact that the defendant had surrendered the possession of the premises was specified among the elements which negated his liability.

In order that the employer may escape liability on the ground of his having surrendered possession of his premises, it is merely necessary

to show that the possession given was such as would enable the contractor to carry out the contract. He is not required to prove that the possession was exclusive. *Mohr v. McKenzie* (1895) 60 Ill. App. 575; *Geist v. Rothschild* (1900) 90 Ill. App. 824.

In a case where the owner of a building employed a contractor to make an excavation in the sidewalk in front of it, the jury were instructed that the mere fact that the owner remained in the possession of the building itself did not establish the fact of his control of the place where the excavation was made. *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875.

It is error to charge the jury, that, in forming an opinion as to whether the employee was a servant or an independent contractor, they should inquire whether the contract "gave exclusive use and right to the contractor over the place," and how long this exclusive use and right were to continue. *Conlin v. Charleston* (1868) 15 Rich. L. 201.

Discussing the contention that the right reserved by a railroad company to run its trains over the bridge during its construction by a contractor destroyed the independency of the employment, the court remarked that this amounted to an assertion of the doctrine that a railroad company or private individual cannot, in the one case, build its road or other structures, or repair either, and in the other, the owner of property cannot build a house thereon, or repair one, by the intervention of an independent contractor, without the entire surrender of the possession and use of the property to such contractor; and that, if such surrender be not made, then the employer is liable for any injury to another resulting from the negligent or tortious act of any agent or servant of the contractor. "The recognition of any such principle," it was declared, would not only lead to the most absurd results, but would be to foster gross injustice and oppression. In every such case the question is, not whether the owner or proprietor retained any use of the property during the erection of the work, but who had the efficient control of the work contracted to be done. Such control, in cases like the present, is necessarily with the contractor; and, were it otherwise, independent employment would be degraded, its liability in a great measure destroyed, and the general efficiency of railroad service correspondingly impaired. Hence the books teem with decided cases in which defendants were held not liable for torts committed on their premises by contractors, or their agents or servants, although there had not been an entire surrender of the possession of the premises to the contractor. *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163.

But testimony to the effect that a person employed to erect a building was given possession of the premises in question will be disregarded, if it appears from the rest of the facts established that he was acting as the employer's superintendent, and merely occupied the premises as mechanics usually do when making improvements. *Samyn v. McClosky* (1853) 2 Ohio St. 536. The court said: "Dignifying a mere license thus to occupy, by calling it a surrender of possession, will not serve to avoid responsibility."

2. Retention of control.

It is clear that the torts of the person employed cannot be imputed to the employer on the mere ground that, while the work was in progress, the latter retained with respect to his premises that ultimate right of control which is an inseparable incident of proprietorship.

That the contract is not the less an independent one, because the employer has that power of interference which is derived from "that reversionary right which is necessarily reserved to every owner of land," was remarked, *arguendo*, in *Schweickhardt v. St. Louis* (1876) 2 Mo. App. 571.

Compare also the remarks of the court in *Gilbert v. Beach* (1855) 4 Duer, 423, *supra*. This doctrine, indeed, is taken for granted in a large number of the cases cited in *supra*, VI. It is equally clear that the employer's reservation of a right to go onto the premises to see that the work is done according to the plans and specifications does not change the relation of the parties. Under such circumstances the person employed still remains in possession of the premises, and continues to perform the work under his contract, and not under the directions of the employer. *Pfau v. Williamson* (1872) 63 Ill. 16.

But the precise significance of evidence that the employer retained over his premises those powers of control which are ordinarily associated with actual possession is a point which is left by the authorities in some obscurity. In Illinois the doctrine seem to have been adopted that this situation is incompatible with any other conclusion than that the person employed was a servant.

Where the landlord of a leased building employed a carpenter to put in three or four skylights for which he was to be paid so much a piece, and the goods of a tenant were injured through his negligence in removing the roof, and allowing the rain to get through, the court said that, while doing the work, the carpenter could only be regarded as the servant of the landlord. The fact that the carpenter testified he had the entire control of the work could not make any difference, as there was no such surrender of the entire possession of the premises to the workmen as could relieve the landlord of responsibility. *Glickauf v. Maurer* (1874) 73 Ill. 289, 20 Am. Rep. 238.

Where the goods of a tenant were injured by the negligence of the servant of a person employed by the landlord to make some changes in the plumbing, the court said that, as the terms of the employment were not given, it must be assumed that no special terms were agreed on, and stated its conclusion as follows: The negligent person employed "was employed generally to do the required work, and was for that purpose the agent or servant of his employer. Possession or control of the building or plumbing or any part of it was not given to him. His employer had the right to control and direct the entire work, and might have discharged R [the plumber] from the employment if he refused to obey her instructions." *Bernauer v. Hartman Steel Co.* (1889) 33 Ill. App. 491.

It will be observed that, in both the cases cited, the facts are analogous to those presented by the decisions collected in *supra*, XI. e, and that the decisions might have been based on the doctrine there applied.

The more correct theory, however, would seem to be that such evidence constitutes at the very most an element to be considered by the jury. There is no such intimate or invariable connection between the power of controlling the de-

tails of the work and the power of controlling the premises on which the work is done, that the exercise of the latter power necessarily implies the exercise of the former power also. It seems certain at all events that, in cases where only a portion of the premises is affected by the performance of the work, the fact that the employer retained control over them is inconclusive, if not wholly immaterial.

In *Boomer v. Wilbur* (1900) 176 Mass. 482, 53 L. R. A. 172, 57 N. E. 1004, the employer was held not to be liable for the negligence of the servants of a contractor for the repair of his chimneys, although he had retained the right of control over the premises.

In *Mumby v. Bowden* (1889) 25 Fla. 454, 6 So. 453, the court proceeded on the theory that, in order to relieve the employer of liability, it must appear that the contractor had control of the work, as well as of the premises.

In a case where the plaintiff fell over cleats which had been negligently nailed to a staircase it was held that the fact that the owner of the building retained possession thereof, together with the use of the stairway after it was in a condition to be used, was immaterial. *Louthan v. Hewes* (1902) 138 Cal. 116, 70 Pac. 1065.

e. The basis on which the compensation of the employee is calculated.

The remuneration of a servant is ordinarily calculated with reference to the period during which he has been in the employment of his master, while an agreement with an independent contractor commonly provides that he is to be paid a definite sum upon the completion of the entire work, or that he is to receive a certain compensation measured by the quantity of work actually done by him.

The following are a few of the many cases which might be cited for the purpose of showing that payment for the whole work by a specific sum is one of the ordinary incidents of an independent contract: *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103; *Lawrence v. Shipman* (1873) 39 Conn. 586; *Brunswick Grocery Co. v. Brunswick & W. R. Co.* (1898) 106 Ga. 270, 71 Am. St. Rep. 249, 32 S. E. 92; *Peyton v. Richards* (1856) 11 La. Ann. 62; *Connors v. Hennessey* (1873) 112 Mass. 96; *Long v. Moon* (1891) 107 Mo. 334, 17 S. W. 810; *Clark v. Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590; *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113.

Examples of cases in which the contract was held to be independent and in which the work was to be paid for by the piece are the following: *Black v. Christchurch Finance Co.* [1894] A. C. 48, 63 L. J. P. C. N. S. 32, 6 Reports, 394, 70 L. T. N. S. 77, 58 J. P. 332; *Shaw v. West Calder Oil Co.* (1872: Ct. of Sess.) 9 Scot. L. R. 254; *Smith v. Belshaw* (1891) 89 Cal. 427; 26 Pac. 834; *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100; *Leavitt v. Bangor & A. R. Co.* (1897) 89 Me. 509, 36 L. R. A. 382, 36 Atl. 998; *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 270, 52 Am. Rep. 376; *Knowlton v. Holt* (1891) 67 N. H. 155, 30 Atl. 346; *Ferguson v. Hubbell* (1884) 97 N. Y. 507, 49 Am. Rep. 544; *Benedict v. Martin* (1862) 36 Barb. 288; *Blattenberger v. Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309.

As elements tending to show the independence of the contract, the facts that no provision was made as to the payment for the services rendered, and that the compensation is dependent

upon the value thereof, were mentioned in *Hexamer v. Webb* (1886) 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755.

A not uncommon footing on which the compensation of an independent contractor is computed is that of a percentage on the cost of the labor. See, for example, *Hale v. Johnson* (1873) 80 Ill. 185; *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242.

It is well settled, however, that these different methods of payment, although they are usually the concomitants of the relations thus specified, are not so closely and essentially connected therewith, that the character of the contract can be inferred as a matter of law from the adoption of one or other method in the given instance.

"The tendency of modern decisions is not to regard as essential or controlling the mere incidentals of the contract, such as the mode and manner of payment." *Atlantic Transport Co. v. Coneys* (1897) 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177.

In the books diverse rules for pronouncing upon this question (i. e. whether or not an employee was a servant) have been stated, but I must say not always with definiteness and perspicuity. Some lay it down that the manner of paying for the work or thing done, whether by the day or the job, is the rule; but this is not so; that is a circumstance to be considered, but not the criterion. *Corbin v. American Mills* (1858) 27 Conn. 274, 71 Am. Dec. 63.

That the mode of payment is a circumstance in determining whether one is an independent contractor or a servant of another, but is not decisive, was declared in *Indiana Iron Co. v. Cray* (1897) 19 Ind. App. 565, 48 N. E. 803.

An instruction based on the theory that the mode of payment is a decisive circumstance was held erroneous in *New Orleans & N. E. R. Co. v. Reese* (1884) 61 Miss. 581, where the statement disapproved was to the effect that a contract with a railroad company to complete an abandoned construction job, the agreement being that the contractor was to be paid what the labor and material to be furnished by him should cost and 10 per cent additional, as compensation, made the contractor servant of the company so as to render it liable for his trespass in taking trees from the land of the third party. Also in *Shea v. Reems* (1884) 36 La. Ann. 966, where it was laid down that the Louisiana Code ordinarily infers the power of control and discharge from the payment of wages. This was declared to be the common-law rule also. This statement is, we think, too sweeping.

The most that can be said having a due regard to the general trend of the authorities, is that the payment of wages is a circumstance from which a jury would be justified in inferring the relation of master and servant, if there should be no antagonistic evidence pointing decisively to the opposite conclusion.

On the one hand, therefore, it has been laid down in numerous cases that, where it is apparent from the remainder of the evidence that the person employed was subject to the employer's control in respect to the means by which the work was to be accomplished, the fact that his compensation was to be determined with reference to the amount of work which he might actually accomplish will be treated as immaterial. In other words, an employee is none the less a servant because he is to be paid by the piece or job, and not by wages or salary.

"No distinction can be drawn from the cir-

cumstance of a man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee." *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 3 C. L. R. 760, 1 Jur. N. S. 677, 24 L. J. Q. B. N. S. 138, 3 Week. Rep. 181.

To the same effect, see *Tennessee Coal, Iron & R. Co. v. Hayes* (1892) 97 Ala. 201, 12 So. 98; *Drennen v. Smith* (1896) 115 Ala. 396, 22 So. 442; *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103; *St. Clair Nail Co. v. Smith* (1890) 43 Ill. App. 105; *Holmes v. Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1466, 22 So. 403; *Waters v. Pioneer Fuel Co.* (1892) 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; *Whitson v. Ames* (1897) 68 Minn. 23, 70 N. W. 793 (case should have been submitted to the jury, as there was some evidence of the exercise of control); *O'Neill v. Blase* (1902) 94 Mo. App. 648, 68 S. W. 764; *Rummell v. Dilworth, P. & Co.* (1885) 111 Pa. 343, 2 Atl. 355, 363; *Huff v. Watkins* (1880) 15 S. C. 85, 40 Am. Rep. 680; *Richey v. DuPre* (1883) 20 S. C. 6; *Dagenais v. Houle* (1897) Rap. Jud. Quebec, 11 C. S. 225.

In cases arising under the embezzlement statutes, the fact that a person employed to solicit orders for a commodity is paid by commission does not negative the inference that he is a servant. *Rex v. Carr* (1811) Russ. & R. C. C. 198; *Reg. v. May* (1861) Leigh & C. C. C. 13, 30 L. J. Mag. Cas. N. S. 81, 7 Jur. N. S. 147, 3 L. T. N. S. 680, 9 Week. Rep. 256, 8 Cox, C. C. 421; *Reg. v. Tite* (1861) Leigh & C. C. C. 29, 30 L. J. Mag. Cas. N. S. 142, 7 Jur. N. S. 556, 4 L. T. N. S. 259, 9 Week. Rep. 554, 8 Cox, C. C. 458; *Reg. v. Bailey* (1871) 12 Cox, C. C. 56, 24 L. T. N. S. 477; *Slinger Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 176.

The existence of independent subcontracts with the persons who performed various distinct kinds of work for the principal contractor will not be inferred from the mere fact that they were paid by the piece. *Allen v. Willard* (1868) 57 Pa. 374.

The mere fact that a coal miner is paid a certain amount for each ton of coal taken out by him does not constitute him an independent contractor, in such a sense that he is exempt from the provisions of this act. *Outrine Hewitt Coal Co. v. Gregory* (1903) 28 Vict. L. Rep. 586.

On the other hand, it is equally well settled that, the fact of its being provided by the agreement that the person employed is to be paid for his services with reference to the period during which the work should continue, although it may carry some weight in doubtful cases, is an indeclinable element in cases where the evidence as a whole points clearly to the conclusion that he was an independent contractor. *Corbin v. American Mills* (1858) 27 Conn. 274, 71 Am. Dec. 63; *Geer v. Darrow* (1891) 61 Conn. 220, 23 Atl. 1087; *Wadsworth Howland Co. v. Foster* (1893) 50 Ill. App. 513, Affirmed in (1897) 168 Ill. 514, 48 N. E. 163; *Morgan v. Smith* (1893) 159 Mass. 570, 35 N. E. 101; *Harkins v. Standard Sugar Refinery* (1877) 122 Mass. 400; *Hexamer v. Webb* (1886) 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Butler v. Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017; *Larow v. Clute* (1891) 37 N. Y. S. R. 859, 14 N. Y. Supp. 616; *Heldenwag v. Philadelphia* (1895) 108 Pa. 72, 31 Atl. 1063; *Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699; 65 L. R. A.

Groesbeck v. Pinson (1899) 21 Tex. Civ. App. 44, 50 S. W. 620; *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163; *Emmerson v. Fay* (1898) 94 Va. 60, 26 S. E. 386; *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875 (in charge to jury).

In a prosecution under the embezzlement statutes the fact that men following the same occupation (drover) as the person employed were customarily paid by the day does not prove that he was a servant. *Reg. v. Hey* (1849) 2 Car. & K. 985, *Temple & M.* 209, 1 Den. C. C. 602, 3 Cox, C. C. 582, 14 Jur. 154.

Nor has the fact that there was no express stipulation as to the amount to be paid for the work any tendency to show that a contract was not an independent one. *Bennett v. Truebody* (1885) 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329. See, however, cases cited in *supra*, XI. e.

f. Pecuniary circumstances of person employed.

In one case the fact that the alleged contractor was financially irresponsible was specifically mentioned among the elements which tended to negative the conclusion that he was an independent contractor. *Wallace v. Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S. W. 399.

That this fact is one which may be properly considered as having a distinct bearing upon the nature of the relation between the parties is a doctrine which may be said to receive a certain amount of indirect support from those decisions also in which (*supra*, XI. d), the existence of a contract of hiring and service was inferred from the character of the work and the industrial status of the workman; for in all of them it may reasonably be assumed that the pecuniary resources of the person employed were extremely limited.

g. Provision in contract that employer shall be indemnified for all losses caused by the negligence of the person employed.

It is well settled that the fact of the contractor's having undertaken, as between himself and the employer, to be responsible for injuries occasioned by any tortious conduct on the part of himself and his servants, does not in any way affect or qualify the position of third parties in regard to the recovery of damages from the employer. Such a stipulation inures to the benefit of the employer alone, and confers no right of action upon anyone else. *French v. Vix* (1894) 143 N. Y. 90, 37 N. E. 612; *Wolf v. American Tract Soc.* (1898) 25 App. Div. 98, 49 N. Y. Supp. 236.

It does not improve the position of the plaintiff in cases where the tortious conduct was held to be merely collateral. *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267; *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642; *Wray v. Evans* (1875) 80 Pa. 102; *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059.

A railroad corporation is not liable for injuries to buildings in the vicinity of its road caused by blasting done by those who have contracted to grade the road, or persons in their employ, although under the contract the corporation reserves the right to retain in its hands sums sufficient to pay all damages that are not adjusted within thirty days from the time they are inflicted. Such a case is not within the provisions of Rev. Stat. chap. 51, § 22, relating to the appropriation of lands (*Tibbetts*

v. Knox & L. R. Co. [1873] 62 Me. 437); nor does it enable the employer to escape liability if the circumstances are otherwise such that the plaintiff is entitled to recover, as where a nondelegable duty was violated by the contractor (Dalton v. Angus [1881] L. R. 6 App. Cas. 740, 30 L. J. Q. B. N. S. 689, 44 L. T. N. S. 844, 30 Week. Rep. 196, per Blackburn, J.; Norwalk Gaslight Co. v. Norwalk [1893] 63 Conn. 495, 28 Atl. 32. See subd. IV. of note to Jacobs v. Fuller & H. Co. *post*, —, on *Liability of employer for injuries caused by the performance by independent contractor of work which is dangerous unless certain precautions are observed*; or where a nuisance originally created by the contractor was continued by the employer (Osborn v. Union Ferry Co. [1869] 53 Barb. 620); or where the contractor was so far under the control of the employer that he was in point of law a servant (Cooper v. Seattle [1897] 16 Wash. 462, 58 Am. St. Rep. 46, 47 Pac. 887).

h. Use of contractor's appliances by employer.

The fact that an agent of the employer uses, for the purpose of executing a part of a work of construction which is in progress, a defective appliance belonging to a contractor who is engaged on another part of the same work, will not render the employer liable for an injury caused by its condition or the manner of its operation at a time when it is being used by, and is under the control of, the contractor himself. *Hughbanks v. Boston Invest. Co.* (1894) 92 Iowa, 267, 60 N. W. 640.

1. The furnishing by the employer of the appliances or materials for the work.

A contract for a work of construction not infrequently provides that the appliances or the materials required for the execution of the work are to be furnished by the employer. Such a stipulation is not sufficient of itself to show that the employee is a servant. *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875 (in charge to jury).

As to the rule that the employer cannot be held responsible on the ground that, while they were being used by the contractor, the appliances or materials furnished became the means or agency by which the injury in suit was inflicted.

See subd. VII. a, of note to *Salliotte v. King Bridge Co.* *post*, —, on *General rule as to absence of liability of employer for acts of independent contractor*.

j. The fact that the stipulated work constituted a part of the employer's regular operations.

It has been laid down that, in determining the question whether a person who undertook the performance of a specific job for a certain price should be regarded as a mere servant, it does not matter what kind of work was the subject of the contract, or whether it was or was not a portion of the regular work which the party contracting for it is carrying on, or some piece of work incidentally connected with it as necessary or convenient.

The court added that such an agreement is to be distinguished from a mere arrangement for the compensation of personal services by the piece instead of by the day. *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100 (contract to break down rock in a mine at a certain price per foot).

65 L. R. A.

The statement here made is opposed to the weight of authority so far as it asserts the immateriality of the nature of the work to which the contract relates (see *supra*, XI. d, but is otherwise unobjectionable.

k. Provision in contract prohibiting use of employer's name.

A provision in the contract with the person employed, that he shall not use the name of his employer in any manner whereby the public or any individual may be led to believe that such employer is responsible for his actions, does not in any degree relieve the employer of liability for his negligence, if, as matter of fact, the other provisions of the contract show that he is a servant, and not an independent contractor. *Singer Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

l. The fact that the contractor was a director of the employing company.

In an action brought by an injured servant, it was held by the superior court of the city of New York that, where a railway company employs one of its directors to construct the floor of a building by day's work, and pays him a commission on the actual cost of the work, he is, as regards the performance of such work, a mere contractor, and that notice to him of any defect in the instrumentalities is not notice to the company. *Dillon v. Sixth Ave. R. Co.* (1882) 16 Jones & S. 283.

The rule thus adopted is doubtless a proper one in any case in which the injured party was chargeable with knowledge of the actual relations between the company and the director. But under the general principles of the law of agency it seems clear that a person who is employed by a director to assist in doing work which is for the benefit of the company has a right to assume that the director is acting as the representative for the company. Such is the doctrine of the supreme court of Kansas. *Solomon R. Co. v. Jones* (1883) 30 Kan. 601, 2 Pac. 657 (work was undertaken by the president of the company). In the case cited it was remarked that possibly a different rule might obtain in regard to parties who had no contractual relations with the work. This point does not seem to have ever been judicially discussed; but it is not easy to see any satisfactory ground upon which such a distinction could be based. A stranger, it would seem, is not less entitled than a servant to the benefit of the presumption that, as regards any matter which falls within the scope of his powers, a general agent really occupies that position.

m. Virtual identity of an employing and contracting company.

One of the grounds on which a recent decision in favour of the plaintiff was based was that the injury had been caused by the negligence of a construction company which had been organized for the express purpose of carrying out the work in question, and that this company and the one from which damages were claimed were controlled and managed by the same persons. *Chicago Economic Fuel Gas Co. v. Myers* (1897) 168 Ill. 130, 48 N. E. 66, Affirming (1896) 64 Ill. App. 270 (injury caused by an explosion of gas while being conveyed through carelessly constructed pipes). The evidence relied upon by

the court as sustaining its conclusion was that all the officers and employees of the construction company who testified in the case were either at the same time connected in some way with the defendant company, or passed alternately from the service of one to the service of the other; that the natural gas which caused the explosion was let into the pipes by the order of the person who acted as the president of both companies; and that he was unable to state whether he gave such order as the president of the gas company, or as the supervising engineer of the construction company. It was considered to be just as legitimate to suppose that he gave the order in the former of these capacities, as that he gave it in the latter capacity.

There is apparently no other instance of the application of such a doctrine. But its justice and reasonableness are so manifest, and it supplies such a simple and direct method of preventing the avoidance of liability by the subterfuge of creating "dummy" corporations, that the present writer has no hesitation in expressing the hope that it will meet with general acceptance.

XIII. Province of court and jury.

If the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court, as a matter of law. *Linnahan v. Rollins* (1884) 137 Mass. 123, 50 Am. Rep. 287; *Scott v. Springfield* (1899) 81 Mo. App. 312; *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. E. 17; *Foster v. Chicago* (1902) 197 Ill. 264, 64 N. E. 322, *Affirming* (1900) 96 Ill. App. 4; *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100; *Potter v. Seymour* (1859) 4 Bosw. 140; *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059.

The general rule of evidence thus applied is that the construction of all written documents belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury. *Taylor, Ev. § 43*; *Greenl. Ev. § 277*.

It has, however, been held that this rule is not applicable where the nature of the relation between the employer and the person employed depends upon the meaning of a written instrument collaterally introduced in evidence; and the effect of that instrument depends, not merely upon its construction, but upon extrinsic facts and circumstances. The inferences of fact to be drawn from the instrument must, in such a

case, be left to the jury. *McNamee v. Hunt* (1898) 30 C. C. A. 653, 59 U. S. App. 9, 87 Fed. 298.

If no written contract has been executed, the character of the relation between the parties is a question for the jury, where the evidence with respect to the essential and determinative facts is conflicting (*Forsyth v. Hooper* [1865] 11 Allen, 419); or is such that different deductions may reasonably be drawn from it (*Goldman v. Mason* [1888] 18 N. Y. S. R. 376, 2 N. Y. Supp. 337; *Kellogg v. Payne* [1866] 21 Iowa, 575; *Rome & D. R. Co. v. Chasteen* [1889] 88 Ala. 391, 7 So. 94; *Carlson v. Stocking* [1895] 91 Wis. 432, 65 N. W. 58 [see *supra*, VI. q]; *Latorre v. Central Stamping Co.* [1896] 9 App. Div. 145, 41 N. Y. Supp. 99 [see *supra*, XI. a, 9]; *Daley v. Boston & A. R. Co.* [1888] 147 Mass. 107, 16 N. E. 690 [see *supra*, XI. c]; *Dane v. Cochrane Chemical Co.* [1895] 164 Mass. 453, 41 N. E. 678 [see *supra*, XI. c]; *Wallace v. Southern Cotton Oil Co.* [1897] 91 Tex. 18, 40 S. W. 399 [see *supra*, XI. a, 9]; *Sullivan v. Dunham* [1898] 35 App. Div. 342, 54 N. Y. Supp. 962 [see *supra*, XI. c, 4]; *Prairie State Loan & T. Co. v. Dolg* [1873] 70 Ill. 52 [see *supra*, VI. c]; *Brophy v. Bartlett* [1888] 1 Illv. Ct. App. 575 [see *supra*, VI. n]).

In a case where a piece of the scaffolding used by masons fell on a passer-by, it was held that a witness should not be permitted to testify that "he hired the men to work for" certain persons; that he "had no control of anything." His testimony should be confined to a narrative of what happened in the making of his contracts, and the conduct of the work, and from this the jury are to draw their conclusions. *Alexander v. Mandeville* (1889) 33 Ill. App. 589.

On the other hand, the effect of the contract is to be determined by the court, where its terms are established by undisputed or clearly preponderating evidence, from which only a single inference can fairly be drawn. This principle is explicitly enounced in *Drennen v. Smith* (1896) 115 Ala. 306, 22 So. 442, and is taken for granted in many of the cases cited in *supra*, VI., X., XI., c.

In *Defurd v. State* (1868) 30 Md. 170, it was laid down that, where there is no written contract, the terms and manner of the employment are matters for the jury, and that it is for the court to declare, in view of the facts established, what was the relation between the parties.

In *Emmerson v. Fay* (1896) 94 Va. 60, 26 S. E. 386, it was laid down broadly that what constitutes an independent employment is a question of law, to be decided upon the facts as proved.

C. B. L.

ILLINOIS SUPREME COURT.

SUPREME LODGE KNIGHTS & LADIES OF HONOR, *Appt.*,

v.

Olivia MENKHAUSEN *et al.*

(209 Ill. 277.)

1. Public policy does not forbid a re-

NOTE.—For other cases in this series as to effect of killing of person insured by beneficiary on right to enforce policy, see *Holdom v. Ancient Order*, U. W. 31 L. R. A. 67, and *Schmidt v. Northern Life Asso.* 51 L. R. A. 141. 65 L. R. A.

covery by the next of kin on a policy upon the life of one murdered by the beneficiary named in the policy.

2. If the beneficiary deprives himself of the right to enforce a benefit certificate by murdering the insured, the obligation of the society may be enforced by those designated by the statute and the rules

As to effect of murder of insured by assignee of policy, see *New York L. Ins. Co. v. Davis*, 44 L. R. A. 305.

of the society as entitled to the fund, in the absence of the beneficiary named.

(April 20, 1904.)

APPPEAL by defendant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for St. Clair County in favor of plaintiffs in an action brought to enforce payment of the amount alleged to be due under a benefit certificate. *Affirmed.*

Statement by **Scott, J.:**

This was an action of assumpsit in the circuit court of St. Clair county by appellees against the Supreme Lodge Knights & Ladies of Honor. The declaration was filed to the January term, 1902, of that court, and consisted of one special count for the amount of a certain benefit certificate. It sets out the facts that on March 22, 1893, the defendant issued its policy of insurance on the life of Elizabeth Menkhausen in the sum of \$1,000, payable, at her death, to her husband, Gustav Menkhausen; that on November 9, 1893, Elizabeth Menkhausen departed this life, and that due proof was then and there furnished the defendant of her death, according to the rules, laws, and regulations of the defendant; that said Gustav Menkhausen, on August 6, 1895, instituted a suit upon said policy, and the defendant appeared and filed a plea. This plea is then set out in full, the substance of which was that Gustav Menkhausen wilfully murdered his wife, and was sentenced to be hung, but that the sentence was commuted by the governor to imprisonment for life, and that said Gustav was, at the time of filing the plea, in the penitentiary under such sentence. The declaration further avers that the only issue in said suit was whether the fact that Gustav Menkhausen murdered his wife was a bar to his suit; that upon a trial a verdict was returned for the defendant, judgment was entered on the verdict, and that judgment is still in force. It is averred by the declaration that the defendant is organized under the laws of Kentucky, Missouri, and Indiana for the purpose of promoting benevolence and charity by establishing a relief fund, from which, on satisfactory evidence of the death of a member, a sum not exceeding \$5,000 shall be paid to such member of his or her family, or person dependent upon or related to him or her, as he or she may have directed; that the defendant is doing business in this state, and has complied with the laws thereof governing fraternal beneficiary societies; that the by-laws of the defendant provide that a benefit may be made payable to the wife or husband, children and grandchildren, parents, brothers and sisters, grandparents,

nieces and nephews, cousins, aunts and uncles, or to the next of kin who would be distributees of the personal estate of the member upon his death intestate, in the order above named. It is then averred that by reason of the death of Elizabeth Menkhausen, and proof of that fact, and by reason of the fact that because of her death at the hands of Gustav Menkhausen it became impossible for him to recover upon said policy or benefit certificate, or to receive the proceeds thereof, the said amount named in said certificate became due and payable to the plaintiffs herein, and that the defendant has not paid the said sum of \$1,000 to the plaintiffs, or to any other person, but refuses so to do. The declaration then avers that Elizabeth Menkhausen died intestate, leaving plaintiffs as her only children and heirs at law; that plaintiffs were members of her family, were her heirs and blood relations, and were dependent upon her for their support. A demurrer interposed by the defendant to this declaration was overruled by the court, and, the defendant electing to stand by its demurrer, judgment was entered in favor of the plaintiffs for \$1,000. An appeal was taken by the lodge to the appellate court for the fourth district, where the judgment of the circuit court was affirmed. The appellate court granted a certificate of importance, and appellant appealed to this court.

Appellant urges as reasons why the demurrer should have been sustained, the following: First. Because appellees have no right, title, or interest in said benefit certificate, or any part thereof, and cannot maintain any action thereon. Second. The act of the legislature of June 22, 1893 (Laws 1893, p. 130), for the organizing and management of fraternal beneficiary societies, has no application to this case, as it was passed after the benefit certificate was issued; and the act of the legislature approved June 16, 1887 (Laws 1887, p. 204), under which this benefit certificate was issued, confers no authority on appellees to maintain this suit. Third. The murder of the assured by the beneficiary named in the benefit certificate was not one of the risks insured against and covered by the benefit certificate, and therefore no action can be maintained on said benefit certificate, or for the amount therein specified, by appellees against appellant.

Messrs. Ashcraft & Ashcraft, with **Mr. J. M. Hamill**, for appellant.

Messrs. Turner & Holder, for appellees:

The heirs at law of a member of a beneficiary society are entitled to the insurance where the person designated as a beneficiary is outside the class of persons capable of taking under the law of the society.

Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065; *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412; *Alexander v. Parker*, 144 Ill. 355, 19 L. R. A. 187, 33 N. E. 183.

If the beneficiary in a life-insurance policy kills the insured he cannot recover from the insurance company; but the insurance money forms a fund for the benefit of the heirs of the insured, and may be recovered by them as if no beneficiary had been designated.

Schmidt v. Northern Life Asso. 112 Iowa, 41, 51 L. R. A. 141, 84 Am. St. Rep. 323, 83 N. W. 800.

Scott, J., delivered the opinion of the court:

The beneficiary named in a benefit certificate who feloniously takes the life of the insured cannot recover from the fraternal beneficiary society, and it is now urged that public policy also requires us to hold that in such a case there can be no recovery by any person whomsoever against such a society, and that under such circumstances not only is the certificate void, but the obligation of the society to pay to anyone whomsoever is canceled, and rendered absolutely inoperative. The cases relied upon by appellant are of two classes: First, where the insured was murdered by the beneficiary, and suit was brought by the criminal, or some one claiming through him; and, second, where the insured was executed in pursuance of the sentence of a court of competent jurisdiction for a crime committed by him or her. Neither class of cases is in point here. The only reason in favor of appellant's contention that seems to us of weight is found in the fact that the beneficiary might be incited to commit murder by the fact that, if unable to collect the benefit himself, it would be payable to some other person or persons in whose welfare he was interested. Human experience teaches that those willing to commit murder and assume the risk of punishment for the benefit of others are so few in number that consideration thereof becomes well-nigh inconsequential. But, even were it otherwise, if the rule suggested by appellant were established, it is perceived that the society would then profit by the murder, and an incentive be created for the destruction of the life of the insured that the interest of the insurer might be advanced. The contract between the society and the insured contained no provision absolving the society from liability in the event that she was murdered by the beneficiary, and public policy does not require us to read such a condition into the agreement. If it did, it would also require us to hold that the beneficiary could not recover on the policy if the insured was murdered by another, act-

ing independently of and against the desire of the beneficiary, because it is within the realm of possibility that such other, without the connivance or knowledge of the beneficiary, might commit the crime solely for the purpose of enriching the latter. If societies of the character of appellant desire to be protected from such contingency, that object must be accomplished by a condition to that effect written into their contracts, failing which the law will not absolve them from liability. *Cleaver v. Mutual Reserve Fund Life Asso.* [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180; *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L. R. A. 141, 84 Am. St. Rep. 323, 83 N. W. 800. In the absence of a contract to that effect, public policy will not permit the society to appropriate unto itself the fund which it has agreed to pay, merely because the life of the insured has been unlawfully taken.

It is suggested, however, that this certificate was payable alone to Gustav Menkhauzen, and that no recovery can be had thereon except by him, or by those claiming through him, and that, as he cannot recover, no one can recover on the certificate. We do not regard this as a suit upon the certificate. A careful examination of the declaration leads us to conclude that it is a suit to recover the benefit, \$1,000, which the appellant undertook, by its constitution and by-laws to pay to the person, within certain classes, who should be designated by Elizabeth Menkhauzen; and that the action is upon the obligation of appellant as evidenced by its constitution and by-laws, and not upon the certificate. These rules or laws of this organization recite its purpose to be the establishment of a relief fund, from which, upon the death of a member, a benefit shall be paid to the person designated by the member in the certificate, and that such benefit may be made payable by the member to the wife or husband, the children, grandchildren, parents, certain other persons of the whole or half blood, or the next of kin who would be distributees of the personal estate of the member, in the order above named. By the act of 1887, which was in force when the certificate in question was issued, it was provided, in substance, that societies of the class to which appellant belongs might be organized for the purpose of furnishing benefits, upon the death of a member, "to the widow, heirs, relatives, legal representatives or the designated beneficiaries of such deceased member." Laws 1887, p. 205, § 1. By the act of 1893 (Laws 1893, p. 130), which became effective a few months after the issuance of this certificate, it was provided, so far as material here, that payment of death benefits should be

made only to the "families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, the member." Hurd's Stat. 1895, chap. 73, § 258. It will be observed that by the spirit of each of these three enactments the children of the deceased would stand next in order after the husband or wife. "Upon the death of a member, where the person claiming to be his designated beneficiary is outside of the classes eligible as beneficiaries of his insurance, the member's heirs at law, who are within such classes, are entitled to the insurance. There being no selection of a beneficiary authorized to take, the fund goes to them. *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412; *Alexander v. Parker*, 144 Ill. 355, 19 L. R. A. 187, 33 N. E. 183." *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065. We think the correct view to take is that Gustav Menkhausen, by his act in taking the life of his wife, placed himself outside the classes from among whom she might designate a beneficiary, and he could not thereafter take the fund, or any part thereof, either as the beneficiary named in the certificate or as heir at law of his wife. The situation, so far as his rights and those of appellees and appellant are concerned, we think is precisely the same as though, after the issuance of this certificate, he had been divorced from Elizabeth Menkhausen, and she had thereafter died without having any alteration made in the certificate. Under such circumstances, he would have no interest in the certificate, but the proceeds thereof would be payable to the heirs of the insured, nothing to the contrary appearing in the certificate, the constitution and by-laws of the order, or the laws of the state under which it operates. *Tyler v. Odd Fellows' Mut. Relief Asso.* 145 Mass. 134, 13 N. E. 380; *Schonfield v. Turner*, 75 Tex. 324, 7 L. R. A. 189, 12 S. W. 626; *Order of Railway Conductors v. Koster*, 55 Mo. App. 186. In *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L. R. A. 141, 84 Am. St. Rep. 323, 83 N. W. 800, and in *Cleaver v. Mutual Reserve Fund Life Asso.* [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180, growing out of the Maybrick murder, the same question was presented as is now before us. In both cases it was held that the fact that the beneficiary had murdered the insured did not cancel the obligation of the insurer, and in both cases the administrator of the insured was allowed to recover on the theory that the insurer held the fund in trust for the estate of the deceased; and in the case at bar it is argued that, if there could be a recovery at all, it must, under the authority of these cases, be in the name of the administrator of the estate of Elizabeth Menk-

hausen. It is very evident that neither the constitution and by-laws of appellant nor the laws of this state contemplate the payment of a benefit of this character to the administrator of the member. The purpose is to pay it directly to the beneficiary, whoever that may be, without the intervention of administration; and where, as here, the law determines the persons who are entitled to the fund, the suit is properly brought in the names of such persons, and in this case there is no occasion for a resort to equity.

Rule 15 (168 Ill. 13, 47 N. E. vii.) of this court indicates the manner in which a brief and argument should be prepared for presentation here. Counsel on both sides of this controversy have failed to observe that rule. A compliance therewith is materially helpful in the consideration of causes in this court. It should be followed in every instance.

The judgment of the Appellate Court will be affirmed.

James E. WAKEFIELD *et al.*, Appts.,
v.

Robert W. VAN TASSELL *et al.*

(202 Ill. 41.)

1. A condition in a deed of a small parcel of land that no grain shall ever be handled on the land granted, which contains no facilities for handling grain at the time of the grant, is not unreasonable or contrary to public policy.
2. The spirit of the rule against perpetuities is not violated by a condition in a deed that no grain shall ever be handled on the land.
3. That plaintiffs stood by and permitted, without protest, an elevator to be erected on the granted land at large expense is not available to defeat an action of ejectment to recover possession of the land on the ground that the placing of the building thereon was a breach of condition in the title deed.
4. Evidence is not admissible to show the nature and business and property interests of the grantor in an action to recover possession of real estate

NOTE.—As to provision in deed that no part of premises shall be used for specified purpose, see also, in this series, *Post v. Well*, 5 L. R. A. 422, with note as to distinction between conditions subsequent and covenants; also *Sioux City & St. P. R. Co. v. Singer*, 15 L. R. A. 751.

As to condition in deed that land is to be used for specified purposes only, see *Greene v. O'Connor*, 19 L. R. A. 262, and note.

For a case in this series holding that restrictions and prohibitions as to the use of real property by the grantee are generally to be resolved in favor of the free use of the property, see *Hutchinson v. Ulrich*, 21 L. R. A. 391.

for breach of condition in the title deed that certain business should not be transacted on it.

(February 18, 1903.)

APPEAL by defendants from a judgment of the Circuit Court for Peoria County in favor of plaintiffs in an action brought to recover possession of certain real estate. *Affirmed.*

Statement by **Ricks, J.:**

This is an appeal from a judgment of the circuit court of Peoria county in an action of ejectment for condition broken in a deed. The facts, briefly, show that in the year 1893, R. W. Van Tassell and wife, of the city of Peoria, in consideration of the sum of \$850, conveyed to Adam J. Best, of the town of Princeville, in said county, by warranty deed, four town lots located in said town of Princeville, and along and near the Rock Island Railroad. The deed contained the following condition: "That no building shall ever be erected on all or any part of said land hereinafter described in which to handle grain; and, further, that no grain shall ever be handled on said land by the grantee herein, his grantee, administrator, executor, assigns, or lessee, or by anyone holding by, through, or under him; and, if this agreement is broken, said land shall revert to and become the property of the grantors herein." This deed was duly acknowledged and recorded in the recorder's office of said county on the 29th day of June, 1893. Appellant Adam J. Best in the year 1901 conveyed an undivided one-half interest in the premises in question to James E. Wakefield, and the two together during that year built an elevator on said lots, and began handling grain thereon. Van Tassell made demand on appellants for possession for condition broken, which was refused. He then brought this suit, and, upon general issue being filed, the cause was tried by the court, by consent of parties, without a jury. At the conclusion of the evidence certain holdings of law were offered by the respective parties, some of which were given and some refused. The court rendered judgment for the plaintiffs below, the appellees here, for possession of the property, and appellants prosecuted their appeal from that judgment to this court. The errors relied upon relate to the exclusion of evidence offered by appellants and refused by the court, and to the rulings of the court upon certain propositions of law offered by the respective parties, all of which are sufficiently covered by the assignments of error. 65 L. R. A.

Messrs. George B. Foster and Whitmore, Barnes, & Boulware, for appellants:

By public policy is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good.

Greenhood, Pub. Pol. p. 2, ex. 2.

The legislature of the state is alone invested with the authority, and must determine its public policy.

Carroll v. East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776, 6 N. E. 183.

The regulation of warehouses and elevators as instrumentalities affecting trade and commerce is a legitimate and proper exercise of the legislative power.

Munn v. People, 69 Ill. 80, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

Restrictions on the use of real estate, where not for the benefit of some individual, or of the public, are contrary to public policy and void.

Mitchell v. Leavitt, 30 Conn. 588; *Greenhood*, Pub. Pol. chap. 7, p. 685; *Eckhart v. Irons*, 128 Ill. 581, 20 N. E. 687; *Linn v. Sigsbee*, 67 Ill. 75; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L. R. A. 641, 49 Am. St. Rep. 784, 28 Atl. 973.

Restrictions of business, trade, etc., cannot run with the land though expressed in the deed conveying it.

Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676; *Gibbs v. Consolidated Gas Co.* 130 U. S. 409, 32 L. ed. 984, 9 Sup. Ct. Rep. 553.

It is a rule of the common law that all contracts in violation of its principles, or opposed to legislative enactments, or that are opposed to public policy, are void.

Nash v. Monheimer, 20 Ill. 215; *Neustadt v. Hall*, 68 Ill. 172; *Jerome v. Bigelow*, 66 Ill. 452, 16 Am. Rep. 597.

A contract may be declared void on account of its corrupt tendency, and as inconsistent with public policy.

Hamilton v. Hamilton, 89 Ill. 349; *Gillett v. Logan County*, 67 Ill. 256; *Workingmen's Bkg. Co. v. Rautenberg*, 103 Ill. 460, 42 Am. Rep. 26; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 294, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798.

Whatever tends to prevent competition in business, impressed with a public character, is opposed to public policy, and is therefore unlawful.

Greenhood, Pub. Pol. pp. 180, 643, 654, 655, 670; 2 Addison, Contr. p. 743.

Any contract which is injurious to the public is void on the ground of public policy.

Horner v. Graves, 7 Bing. 743, 5 Moore & P. 768, 9 L. J. C. P. 192; *Craft v. McCoughy*, 79 Ill. 350, 22 Am. Rep. 171; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169.

The general rule that contracts in partial restraint of trade are invalid does not apply to corporations engaged in a public business in which the public is interested.

Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co. 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169; *South Chicago City R. Co. v. Calumet Electric Street R. Co.* 171 Ill. 391, 49 N. E. 576; *More v. Bennett*, 140 Ill. 80, 15 L. R. A. 361, 33 Am. St. Rep. 216, 29 N. E. 888.

The rule prohibiting perpetuities requires that the absolute ownership of property must rest in someone within the period of a life or lives in being and twenty-one years and nine months thereafter.

Owsley v. Harrison, 190 Ill. 240, 60 N. E. 89.

A perpetuity is any limitation tending to fetter the alienation of property for a period longer than permitted.

Waldo v. Cummings, 45 Ill. 421; *Russell v. Baptist Theological Union*, 73 Ill. 337; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246; *Howe v. Hodge*, 152 Ill. 252, 38 N. E. 1083; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259; *Bigelow v. Cady*, 171 Ill. 229, 63 Am. St. Rep. 230, 48 N. E. 974.

The plaintiffs, by standing by and seeing valuable improvements placed upon the premises, are estopped from claiming under the restriction after the improvements are placed upon the premises.

Mitchell v. Leavitt, 30 Conn. 587; *Jenks v. Paulowski*, 98 Mich. 110, 22 L. R. A. 863, 39 Am. St. Rep. 522, 56 N. W. 1105.

A condition subsequent will not be enforced where the contract is tainted with illegality.

St. Louis, J. & C. R. Co. v. Mathers, 104 Ill. 257.

An invalid contract is no estoppel.

Herman, Estoppel, § 224; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302, 49 N. E. 592; *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592, 22 Am. Rep. 122; *Gray v. Chicago, M. & St. P. R. Co.* 189 Ill. 409, 59 N. E. 950; *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L. R. A. 391, 34 N. E. 556; *Lyman v. Suburban R. Co.* 190 Ill. 320, 52 L. R. A. 645, 60 N. E. 515.

Mr. Arthur Keithley, for appellees:

The deed is valid.

Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; *O'Brien v. Wetherell*, 14 Kan. 616; *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391, 22 N. W. 816; *Plumb* 65 L. R. A.

v. Tubbs, 41 N. Y. 442; *Sperry v. Pond*, 5 Ohio, 388, 24 Am. Dec. 296; *Lyman v. Suburban R. Co.* 190 Ill. 320, 52 L. R. A. 645, 60 N. E. 515.

The grantee in a deed of this character is estopped from denying the title of his grantor.

Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; *O'Brien v. Wetherell*, 14 Kan. 616; *Fitch v. Baldwin*, 17 Johns. 161; *Miller v. Shackelford*, 4 Dana, 264; *Gill v. Fauntleroy*, 8 B. Mon. 177.

Demand for possession before bringing suit is not necessary.

Cowell v. Colorado Springs Co. 100 U. S. 55, 25 L. ed. 547; *Lyman v. Suburban R. Co.* 190 Ill. 320, 52 L. R. A. 645, 60 N. E. 515.

It is either to prevent or compel the performance of legal acts, as distinguished from illegal acts, that conditions subsequent are inserted in deeds.

Smith v. Barrie, 56 Mich. 314, 56 Am. Rep. 391, 22 N. W. 816.

When the intention of the parties is clearly manifested in the creation of restrictions or limitations upon the use of the grantee, for the use of the grantor, his heirs or assigns, a court of equity will enforce the same.

Eckhart v. Irons, 128 Ill. 569, 20 N. E. 687; *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L. R. A. 391, 34 N. E. 556.

The owner of land selling or leasing it may insist upon just such covenants as he pleases touching the use and mode of enjoyment of the land.

Star Brewery Co. v. Primas, 163 Ill. 652, 45 N. E. 145.

Estoppels in pais relating to real estate cannot be made available in a court of law.

Blake v. Fash, 44 Ill. 302; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.* 102 Ill. 514; *Linnertz v. Dorway*, 175 Ill. 508, 67 Am. St. Rep. 232, 51 N. E. 809; *Cobbs v. Niblo*, 6 Ill. App. 60.

Contracts in restraint of trade to a limited extent, or limited contracts in restraint of trade, are binding.

Hursen v. Gavin, 162 Ill. 377, 44 N. E. 735; *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 86 Am. St. Rep. 346, 61 N. E. 1038; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391, 22 N. W. 816; *Linnertz v. Dorway*, 175 Ill. 508, 67 Am. St. Rep. 232, 51 N. E. 809; *Gordon v. Dickinson*, 131 Ill. 141, 23 N. E. 439.

Ricks, J., delivered the opinion of the court:

Appellants contend that the deed conveying the premises in question to Best operated as an absolute conveyance in fee, free from all

restrictions or limitations whatever as to any future use to which the premises might be put, for the reasons that the condition in the deed was (1) contrary to public policy, and against public welfare; (2) that it violates the spirit of the rule of perpetuities; (3) that it is unreasonable; and (4) that it is inoperative by reason of the intervention of the doctrine of equitable estoppel.

The condition, as expressed in the deed, is plain and unambiguous, and needs not the aid of a court to construe its meaning. Parties have a right to make deeds, and insert therein such conditions as they see fit, and contracts entered into freely and voluntarily must be held sacred, and be enforced by the courts. As the parties make their deeds and contracts, so the courts must take them; and yet they must not be such contracts as are in contravention of the paramount principle of public good. So long as the beneficial enjoyment of an estate conveyed in fee simple is not materially impaired by restrictions and conditions contained in a deed, such restrictions and conditions as to the mode of its use are held valid. The enforcement of these conditions by the courts arises from the principle of law that every owner of the fee has the legal right to dispose of his estate, either absolutely or conditionally, or to regulate the manner in which the estate shall be used and occupied, as the grantor may deem best and proper. Just so long as the conditions and restrictions are not violative of the public good or subversive of the public interest, they will be enforced. It has been well said that public policy is a variable quality, but that it is only variable in so far as the habits, capacities, and opportunities of the public have become more varied and complex, and that the principles to be applied have always remained unchanged and unchangeable. "The relations of society become, from time to time, more complex. Statutes defining and declaring public and private rights multiply rapidly, and public policy often changes as the laws change, and therefore new applications of old principles are required." *Davies v. Davies*, L. R. 36 Ch. Div. 364, 56 L. J. Ch. N. S. 962, 58 L. T. N. S. 209, 36 Week. Rep. 86. It is not the interest of the parties alone which is to be considered the true test, but in each particular case, under the facts, the judicial inquiry is, Will the enforcement of the condition be inimical to the public interests? And so in *Price v. Green*, 16 Mees. & W. 346, 16 L. J. Exch. N. S. 108, 9 Jur. 880, a contract not to carry on the perfume business within 600 miles of London was held void, the contract being one which the court deemed would be against public policy to enforce. Yet in the case of *Nordenfelt v.* 65 L. R. A.

Mazin-Nordenfelt Guns & Ammunition Co. [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, where the patentee and manufacturer of guns and ammunition for war purposes transferred his patent to a company, and covenanted with the latter not to engage in that business for a term of twenty-five years, it was held that this condition was valid, and not against public policy, for the reason that, owing to the nature of that particular business, and the limited number of customers to whom sale might be made (being mainly to the governments of countries), the restraint imposed in that case was not larger than was necessary for the protection of the contractee, and not injurious to the public interest. In *Brooks v. Cooper*, 50 N. J. Eq. 761, 21 L. R. A. 617, 35 Am. St. Rep. 793, 26 Atl. 978, it is said: "Whatever tends to injustice or oppression, restraint of liberty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute, or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the law as to executive, legislative, or other official action, whenever embodied in and made the subject of a contract, the contract is against public policy and therefore void, and not susceptible of enforcement." As, for instance, an agreement to withdraw an election petition in consideration of money was held void. *Coppock v. Bower*, 4 Mees. & W. 361, 8 L. J. Exch. N. S. 9. And so an agreement to obtain a pardon was held void. *Kribben v. Haycraft*, 26 Mo. 396. Likewise contracts for services known as "lobby services" (*Trist v. Child*, 21 Wall. 441, 22 L. ed. 623), and a note executed in consideration of the payee agreeing to resign a public office in favor of the maker and using his influence to appoint the latter his successor are void (*Meacham v. Dow*, 32 Vt. 721). And conditions in general restraint of marriage (*Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281), or general restraint of alienation (*Reifsnnyder v. Hunter*, 19 Pa. 41), or the procuring of a *nolle prosequi* from the governor (*Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346), or to prevent competition in bidding for government contracts (*Gulick v. Ward*, 10 N. J. L. 87, 18 Am. Dec. 389), have been held void as opposed to public policy. But where the condition is made in good faith, and stipulates for nothing that is *malum in se* or *malum prohibitum*, before the court should determine the condition to be void, as contravening public policy, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, and not theoretical and problematical. *Kellogg v. Larkin*, 3 Pinney

(Wis.) 123, 3 Chand. (Wis.) 133, 56 Am. Dec. 164. So it has been universally held that conditions in deeds restraining the grantee from selling intoxicating liquors upon the premises are valid. *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145. An agreement not to run a stage coach on a certain road has been held valid (*Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102), and a condition that a party would not, at any time thereafter, own, run, or be interested in any line of packet boats on the Erie canal, was held valid (*Chappel v. Brockway*, 21 Wend. 157); also a condition that a schoolhouse should not be erected on the premises (*McKissick v. Pickle*, 16 Pa. 140), or a distillery, or a machine shop for iron manufacture, or a hospital, or a cemetery, have all been held to be valid conditions (*Plumb v. Tubbs*, 41 N. Y. 444). A stipulation in a deed that the premises conveyed should not be used or occupied as a hotel (*Stines v. Dorman*, 25 Ohio St. 580), and a condition against the erection of a building for the manufacture of resin oil (*Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556), and a condition that the grantor should have the exclusive right to sell beer to any public house erected on the land conveyed (*Colt v. Toule*, Eng. Ch. App., decided in 1859), were held enforceable conditions. A condition that neither the premises nor the building erected thereon were to be used at any time thereafter as a public house (*Post v. Bernheimer*, 31 Hun, 247), also a condition in a deed to the county on the express condition that the county would "erect thereon, within five years, a courthouse for the use of said county, and keep and maintain the same thereon for the space of ten years" (*Pepin County v. Prindle*, 61 Wis. 301, 21 N. W. 254), have been held valid. And where an estate was conveyed on the condition of not placing a window on the north side of the house, and the grantor was never the owner of the land adjoining on the north side, and the estate was afterwards mortgaged by the grantee, it was held that the whole estate, both of the mortgagor and mortgagee, was forfeited on condition broken. *Gray v. Blanchard*, 8 Pick. 284.

In *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798, this court said: "Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good." The question, then, in this case to determine, is, Does the condition in the deed have a tendency to be injurious to the public, or to be against the 65 L. R. A.

public good? It will be observed that in this deed the only condition contained therein was that no grain elevator should ever be built thereon, or grain ever be handled thereon. It left the estate free to be used for any and for all other purposes whatsoever, and was not subversive of the estate, and did not destroy or limit its alienable or inheritable character. *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547. The condition, as made at the time of the deed between the parties, appears to have been a reasonable one, and the intent of the parties to the deed is clear. There is no showing in the record that the situation of the property or surroundings have changed, so as to make the condition at the present time an unreasonable one; and we cannot see that there would result any certain and substantial advantage to the public by holding the condition in this deed void. The parties having seen fit to place such a condition in the deed, the intention being clear and free from doubt, and the same not being *malum in se* or *malum prohibitum*, and not contrary to public policy, the court must enforce the same. *Hutchinson v. Ulrich*, 145 Ill. 342, 21 L. R. A. 391, 34 N. E. 556.

In support of appellants' contention that the condition in this deed is contrary to public policy, and against the public welfare, attention is called to the fact that the evidence shows that the building erected on the premises in question is a public warehouse, and a subject of great public concern, in the encouragement of which the public has an interest, and that any condition which would tend to restrict such encouragement must necessarily be deemed contrary to public policy. At the time of the deed to appellant Best there was no elevator upon the premises, or grain being handled thereon. The condition in the deed became effective upon the delivery of the deed, and the public, so far as it related to the property here involved, could have no interest in a business not then existing thereon. Had the restriction been so broad as to have affected all the available lands in the community from being occupied by a warehouse, or had there been at the time the deed was made, a public warehouse upon the premises, and the condition sought to prohibit the use of such as a warehouse, then a different question might be presented for determination, as to the effect of which we express no opinion. The public is no more injuriously affected by a condition prohibiting the use of a small tract of land in a village for the purpose of a public warehouse than it is affected by a condition prohibiting the use of a tract of ground for a schoolhouse; and in the illustrations above cited there are numerous businesses of great public concern, but their

inhibition from limited areas were not deemed to be inimical to public policy.

Nor do we think the contention of counsel for appellants that the condition violates the spirit of the rule of perpetuities can be sustained. In *Gray v. Chicago, M. & St. P. R. Co.* 189 Ill. 400, 59 N. E. 950, where one of the conditions of the deed in question was that appellee should maintain a passenger depot at a certain place, and stop thereat all its accommodation trains to take and leave passengers, it was contended by appellee that the condition, being perpetual, was illegal and void, and that the appellee held the land free from such invalid condition; but this contention we refused to uphold, and we think that case decisive of the one at bar as to appellants' objection that the condition violates the spirit of the rule of perpetuities. This disposes of appellants' first, second, and third contentions.

Appellants further urge that the condition should not be enforced, for the reason that appellees are estopped from claiming under the restriction, because they had actual notice of the intention of appellants to erect a warehouse upon the premises, which were vacant, and permitted appellants so to do without hindrance or objection. There is no proof in the record that the appellees stood by and permitted this elevator to be erected upon this property without protest; but, even if such were the case, it would not be permissible, in an action of ejectment, to invoke estoppel *in pais* in order to defeat the legal title to the land. *Linnertz v. Dorway*, 175 Ill. 508, 67 Am. St. Rep. 232, 51 N. E. 809.

Appellants insist that the rulings of the trial court in excluding certain evidence tending to show the nature of the business and property interests of appellees in the village of Princeville was erroneous. There was no error in excluding this testimony. *Gray v. Chicago, M. & St. P. R. Co.* 189 Ill. 400, 59 N. E. 950.

At the request of appellees, the court, trying the case without a jury, made four holdings as to the law of the case: First, that the condition in the deed was a valid one, and for violation of it appellees could re-

cover; second, that the condition was not such a restraint of trade as to violate the law, or to invalidate the deed; third, that appellants were estopped from denying the title of appellees at the time of making the deed in controversy; fourth, that it was not necessary, in order to enable the plaintiffs to recover, that they should show where they procured their title, or what that title was. The appellants offered fifteen holdings, of which the first, third, and fourth were held as requested, and the remaining twelve were refused. All the refused holdings but the eleventh were upon the proposition that real estate is an article of commerce; that uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed, and it is contrary to public policy to tie up real estate with restrictions and prohibitions as to its uses. This proposition was presented in various forms; some on the theory that it was against public policy, because it was in restraint of trade; others upon the theory that the public is interested in public warehouses and in the business conducted in them; and others that such restrictions were against the Constitution and laws of the state. The eleventh refused holding was to the effect that the restriction was void because it prevented the building of a public warehouse on the only suitable and available lots in the village; that there was no public warehouse in the village at the time of the execution of the deed; and because, further, the grantor had no other lots or interests in the village. This instruction was refused, because it was not applicable to the facts. If the propositions offered on behalf of appellees were properly held, as we think they were, the court did not err in the refusal of those asked by appellants.

Finding no errors in the record, the judgment of the Circuit Court is affirmed.

Boggs, J., did not concur.

Rehearing denied April 10, 1903.

Writ of error dismissed by Supreme Court of United States January 18, 1904.

INDIANA SUPREME COURT.

Louisa J. COCHRAN, *Appt.*,

v.

Thomas BOLEMAN *et al.*

(.....Ind.....)

The members of an unincorporated mu-

tual benefit association are not subject to suit by the beneficiary of a deceased member for their respective shares of such benefit, where the by-laws of the association contemplate the collection and disbursement of benefits by officers, and for-

NOTE.—As to liability of a member of a benefit society to an action for an assessment, see, in this series, *Ellerbe v. Barney*, 23 L. R. A. 65 L. R. A.

435, and *note*; also *Lehman v. Clark*, 43 L. R. A. 648, and *L'Union St. Jean Baptiste v. Ontiguay*, 64 L. R. A. 158.

feiture of membership is the only penalty provided for failure to pay an assessment.

(May 17, 1904.)

APPEAL by plaintiff from a judgment of the Superior Court for Vanderburgh County in favor of defendants in an action brought to enforce payment of the amount alleged to be due on a mutual benefit certificate. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. W. Funkhouser, A. F. Funkhouser, G. K. Denton, and C. M. Sells, for appellant:

An action cannot be maintained against this association in its associate name.

Niblack, Ben. Soc. p. 183; 22 Enc. Pl. & Pr. pp. 242-246.

Since this association is not incorporated, it has no legal entity separate and apart from its members, and therefore the members themselves, those who compose the association, are the insurers as well as the insured. In a few states such an unincorporated association may be sued in the associate name in accordance with statutes authorizing such an action.

22 Enc. Pl. & Pr. p. 245.

But even in such states this is only a matter of convenience, because of the difficulty of bringing so many defendants into court. And a judgment, when obtained, is a judgment against the individuals composing the association.

Taylor v. Order of Railway Conductors, 89 Minn. 222, 94 N. W. 684; *Van Houten v. Pine*, 36 N. J. Eq. 133.

With regard to the question as to the proper form of action, it is immaterial whether the association is incorporated or not.

Pritchett v. Schafer, 2 W. N. C. 317; *Supreme Lodge, K. H. v. Abbott*, 82 Ind. 1; *Grand Lodge, A. O. U. W. v. Gandy*, 63 N. J. Eq. 692, 53 Atl. 142.

A quasi or *de facto* corporation exists only where the association attempts unsuccessfully to incorporate, or holds itself out to be, or does business on the assumption that it is, a corporation.

8 Am. & Eng. Enc. Law, p. 748.

If this association were incorporated, then the members of course would not be liable individually.

If they attempt to carry on business as an unincorporated association, they must take the consequences of liability attaching by reason of doing business in this manner.

Taylor v. Order of Railway Conductors, 89 Minn. 222, 94 N. W. 684.

The members of this association are partners.

Bacon, Ben. Soc. § 28; Collyer, Partn. § 29.
65 L. R. A.

Messrs. Alexander Gilchrist, Curran A. DeBruer, and John D. Welman, for appellees:

Such a society as that to which the deceased and the appellees belonged is not in any sense a partnership.

Brown v. Rains, 53 Iowa, 81, 4 N. W. 867; *Peck v. Lusk*, 38 Iowa, 93; *Guest v. Burlington Opera-House Co.* 74 Iowa, 458, 38 N. W. 158; *Winter v. Pipher*, 96 Iowa, 17, 64 N. W. 663; *Heard v. Wilder*, 81 Iowa, 421, 46 N. W. 1075; *McBride v. Ricketts*, 98 Iowa, 538, 67 N. W. 410; *Price v. Alexander*, 2 G. Greene, 427, 52 Am. Dec. 526; *Reed v. Murphy*, 2 G. Greene, 574; 1 *Bates*, Partn. §§ 1, 75; Bacon, Ben. Soc. §§ 28, 112; *Lafond v. Deems*, 81 N. Y. 514; *Caldicott v. Griffiths*, 22 Eng. L. & Eq. 529; Collyer, Partn. Wood's ed. § 29; *State ex rel. Robertson v. Hope*, 102 Mo. 410, 14 S. W. 985; Niblack, Ben. Soc. 2d ed. § 80; 1 Lindley, Partn. 57; *Richmond v. Judy*, 6 Mo. App. 465; 17 Am. & Eng. Enc. Law, p. 865; *Burt v. Lathrop*, 52 Mich. 106, 17 N. W. 716; *Austin v. Thomson*, 45 N. H. 113; *Re London Marine Ins. Assn.* L. R. 8 Eq. 176, 20 L. T. N. S. 943, 17 Week. Rep. 784; *Re St. James's Club*, 2 De G. M. & G. 383, 16 Jur. 1075; *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799; *Brown v. Stoerkel*, 74 Mich. 269, 3 L. R. A. 430, 41 N. W. 921.

No matter by what name the association may be called, the rights and obligations of the members are fixed, and must be determined by the by-laws and the benefit certificates. Under these, the individual members assume no enforceable obligations whatever. Under the certificate and the by-laws, the appellees did not, nor did either one of them, enter into any contractual relation with the appellant. The agreement of the members is simply to pay assessments made upon them, or to forfeit all rights as members, including the right of insurance.

Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716; *Hammerstein v. Parsons*, 38 Mo. App. 332; *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300; Hirschl, *Fraternities & Societies*, 3-6; *Waller v. Thomas*, 42 How. Pr. 344; *White v. Brownell*, 3 Abb. Pr. N. S. 325; *Olery v. Brown*, 51 How. Pr. 92; *Thomas v. Ellmaker*, 1 Pars. Sel. Eq. Cas. 98; *Payne v. Snow*, 12 Cush. 443, 59 Am. Dec. 203; *Barry v. Nuckolls*, 2 Humph. 324; *Cohn v. Borst*, 36 Hun, 562; Bacon, Ben. Soc. §§ 35, 112; *Hyde v. Woods*, 94 U. S. 523, 24 L. ed. 264; *Tyrrell v. Washburn*, 6 Allen, 466; *Abbott's Digest of Corp. title, Associations*; 1 *Bates*, Partn. § 17; *Hill v. Beach*, 12 N. J. Eq. 31; *Carlen v. Drury*, 1 Ves. & B. 157, 12 Revised Rep. 203; *Keasley v. Codd*, 2 Car. & P. 408; *Hess v. Werts*, 4 Serg. & R. 356; *Fuller v. Rowe*, 57 N. Y. 23; *Ferris v. Thaw*, 5 Mo. App. 279; *Sproat v. Porter*, 9 Mass.

300; *Carlton v. Southern Mut. Ins. Co.* 72 Ga. 371.

The contract is unilateral. Each member simply agrees that, if he does not pay any assessment made upon him, he will forfeit his rights. Under such a contract there can be no recovery by any beneficiary against the individual members of the order.

Lehman v. Clark, 174 Ill. 279, 43 L. R. A. 648, 51 N. E. 222; *Clark v. Schromeyer*, 23 Ind. App. 565, 55 N. E. 785; 3 Am. & Eng. Enc. Law. 2d ed. p. 1100.

Monks, J., delivered the opinion of the court:

This action was brought by appellant on a certificate of insurance on the life of her deceased husband in the mutual benefit department of the Order of Railway Conductors of America, an unincorporated association, having its principal place of business at Cedar Rapids, Iowa, against the individual members of said department residing in this state. The complaint was in two paragraphs. A demurrer for want of facts was sustained to each paragraph, and, appellant refusing to plead further, judgment was rendered in favor of appellees. The ruling of the court on said demurrer is assigned for error.

It is alleged in the first paragraph of complaint that the defendants and several thousand other persons living in other states, without the jurisdiction of the court, are, and were at the time the contract of insurance was entered into, members of the mutual benefit department of the Order of Railway Conductors of America; that such department claimed and held itself out to be, at the time the contract was made, an unincorporated mutual insurance association; and that the president and secretary of the Grand Division of the Order of Railway Conductors of America, and an insurance committee appointed by said grand division, were the agents of the members for the purpose of transacting the business of the association. The death of the insured, and the performance of all the conditions to be performed by appellant and the deceased, are alleged. It is also averred that the by-laws of said mutual benefit department are a part of the contract sued upon, and copies of the application, certificate, and by-laws are made a part of the complaint.

It is provided in the certificate sued upon that, in consideration of the membership fee, and of each and every assessment that may be levied against said certificate in accordance with the then existing laws governing the said mutual benefit department, said department "agrees with A. S. Cochran in case of his death, and after due notice and satisfactory evidence of such death is received 65 L. R. A.

and the claim is properly approved in accordance with the laws governing the said mutual benefit department to pay or cause to be paid, to the person or persons as herein provided, such sums as may be realized from an assessment levied on account of such death. The amount herein provided for to be paid as follows: Three thousand dollars to L. J. Cochran who is my wife, . . . provided that the sum to be paid under this certificate on account of death or disability of the member herein named shall in no case exceed the sum of three thousand dollars. It is distinctly declared, covenanted, and agreed that this certificate is but evidence of membership in said mutual department, and that it in no sense, and at no time, promises or agrees to anything that is not dependent at all times upon the laws of said mutual benefit department as they may be legally adopted from time to time." Said certificate was issued February 10, 1897.

It is provided in the application, which is made a part of the agreement contained in said certificate, that "if payment for each and every assessment is not received by the treasurer within two calendar months from the date of notice thereof, membership in the mutual benefit department of the Order of Railway Conductors of America and all rights to any benefit therein is forfeited." Section 8 of the by-laws provides that "the secretary shall receive and hold in trust all funds of the department, and for each approved claim he shall, as soon as possible, pay to the proper person or persons such an amount as shall be realized from an assessment levied for the purpose of paying the claim, provided the amount paid shall in no case exceed the amount for which the claimant was insured." Section 13 of the by-laws provides for the levying of assessments to pay approved death and disability claims, and "if any of the above assessments are not paid at the office of the department within two calendar months from the date of the notice thereof, the certificate or certificates upon which such payments have not been made shall be forfeited, together with all rights to any benefit thereunder. If, after the approved claims against the department for the year have been paid, there shall be in the treasury to the credit of the fund a surplus which shall render such action consistent, one or more assessments will be suspended or omitted from the notices for the following year."

It is not alleged that there is any statute of Iowa which in any way affects or controls the liability of the members of said mutual benefit department to said department or to each other, nor is any statute of said state set out and made a part of the

complaint. The by-laws of the mutual benefit department show that the sole purpose thereof is to aid and benefit the disabled members, and persons having an insurable interest in the lives of deceased members. The personnel of the membership changes from time to time by the addition of new members, the death of old members, and by forfeitures of membership. The by-laws, which are a part of the certificate and application, show the methods of operating said department, and the means of raising the money to pay death losses, through assessments levied upon the members. Nowhere in said constitution and by-laws is any provision made for a distribution of profits or for any commercial losses. It is evident that said department does not exist for any purpose of gain. Said unincorporated association is clearly not a partnership. *Bacon, Ben. Soc. §§ 28, 30, 112, 116; Niblack, Ben. Soc. 2d ed. §§ 80 et seq.; Bates, Partn. § 75; Lafond v. Deems, 81 N. Y. 507, 514; Richmond v. Judy, 6 Mo. App. 465, 467; Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716; Payne v. Snow, 12 Cush. 433, 59 Am. Dec. 203; Caldicott v. Griffiths, 22 Eng. L. & Eq. 529.* Appellant admits that said members are not partners, but insists that the individual members of the department are liable for a death claim, for the reason that the officers are elected by the members, and the by-laws give such officers the authority to make contracts such as the one sued upon, and in making such contracts the officers represent the members. It is true the by-laws authorize certain officers named to make such contracts, but the application, the certificate, and the constitution and by-laws of the department constitute the contract by which the obligations

of the members to each other and to the department must be determined. When Asa S. Cochran, appellant's husband, now deceased, became a member of said mutual benefit department of said order, he consented and agreed to the by-laws of said department and the application and certificate issued to said Cochran, in which appellant is named as the beneficiary, as the contract which was to govern him and the other members of said department in adjusting their rights and obligations among themselves. *Bacon, Ben. Soc. §§ 37, 38, 39; St. Mary's Beneficial Soc. v. Burford, 70 Pa. 321.* According to this contract there was no promise to each member by all the other members that in the event of his death they would pay his beneficiary anything. The only provision made to compel the payment of the assessments to said department is the penalty of forfeiture of membership in said department and of all rights under said contract. In such a case the assessment cannot be collected by a suit against the member refusing to pay the same. *Gibson v. Megrew, 154 Ind. 273, 48 L. R. A. 362, 56 N. E. 674; Lehman v. Clark, 174 Ill. 294, 43 L. R. A. 648, 51 N. E. 222; Clark v. Schromeyer, 23 Ind. App. 565, 55 N. E. 785.* Under this kind of a contract, the members of said department are not personally liable to a beneficiary for a death claim. *Hammerstein v. Parsons, 38 Mo. App. 332; Payne v. Snow, 12 Cush. 443, 59 Am. Dec. 203; Bryden v. Hinds (Cal.) 55 Alb. L. J. 327.* It follows that the demurrer to the first paragraph of complaint was properly sustained. For the same reason, the second paragraph of complaint was insufficient.

Judgment affirmed.

IOWA SUPREME COURT.

Harvey McCLURG, *Appt.*,

v.

James M. BRENTON *et al.*

(123 Iowa, 368.)

1. An officer of the law has no right to break in upon the privacy of a home, and subject its occupants to the indignity of a search for the evidences of crime, without a legal warrant procured for that purpose.

2. The jury must determine whether a

NOTE.—As to evidence of trailing of criminals by bloodhounds, see also, in this series, *Pedigo v. Com. 42 L. R. A. 432, and note;* and the later cases of *State v. Moore, 55 L. R. A. 96, and Brott v. State, 63 L. R. A. 789.*

65 L. R. A.

householder consented to have his premises searched by an officer of the law for evidences of crime, where the evidence upon that subject is conflicting.

3. One who consents to have his property searched by an officer without a warrant has no right of action as for an illegal search.

4. As part of the circumstances leading immediately to the search without a warrant of a citizen's house for evidence of crime, persons sued for such act may prove the presence of bloodhounds in the searching party, and the use made of them on the occasion under investigation, as bearing upon the question of malice.

5. The doctrine or rule of probable cause has no application in a suit to recover damages for the unlawful search, without a warrant, of a citizen's house for evidence of crime.

6. In defense of an action for illegal search of a citizen's residence, evidence is not admissible as to the breeding and training of the hounds which led the party to the house.
7. Photographs of hounds used in tracking an alleged criminal are not admissible in evidence upon trial of an action for unlawfully searching his house for evidence of the crime, without a warrant.

(March 16, 1904.)

APPEAL by plaintiff from a judgment of the District Court for Polk County entered upon a verdict directed for defendants in an action brought to recover damages for an alleged unlawful search of plaintiff's premises. *Reversed.*

The facts are stated in the opinion.

Messrs. McVey, McVey, & Graham and J. D. Laws, for appellant:

If the case could not be taken from the jury at the close of the plaintiff's evidence in chief, it cannot be thereafter.

Meyer v. Houck, 85 Iowa, 319, 52 N. W. 235; *Phillips v. Phillips*, 93 Iowa, 615, 61 N. W. 1071; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Scott v. St. Louis, K. & N. W. R. Co.* 112 Iowa, 54, 83 N. W. 818; *Betts v. Betts*, 113 Iowa, 115, 84 N. W. 975.

Compensatory damages are allowable for mental suffering caused by outrage and indignity; and it is proper to consider the wounded feelings of the person who suffered the wrong.

Shepard v. Chicago, R. I. & P. R. Co. 77 Iowa, 54, 41 N. W. 564; *Curtis v. Sioux City & H. P. R. Co.* 87 Iowa, 622, 54 N. W. 339; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L. R. A. 72, 57 Am. St. Rep. 294, 62 N. W. 1.

It is not permissible, under the law of evidence, to put a dog on the witness stand by proxy, and let it testify about what it did or saw or thought. There can be no more virtue extracted from the fact that the animal followed was a dog, than if it were a horse, a cow, or any other of the dumb brutes.

State v. Moore, 129 N. C. 494, 55 L. R. A. 98, 39 S. E. 626; *Hodge v. State*, 98 Ala. 10, 39 Am. St. Rep. 17, 13 So. 385; *Simpson v. State*, 111 Ala. 6, 20 So. 572; *Pedigo v. Com.* 103 Ky. 41, 42 L. R. A. 432, 82 Am. St. Rep. 506, 44 S. W. 143.

If the presence of the dogs was not a circumstance tending to prove a defense, or a justification or a valid excuse for their conduct, then it was not admissible at all. The fact that these men committed an outrage when following dogs is almost parallel to the case of men committing outrages when drunk.

65 L. R. A.

Neither dogs, nor drunkenness even, tend to make a defense, or to justify, excuse, or mitigate.

Malice, in its legal sense, and as used and proved in this case by plaintiff, means a wrongful act done intentionally, without just cause or excuse.

Dexter v. Spear, 4 Mason, 115, Fed. Cas. No. 3,867; *United States v. Harriman*, 1 Hughes, 525, Fed. Cas. No. 15,311; *State v. Robbins*, 66 Me. 324; *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373; *True v. Plumley*, 36 Me. 466; *Etchberry v. Levielle*, 2 Hilt. 40; *Com. v. Snelling*, 15 Pick. 337; *Buckley v. Knapp*, 48 Mo. 152; *Barbee v. Hereford*, 48 Mo. 323; *Com. v. Bonner*, 9 Met. 410.

Messrs. Myerly & Myerly, with **Messrs. Read & Read**, for appellees:

The action is to recover damages for trespass to real property. Force is the gist or criterion of the action. If the entry was with permission, expressed or implied, there was no trespass.

26 Am. & Eng. Enc. Law, pp. 570, 573, 590, 615; *Hatch v. Donnell*, 74 Me. 164.

The evidence, as a whole, was insufficient to sustain a verdict for the plaintiff, and the court rightly directed a verdict for the defendants.

Meyer v. Houck, 85 Iowa, 319, 52 N. W. 235; *Beckman v. Consolidation Coal Co.* 90 Iowa, 252, 57 N. W. 889; *Lichtenberg v. Meriden*, 91 Iowa, 45, 58 N. W. 1053; *Seeds v. Grand Lodge A. O. U. W.* 93 Iowa, 175, 61 N. W. 411; *Walker v. Irwin*, 94 Iowa, 448, 62 N. W. 785; *Barnhart v. Chicago, M. & St. P. R. Co.* 97 Iowa, 654, 66 N. W. 902; *Nelling v. Chicago, St. P. & K. C. R. Co.* 98 Iowa, 554, 63 N. W. 568, 67 N. W. 404; *Hurd v. Neilson*, 100 Iowa, 555, 69 N. W. 867; *Cherry v. Des Moines Leader*, 114 Iowa, 298, 54 L. R. A. 855, 86 Am. St. Rep. 365, 86 N. W. 323.

The question is not what view the jury might adopt, however irrational or unreasonable; it is, whether the evidence, honestly, rationally, and reasonably considered, is sufficient to sustain the burden of proof.

Meyer v. Houck, 85 Iowa, 319, 52 N. W. 235.

No actual damages were shown. The court will not reverse in order to allow nominal damages.

Harwood v. Lee, 85 Iowa, 622, 52 N. W. 521.

Weaver, J., delivered the opinion of the court:

1. That the appellees did search the house and premises of the plaintiff for the discovery of alleged stolen property, and that such search was made without any warrant issued for that purpose, was not denied on the trial below, and is conceded in argu-

ment. The claim is made, however, that this act, otherwise unlawful, was done with the consent of the plaintiff, and it was upon the theory that this defense had been established without substantial dispute that the trial court directed a verdict against the appellant. We have therefore to consider whether the evidence made a case from which the jury might properly have found in appellant's favor. At the date of the transaction in question, the defendant Brenton was mayor of the city of Des Moines, Brackett was chief of police, and Crewse was captain of the night force of said city. Plaintiff was the head of a family, residing in Des Moines, near the boundary line between that city and the town of Valley Junction. The evidence, giving it the most favorable construction which it will reasonably bear in plaintiff's favor, as we are required to do for the purposes of this appeal, tends to show the following state of facts: On or about May 2, 1902, "a Mr. Brown" informed the mayor that a neighbor, from whom some chickens had been stolen, desired the officers to bring out certain bloodhounds kept in the city, and try to trace the thief. Responding to this call in person, the mayor on the same evening started for the scene of action, accompanied by quite a retinue of followers. Among the number were the chief of police, the captain of the night force, a city alderman, the city physician, the "man with the hounds," and various other gentlemen, presumably volunteers in the cause of retributive justice. The order and line of march are not made clear by the testimony, and we have not been favored with any maps or charts showing the disposition of the forces. It does appear that some time during the evening they rendezvoused at Valley Junction, from which base of operations the advance upon plaintiff's house was made about 10 or 11 o'clock P. M. The dogs were taken to the premises of the person who claimed to have lost the chickens, and there turned loose for a trial of their detective skill. Following their lead, as is claimed, the mayor's forces came to the home of the plaintiff, who, unsuspecting of this canine impeachment of his good name and fame, had retired with his family for the night. The mayor and captain of the night force advanced to the door, gave the alarm in due form, and demanded entrance. Soon the door opened "about 5 or 6 inches," it is said, revealing the plaintiff clad in a night robe, and armed with an iron poker. The captain, turning his head aside to avoid an anticipated blow from the poker, at the same time deftly inserted his foot between the door and the jamb, thereby retaining all the advantage thus far gained. The

mayor, noting the captain's peril, interposed to prevent any assault upon him by promptly warning the plaintiff: "None of that goes here. I am mayor of the city of Des Moines, and we are here on official business." Naturally this proclamation tended to chill the ardor of the defense, and the door was soon opened,—whether by the act of the plaintiff from within, or by pressure from the party without, is a matter of controversy. The defendants testify that, on being informed of the official character of the mayor's party and the object of their call, plaintiff allowed them to proceed and make the search; and, if this was not disputed, the ruling of the lower court could, perhaps, be sustained, although it is not free from doubt that a consent obtained in the manner, and under the circumstances portrayed by defendants themselves, would be, in any just sense of the word, a free and voluntary act. But the evidence as to the alleged consent is by no means all one way. Plaintiff and his two sons distinctly deny that consent was given to the entry into the house or to its search, and declare that the door was forced open against the resistance of the plaintiff, that the poker was forcibly wrested from plaintiff's hands, and that, when one of the sons attempted to hand the key of the chicken house to his father, one of the mayor's party unceremoniously took possession of it, and thereby gained entrance to the chicken house. In some material respects their story finds corroboration in the testimony of witnesses for the defense. There is testimony, also, that the search was conducted, by some of the party, at least, in a loud and boisterous manner, and with little regard for the sensibilities of the plaintiff and his family. One of the searchers candidly admits that he was a "little enthused," and did not pay much attention to the details; and it is said by one witness that another member of the party became somewhat confused as to the real object of the search, and demanded to know whether there was "any beer in the cellar." The discouraging answer that there "was no cellar" seems not to have been fully credited, for it is further testified that the knot holes in the floor were carefully probed with a pocket rule, to ascertain the amount of available space thereunder. Upon such a state of the record, we think it very clear that the jury should have been allowed to pass upon the issue of fact presented by the pleadings. If plaintiff's home was invaded in the manner claimed by him, he has suffered a wrong for which the law will afford him substantial remedy. On the other hand, if he freely and voluntarily surrendered his premises to the search, as claimed by the defendants, he has suffered no wrong;

but, the fact being in dispute, the court cannot rightfully intervene to direct a verdict for either party. The right of the citizen to occupy and enjoy his home, however mean or humble, free from arbitrary invasion and search, has for centuries been protected with the most solicitous care by every court in the English-speaking world, from Magna Charta down to the present, and is embodied in every bill of rights defining the limits of governmental power in our own Republic. The mere fact that a man is an officer, whether of high or low degree, gives him no more right than is possessed by the ordinary private citizen to break in upon the privacy of a home and subject its occupants to the indignity of a search for the evidences of crime, without a legal warrant procured for that purpose. No amount of incriminating evidence, whatever its source, will supply the place of such warrant. At the closed door of the home, be it palace or hovel, even bloodhounds must wait till the law, by authoritative process, bids it open. Even with a warrant, the law of this state forbids a search in the nighttime, save upon a showing therefor, and upon special authority expressed in the writ. Code, § 5555. A right thus carefully guarded by the statute as well as by the common law is not to be lightly disregarded.

2. Plaintiff assigns error upon the ruling of the trial court admitting testimony offered by defendants as to the conduct of the dogs in leading the searching party to his house. Its admission is sought to be justified by defendants as being a part of the *res gestæ*, and upon the question of malice. As a part of the circumstances leading immediately to the search, and thus, perhaps, tending to disclose something of the motive actuating the defendants, we are inclined to hold, though not without some hesitation, that it was allowable for the defendants to prove the facts as to the presence of the dogs, and the use made of them on the occasion under investigation. Beyond that, however, the defendants should not have been permitted to go. It must be borne in mind that this is not an action for malicious prosecution or malicious arrest, but for an alleged wrongful and unauthorized trespass upon plaintiff's home and property. In a case of the former kind, an honest belief in the guilt of the person prosecuted or arrested, and the facts and circumstances on which such belief is founded, are ordinarily proper matters of inquiry; and such circumstances, if amounting to probable cause for the proceeding complained of, will constitute a complete defense to a suit for damages. But in a case like the one at bar the doctrine or rule of probable cause has no application. To illustrate, in an action

for damages for malicious prosecution for theft the defendant may plead and prove that plaintiff was in fact guilty of the crime charged against him, and thus establish a perfect defense. But in an action for an unlawful search it is no defense whatever to say that plaintiff was a thief, or did in fact have the stolen property upon his premises. The fact may be admitted, but the right of action remains. There is but one possible phase of the case upon which the admission of any testimony of this kind can be upheld. If the jury should find for plaintiff,—that the wrongful search was made, and that in such act the defendants were moved or inspired by malice toward the plaintiff,—they could, in addition to actual damages, assess a greater or less sum against the defendants by way of punishment or as exemplary damages. In mitigation of such damages, only, evidence may be received of any fact which fairly and reasonably tends to show that the act was done in good faith and without malice. Motive and intent being of the essence of the inquiry where exemplary damages are sought, any evidence which fairly tends to their disclosure is admissible. *Redfield v. Redfield*, 75 Iowa, 435, 39 N. W. 688; *Wallace v. Finch*, 24 Mich. 255; *Camp v. Camp*, 59 Vt. 667, 10 Atl. 748; *Voltz v. Blackmar*, 64 N. Y. 440. It is necessary, however, for the court to carefully guard the application of this rule, to prevent its being made an open door for the introduction in evidence of much that is immaterial, irrelevant, and confusing; and the jury should be informed in cases of this nature that evidence of good motive or absence of malice goes only to the matter of assessing damages by way of punishment or example, and should be wholly disregarded in assessing actual or compensatory damages.

3. Much evidence was admitted over plaintiff's objection which was merely laudatory of the fame and royal lineage of the hounds employed in the raid upon the plaintiff's premises. For instance, the mayor, as a witness, was permitted to state what he had been informed as to the breeding and training of the animals, and what he had heard of their work, and that an old schoolmate of the witness had highly indorsed them in a letter. In view of the well-known ease with which letters of indorsement from good men are procured by all kinds of candidates for favor, it may, perhaps, be presumed that credentials of this sort could have no weight with the jury, and that plaintiff suffered no prejudice therefrom; but we think the matter so clearly incompetent and immaterial that the objection thereto should have been sustained. The witness Quint was also allowed to testify

that he represents a company which insures banks against burglary, and makes it a business to "punish and prosecute criminals," and that in such capacity he had looked up the history of the hounds, with a view of utilizing their services in the company's business. From this investigation he says he was "led to believe them finely bred, safe, and sure, trained for great capacity in following and tracking and using the scent, quite intelligent, and probably the best hounds in the West;" a statement which he emphasized by stories gleaned from hearsay,—how by the remarkable instinct of these dogs a robbery of a bank had been frustrated, and the murderer of a woman had been driven to suicide after a chase of 30 miles, the only clue given the dogs being a scent "from a pair of socks" of the fleeing malefactor. As a seal to this eulogium, the witness produced photographs of the hounds, which were admitted in evidence. The particular point in controversy which these portraits were intended to il-

luminare is not pointed out by counsel, and our unaided efforts in that direction have proved fruitless. All this testimony, both of the mayor and Quint, was objected to by the plaintiff, and should have been excluded. The matter being tried was the alleged trespass upon plaintiff's home, not plaintiff's guilt or innocence of chicken stealing, nor the pedigree, training, skill, or appearance of the bloodhounds,—a distinction which at times seems to have been overlooked in the presentation of the testimony.

4. Complaint is also made of the action of the trial court in allowing defendants to amend their answer upon the eve of trial: but to permit amendment is a rule applied by courts with great liberality, and we find nothing to indicate that the discretion thus universally exercised was abused in the present instance. Other questions raised are such as are not likely to arise upon a retrial, and we do not consider them.

For the reasons stated, *the judgment appealed from is reversed.*

KANSAS SUPREME COURT.

Eva J. LEICESTER, *Plff. in Err.*,
v.
Cornelia E. HOADLEY.

(66 Kan. 172.)

- *1. A judgment obtained by a wife against another woman for damages sustained by the wife by reason of the alienation of the affections of her husband is not released by the discharge of the judgment debtor under proceedings in bankruptcy, where such alienation has been accomplished by schemes and devices of the judgment debtor, and has resulted in the loss of support and impairment of health to the wife.
2. Injuries so inflicted are wilful and malicious, and are to the person and property of another, within the meaning of § 17 of the United States bankrupt law (30 Stat. at L. 550, chap. 541, U. S. Comp. Stat. 1901, p. 3428).

(January 10, 1903.)

ERROR to the District Court for Riley County to review a judgment in favor of plaintiff in an action brought to procure the cancellation and discharge from record of a judgment. *Reversed.*

The facts are stated in the opinion.

*Headnotes by CUNNINGHAM, J.

NOTE.—For effect of discharge in bankruptcy on judgment in action for criminal conversation, see, in this series, *Colwell v. Tinker*, 58 L. R. A. 765.
65 L. R. A.

Mr. John E. Hessin, for plaintiff in error:

Malice means a want of legal excuse.

Tcrwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 429; *Colwell v. Tinker*, 169 N. Y. 531, 58 L. R. A. 765, 98 Am. St. Rep. 587, 62 N. E. 668; *Re Freche*, 109 Fed. 620.

This is such a personal injury as is contemplated by the act.

Re Freche, 109 Fed. 620; *Colwell v. Tinker*, 169 N. Y. 531, 58 L. R. A. 765, 98 Am. St. Rep. 587, 62 N. E. 668; *McDonald v. Brown*, 23 R. I. 546, 58 L. R. A. 768, 91 Am. St. Rep. 659, 51 Atl. 213; *Re Maples*, 5 Am. Bankr. Rep. 426, 105 Fed. 919; *United States v. Reed*, 86 Fed. 308; *Exline v. Sargent*, 23 Ohio C. C. 180.

Mr. A. M. Harvey, with Mr. W. W. Harvey, for defendant in error:

The judgment was a provable debt in the bankruptcy case, under § 63 of the United States bankruptcy law of 1898.

All provable debts are released by a discharge in bankruptcy, except those specifically excepted in § 17 of the bankruptcy act.

In an action of this kind, where the defendant is not a parent of plaintiff's consort, neither malice nor wilful intent to injure is an essential ingredient of the cause of action.

15 Am. & Eng. Enc. Law, p. 863.

Plaintiff did not ask for exemplary or punitive damages, which are the only kind

she would have been entitled to receive because of malice and wilfulness.

State use of McClenden v. Jungling, 116 Mo. 162, 22 S. W. 688; 2 Sedgw. Damages, 8th ed. § 564; *Waldron v. Waldron*, 45 Fed. 315; *Yowell v. Vaughn*, 85 Mo. App. 206; *Lindblom v. Sonstetie*, 10 N. D. 140, 86 N. W. 357.

The word "fraud" as used in § 17, means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.

Collier, Bankruptcy, 3d ed. 199.

The term "fiduciary capacity" embraces only cases of technical trust, and not cases of implied trust.

Stickney v. Parmenter, 74 Vt. 58, 52 Atl. 73, and cases there cited; *Re Benedict*, 37 Misc. 230, 75 N. Y. Supp. 165.

There was no injury to person or property.

Finnegan v. Hall, 35 Misc. 773, 72 N. Y. Supp. 347; *Burnham v. Pidcock*, 33 Misc. 65, 66 N. Y. Supp. 806; Affirmed in 58 App. Div. 273, 68 N. Y. Supp. 1007; *Cooke v. Plaisted*, 181 Mass. 82, 62 N. E. 1054.

Cunningham, J., delivered the opinion of the court:

This action was brought by the defendant in error, Mrs. Hoadley, to procure the cancellation and discharge of the record of a judgment held against her by Mrs. Leicester. By her petition it appeared that this judgment was obtained November 11, 1899, and that by the consideration of the United States district court for the district of Kansas sitting in bankruptcy she was discharged from her debts on March 6, 1900, but, notwithstanding such discharge, Mrs. Leicester was still claiming the judgment rendered in her favor to be in full force and effect. The answer filed by Mrs. Leicester admitted she was claiming that the judgment was in full force, and was not discharged by the proceedings in bankruptcy, it being such a one as was not affected by such proceedings; that the judgment was rendered in an action for damages occasioned to her by the alienation of the affections of her husband by Mrs. Hoadley. The petition of Mrs. Leicester in the action in which the judgment was rendered alleged that Mrs. Hoadley had once been married, but was divorced; that by the use of secret influences, by repeated effort, by meetings at various places by day and night, by false statements wilfully and maliciously made against Mrs. Leicester, by numerous and varied marks of affection exhibited toward Mr. Leicester, notwithstanding the repeated remonstrances from the wife, the affections of her husband

had been alienated from her at a time in life when she most needed the same, she being forty-seven years of age, her home broken up, her health impaired, and her peace of mind destroyed. After trial in the original action, verdict was for the plaintiff, and judgment for \$5,000 entered thereon, a copy of the journal entry of the judgment being attached to Mrs. Leicester's answer. A demurrer filed by the plaintiff, Mrs. Hoadley, to this answer, was sustained, and Mrs. Leicester is here asking a reversal.

We are thus called upon to construe § 17 of the bankrupt law, 30 Stat. at L. 550, chap. 541 (U. S. Comp. Stat. 1901, p. 3428), which is as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another." The questions here presented are whether the injury for which Mrs. Leicester obtained her judgment against Mrs. Hoadley was: First, wilful and malicious; and, second, whether it was one to her person or property. What is a wilful and malicious act, as applied to a civil liability? There can be no necessity of remarking that all definitions of wilfulness and maliciousness in connection with criminal actions are utterly aside and apart from this discussion. A wilful act is one done on purpose, intentionally, not accidentally. *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695; *Re Maples*, 3 N. B. N. Rep. 539, 105 Fed. 919. That the acts ascribed to Mrs. Hoadley in the above statement fall within this definition will admit of no doubt. A malicious act, within any definition of the term, necessarily includes that of wilfulness, and, within the definition as applied to civil injuries, means nothing more than such acts as go to the destruction of another's legal rights without any just cause therefor, or, perhaps, rather in utter disregard of the legal rights of the injured one. A malicious act is "an unlawful act done intentionally, without just cause or excuse." 16 Am. & Eng. Enc. Law, 2d ed. p. 1112. This is the definition found in *Bromage v. Prosser*, 4 Barn. & C. 255, 6 Dowl. & R. 296, 1 Car. & P. 475, 3 L. J. K. B. 203, 28 Revised Rep. 241, and, as the authorities clearly show, has been followed in hundreds of cases since its announcement. It is not necessary that one should be incited by a malevolent or malicious motive, such as is required to give color to a criminal act, in order that his act may be malicious, as used in the bankruptcy law. Hatred, or revenge, or passion need not inspire him. It is sufficient if the act is done in disregard of another's legal rights,

and in a way which any reasonable person would know to be in contravention of those rights. It is a well-recognized subject in substantive law that one cannot interfere with the contract relations existing between others without being guilty of an actionable tort, and that such interference is termed malicious within the purview of the sense in which it is used in the bankruptcy law. Upon these general considerations many authorities might be cited. 16 Am. & Eng. Enc. Law, 2d ed. p. 1109. The enticement away of servants and the slander of title are well-known examples of such malicious interference noted, and, as above suggested, are wilful and unjustifiable interferences with the contract relations existing between parties. Corporations may be charged with malice in such matters, and surely no corrupt or criminal motive may be charged as a basis. The case of *Colwell v. Tinker*, 160 N. Y. 531, 58 L. R. A. 765, 98 Am. St. Rep. 587, 62 N. E. 668, was one much like the case at bar, where a discharge was sought from damages awarded for criminal conversation. While, of course, such an offense is more grievous than the one upon which Mrs. Leicester recovered her judgment in this case, still the underlying principle is the same. The court there held that an action for criminal conversation was one for a wrongful act done intentionally, and without just cause or excuse, and that the judgment recovered therefor was both a wilful and malicious injury to the person and property of another. In *Ezline v. Sargent*, 23 Ohio C. C. 180, it was held that a judgment for damages based upon the alienation of a wife's affections is within § 17 of the bankruptcy act, and could not be relieved against by the debtor availing himself of the benefits of the act. We think that the injury for which Mrs. Leicester recovered in this case was wilful and malicious, within the meaning of the terms as used in the quoted section.

2. Was it an injury to person or property? The matrimonial relation, so far as the wife is concerned, from a pecuniary view, is made valuable chiefly because of the provision it makes for her maintenance and the comfort and security afforded her by a home thereby secured; and all this is based largely, if not wholly, upon the love of her husband. The law will be found sadly deficient to compel if love shall no longer

65 L. R. A.

prompt. While the deprivation of the love of her husband might not fall within the terms of the bankruptcy law, surely the results of that deprivation do. The petition of Mrs. Leicester upon which her judgment was obtained averred that she was forty-seven years of age; that the greater portion of her life had been spent as the wife of Mr. Leicester; that she was at that period of life when she needed all of the love and care which a husband only could bestow; that the acts of Mrs. Hoadley had "wholly alienated the affections of her said husband from her, and had broken up her home, and deprived her of his comfort and love." She further alleges that, by reason of the wrongdoings of Mrs. Hoadley, "she suffered agony of mind for many months, has passed many sleepless nights, and is and has been sore distressed during the continuance of the said grievances, and she is now, by reason of the conduct of the said defendant, sick, her health impaired, and her home destroyed." Surely, all of this was an injury. It was an injury to the person as well as to the property. Authorities are not wanting to sustain the claim that even anguish of mind and mental suffering are such injuries to the person as would fall within the language of the act. *Re Freche*, 109 Fed. 620; *Dela-mater v. Russell*, 4 How. Pr. 234. The loss sustained by the wife was not alone the loss of the affections of her husband, but the loss of all those comforts and ministrations dependent upon those affections. Her health had become impaired, and her home destroyed. The allegations of the petition under which Mrs. Leicester recovered the judgment in question are clearly that she suffered both in person and property in the most ordinary and everyday acceptance of those terms. We are of the opinion that the facts set out in Mrs. Leicester's answer were sufficient to show that the judgment sought to be discharged was such a one as, under the provisions of § 17 of the bankrupt law, was not discharged by proceedings in bankruptcy, and hence that the trial court erred in sustaining plaintiff's demurrer thereto.

This ruling will be reversed, and the cause remanded for further proceedings.

All the Justices concur.

Petition for rehearing denied January 10, 1903.

OREGON SUPREME COURT.

W. O. DANIELSON *et al.*, *Appts.*,
v.

W. B. ROBERTS *et al.*, *Respts.*

(.....Or.....)

Trover will lie on behalf of one who, while in the employ of another, finds upon the latter's premises money evidently hidden and forgotten by an unknown owner, against his employer, in case the latter takes it out of his possession and refuses to restore it to him.

(January 11, 1904.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Jackson County in favor of defendants in an action brought to recover for the alleged conversion of certain money to the possession of which plaintiffs were entitled. *Reversed.*

The facts are stated in the opinion.

Messrs. W. Estill Phipps and John A. Jeffrey, for appellants:

"Treasure trove" is defined as found treasure (Bouvier, Law Dict. 1135), and is derived from the French word *trouver*, to find.

1 Bl. Com.

Under the law governing treasure trove, the discoverer of buried treasure is the owner thereof against all persons except the original owner,—especially where the subject is not regulated by statute.

2 Kent, Com. 14th ed. 350, 357-360; Beltinger & Cotton's Anno. Codes and Statutes (Or.) §§ 3887-3905; *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; Bouvier, Law Dict. 1135; *Warren v. Ulrich*, 130 Pa. 414, 18 Atl. 618; *Huthmacher v. Harris*, 38 Pa. 491, 80 Am. Dec. 502; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; 10 Am. & Eng. Enc. Law, 2d ed. p. 580; 26 Am. & Eng. Enc. Law, pp. 535, 536.

Such treasure is not "lost property," but is governed partially by the same rule, as the two subjects seem to be merged into each other in the United States.

26 Am. & Eng. Enc. Law, pp. 535, 536; *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100.

An employer can claim no title to property discovered, by virtue of the employment of the discoverer, where it was dug out by him (the employee), not in the course of his work, but independently of it. The place of the finding is immaterial.

NOTE.—As to rights and liabilities of finder of property, see also note to *State v. Hayes*, 37 L. R. A. 116.
65 L. R. A.

Burns v. Clark, 133 Cal. 634, 85 Am. St. Rep. 233, 66 Pac. 12; *Bowen v. Sullivan*, 62 Ind. 290, 30 Am. Rep. 172; *Ellery v. Cunningham*, 1 Met. 112; *Tatum v. Sharpless*, 6 Phila. 20; *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664.

Messrs. W. I. Vawter and J. R. Neil for respondents.

Bean, J., delivered the opinion of the court:

This is an action of trover to recover for the alleged conversion of money. The plaintiffs aver, in substance, that in March, 1894, while engaged, at the request of the defendants, in cleaning out and removing the loose dirt and *débris* from an old building situated on premises occupied by the defendants, they discovered a tin vessel, rusty and worn with age, which contained the sum of \$7,000 in gold coin of the United States; that the defendants wrongfully took and received the money from the plaintiffs, and have ever since wrongfully and unlawfully detained the same, to their damage in the sum of \$7,000; that the building in which the money was found had stood on the premises for more than forty years, and during that time had been in the possession and control of many owners and tenants; that the dirt and *débris* which the plaintiffs were engaged in cleaning out and removing at the time the money was discovered had been undisturbed for many years; that the vessel which contained the money was so worn and destroyed by time and the elements that it was difficult to ascertain from an inspection of it what kind of a vessel it had been, and plaintiffs could hardly hold it together until it and its contents were taken by the defendants; that the owner of the vessel and the money contained therein "has long since died, and the said vessel and the said sum of \$7,000 contained therein were prior to said time lost, and their whereabouts unknown to any person or persons whatever;" that plaintiffs are the discoverers of the money, and are now, and ever since the — day of March, 1894, have been, the owners thereof, and entitled to its immediate possession; that defendants wrongfully and unlawfully fail, neglect, and refuse to repay the same to the plaintiffs, etc. The answer denies all the material allegations of the complaint, except the discovery by the plaintiffs of the treasure, and that they were working for the defendants at the time, and alleges affirmatively that the money discovered did not exceed the sum of \$1,000, and was the property of one of the defendants, who had vol-

untarily deposited it in the place where discovered for safe-keeping, and at no time had abandoned or lost it. The reply denies the material allegations of the answer. Upon the issues joined the cause came on for trial before a jury. After the plaintiffs' testimony was all in, the defendants moved for and were allowed a nonsuit. The evidence in the bill of exceptions tends to show that in 1894 the plaintiffs, who were then aged about eight and ten years, respectively, were employed by the defendants to clean out an old henhouse situated on premises then occupied by defendants, but which had previously been owned and in the possession of numerous other persons; that while so engaged they dug up an old rust-eaten half-gallon tin can containing a number of musty and partially decayed tobacco socks filled with gold coin, which they delivered to the defendants. W. O. Danielson, the elder of the two boys, thus describes the finding of the money and its delivery to the defendants: "We hauled several loads from the front end of the building. I was in the back end of the building, spading through the trash, and the point of the shovel struck something hard. I shoveled the trash away, and got the can on my spade, and was going to throw it in the sled. It was too heavy, so I dragged it out toward me a foot or so, and told my brother the can must be full of rocks. So I tried to take the lid off with my fingers. It was rusty and old, and I could not get it off, so I took the pick and chopped through the lid, and when I pulled it out the lid came with it. . . . In doing so I cut two of the sacks—tobacco sacks—containing fives and twenties. So we looked through all the sacks, which were gold. . . . My brother says, 'Let's take it over home.' I says, 'No, . . . let's take it up and show Dee Roberts.' So we packed it up on the spade together. . . . We packed it up to the porch steps, and Dee came out and says, 'What you got, boys? We says, 'A can of gold.' 'Where did you get it?' 'Out in the henhouse.' So Mary Roberts, Dee's wife, and O'Neil came to the door, and said, 'Let's have it,' so we gave it to them. They walked inside and closed the door in our face, and we went back to work to finish up our job. About half an hour after, Dee called us out and says: 'Here's five cents, boys. We put the money there some time ago, and were going to buy something with it. Don't say anything about it, and the Lord will bless you.' We asked him how much was in the can. He said, 'Over \$7,000.'" The witness further testified that the can containing the money was old and rusty, and almost ready to fall to pieces; that it was buried in the earth under the *débris* and dirt in the

henhouse, 3 or 4 inches below the surface, and that the ground around it was quite solid, as if it had not been disturbed recently; that the building in which it was found was old, and looked as if it had not been cleaned out for some time, and the dirt and *débris* over the can did not appear to have been recently disturbed. The plaintiff C. P. Danielson testified to substantially the same state of facts.

The motion for nonsuit was sustained on the ground, as we understand it, that the evidence for the plaintiffs showed that the money in question had been intentionally deposited by someone where found, and therefore the plaintiffs could not invoke the rule that the finder of lost property is entitled to its possession against all the world except the true owner. Ever since the early case of *Armory v. Delamirie*, 1 Strange, 505, where it was held that the finder of a jewel might maintain trover for the conversion thereof by a wrongdoer, the right of the finder of lost property to retain it against all persons except the true owner has been recognized. In that case a chimney sweeper's boy found a jewel, and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and it was held that the boy might maintain trover on the ground that by the finding he had acquired such a property in the jewel as would entitle him to keep it against all persons but the rightful owner. This case has been uniformly followed in England and America, and the law upon this point is well settled. *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; 19 Am. & Eng. Enc. Law, 2d ed. p. 579. But it is argued that property is lost in the legal sense of that word only when the possession has been casually and involuntarily parted with, and not when the owner purposely and voluntarily places or deposits it in a certain place for safe-keeping, although he may thereafter forget it, and leave it where deposited, or may die without disclosing to anyone the place of deposit. This seems to have been the view taken by Mr. Justice Lord in *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100, where money was found hidden under the floor of a barn. It had evidently, as in this case, been deposited there by someone, and the question for decision was whether the defendant, who had treated the money as lost property, and disposed of it as provided in the statute, was guilty of a conversion, and liable to the true owner therefor. It is said in the opinion that, until the owner was discovered, the money was in the nature of treasure trove, and could not be treated as lost property, within the meaning of the statute. At common law a distinction was made between

lost property and treasure trove. Lost property was such as was found on the surface of the earth, and with which the owner had involuntarily parted. The presumption arising from the place of finding was that the owner had intended to abandon his property, and that it had gone back to the original stock, and therefore belonged to the finder or first taker until the owner appeared and showed that its losing was accidental, or without an intention to abandon the property. Treasure trove, on the other hand, was money or coin found hidden or secreted in the earth or other private place, the owner being unknown. It originally belonged to the finder if the owner was not discovered; but Blackstone says it was afterward adjudged expedient, for the purposes of state, and particularly for the coinage, that it should go to the King; and so the rule was promulgated that property found on the surface of the earth belonged to the finder until the owner appeared, but that found hidden in the earth belonged to the King. 1 Bl. Com. *295. In this country the law relating to treasure trove has generally been merged into the law of the finder of lost property, and it is said that the question as to whether the English law of treasure trove obtains in any state has never been decided in America. 2 Kent, Com. *357; 26 Am. & Eng. Enc. Law, p. 538. But at the present stage of the controversy it is immaterial whether the money discovered by plaintiffs was technically lost property or treasure trove, or, if treasure trove, whether it belongs to the state or to the finder, or should be disposed of as lost property if no owner is discovered. In either event the plaintiffs are entitled to the possession of the money as against the defendants, unless the latter can show a better title. The reason of the rule giving the finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface. It is thus stated in *Armory v. Delamirie*, 1 Smith Lead. Cas. pt. 1, *475: "Every one on whom the possession of chattels personal is cast

by the law, by the act of the parties, or through the force of circumstances is charged with the duty of taking reasonable care, and answerable if he does not to the owner, and may consequently recover for any wrongful act by which the property is impaired, in the capacity of trustee, if in no other character." The money for which this action is brought came lawfully into the possession of the plaintiffs. The circumstances under which it was discovered, the condition of the vessel in which it was contained, and the place of deposit, as shown by the plaintiffs' testimony, all tend with more or less force to indicate that it had been buried for some considerable time, and that the owner was probably dead or unknown. The plaintiffs, having thus come into its possession, were charged with the duty of holding it for the true owner, if he could be ascertained, and, if not, of making such disposition thereof as the law required. The possession of the money was cast upon them by the force of circumstances. They were consequently under the obligation of taking reasonable care of it until it could be returned to the true owner, or otherwise disposed of, and they may therefore maintain such actions or proceedings as may be necessary to enable them to retain or recover its possession. The fact that the money was found on the premises of the defendants, or that the plaintiffs were in their service at the time, can in no way affect the plaintiffs' right to possession, or their duty in reference to the lost treasure. *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664; *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172; *Tatum v. Sharpless*, 6 Phila. 18; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; *Bridges v. Hawksworth*, 21 L. J. Q. B. N. S. 75, 15 Jur. 1079. We are of the opinion, therefore, that the case should have gone to the jury, and, unless it should appear that the defendants are the owners of the money, they must return the possession thereof to the plaintiffs, in order that they may make lawful disposition thereof.

Judgment reversed, and new trial ordered.

NEW YORK COURT OF APPEALS.

John WANAMAKER, *Respt.*,
v.
Simon J. WEAVER, *Appt.*

(176 N. Y. 75.)

1. A man is not bound to pay for necessities furnished to his wife with whom he is living, upon any theory of implied agency on her part, where she was amply supplied with articles of the same character as those purchased, or was furnished with ready money with which to pay cash for them.
2. A merchant may continue to furnish necessities to a woman upon the credit of her husband, where she is known to him, and he has been in the habit of doing so, until he receives notice from the husband forbidding him to do so any longer.

(Parker, Ch. J., dissents.)

(October 6, 1903.)

NOTE.—*Liability of the husband for necessities furnished wife while living with him.*

- I. Scope, 529.
- II. Introductory, 529.
- III. Personal necessities.
 - a. Implied agency in law, 529.
 - b. Effect of notice to tradesmen, 532.
- IV. Family necessities, 532.
- V. Husband's liability affected by style of life he adopts.
 - a. In general, 534.
 - b. Effect of notice to tradesmen, 538.
 - c. Burden of proof, 538.
- VI. Presumptive agency arising from cohabitation.
 - a. In general, 539.
 - b. May be rebutted.
 1. In general, 539.
 2. By proof of ample provision otherwise made by husband.
 - (a) In general, 540.
 - (b) Allowance, 542.
 3. By proof of notice to tradesmen, 544.
 4. By proof of authority in wife privately withdrawn, 545.
 5. By proof of extravagance of the purchases, 547.
 6. Burden of proof, 548.
- VII. Authority implied from husband's assent to previous transactions, 548.
- VIII. Liability of husband, by reason of estoppel or ratification, for wife's purchases upon his credit of articles for personal use, 549.
- IX. When husband is an infant, 550.
- X. Money loaned wife to purchase necessities, 550.
- XI. In absence of certainty as to whom credit was given, 551.
- XII. Statutes, 551.

I. Scope.

In selecting the cases for this note, the following lines have been drawn: All decisions discussing the liability of the husband, not only

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of the Monroe County Court in his favor in an action brought to recover the purchase price of goods sold and delivered. *Reversed.*

The facts are stated in the opinion.

Messrs. John Van Voorhis & Sons, for appellant:

The common-law liability of the husband for necessities and suitable comforts has always rested on the assumption that the credit was given to the husband, and not to the wife, and the purchase was made with his implied consent.

There had to be an agency on the part of the wife. This could be the agency of necessity, as it is sometimes called, arising from the marital relation. When the husband has failed to supply the wife with nec-

by reason of his obligation, as such, to support and maintain his wife, but also on account of the presumptive agency arising from cohabitation, as well as on account of any acts or omissions constituting an assent, actual or constructive, on his part, have been taken, and constitute the subject-matter of this annotation.

Decisions as to the liability of the husband when the wife is such by repute only have been excluded, as have, also, those deciding merely whether the purchases made were "necessaries," without going into the question of the husband's liability for them except by implication.

II. Introductory.

The want of early English authorities upon this general question was accounted for in *Manby v. Scott*, 8ld. pt. 1, p. 109, 2 Smith, Lead. Cas. 450, as follows: "The reason of which, according to some, is the discretion of our ancestors, which was so great that they would not publish and bequeath such matters to posterity in order that bad wives and bad husbands might not know their power, which might render the one cruel and the other disobedient, and, so long as they were ignorant of it, they would not endeavor to enforce. But, according to others, the reason is,—that there was no such great cruelty in times past; nor did there ever occur in practice such a case as is now for judgment before us."

III. Personal necessities.

a. Implied agency in law.

The liability of a husband for actual, personal, necessities furnished his wife rests first of all upon contract,—his contract with her, entered into by the fact of marriage, to support and maintain her.

The true ground of her husband's liability for necessities for his wife is his duty arising from the marriage relation. *Black v. Bryan*, 18 Tex. 453; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77.

But, if he absolutely refuses or neglects to do his duty in this regard, the wife has no power,

essaries, she may purchase such articles, and charge them to the husband, who will be compelled to pay.

Cromwell v. Benjamin, 41 Barb. 558.

The husband may defend such action on the ground that he had supplied the wife with necessities, or had given her an allowance with which to provide herself.

Ibid.; *Renaux v. Teakle*, 20 Eng. L. & Eq. 345, 8 Exch. 680, 22 L. J. Exch. N. S. 241, 17 Jur. 351, 1 Week. Rep. 312.

The question whether the articles purchased were necessities is, except in a very clear case, where the court would be justified in directing authoritatively that the articles cannot be necessities, a question of fact for the jury.

Bergh v. Warner, 47 Minn. 250, 28 Am.

under the old common-law theory that the personal existence of the wife is merged in her husband, to compel him to comply with his contracts entered into with her; neither has she, aside from statutes, any power to make a contract for herself.

A *feme covert* is incapable of making a contract; and, even though it be for necessities of diet and apparel, that shall not charge her husband. *Bill v. Lake*, Hutton, 105.

Therefore, since she cannot compel her husband's compliance with his contract to maintain her, and cannot, aside from statutes, enter into a contract herself, it is apparent that she can obtain no credit with tradesmen, as there would exist no ground by which they could recover for the goods supplied her. She has, then, in the inherent nature of the situation, no resource except to obtain food and the other actual necessities of which she stands in need, from the public. But it is not good policy for the public to perform that which it is the duty of some individual to do, and, therefore, upon the theory that the good of the people is the supreme law, the rule has been established that the law will hold a husband liable for articles purchased by his wife and actually necessary to keep her "a going concern." *Green v. Coast Line R. Co.* 97 Ga. 15, 33 L. R. A. 806, 54 Am. St. Rep. 379, 24 S. E. 814.

The husband, however, as between himself and the tradesmen, cannot be held by reason of the contract of marriage between himself and wife; there must in some way exist an assent on his part to the express contract of sale entered into by the tradesmen and his wife upon his credit in order to bind him.

A man is bound by no contract of his wife, even for necessities, without his assent. *Montague v. Espinasse*, 1 Car. & P. 356.

A wife cannot charge her husband for victuals bought for the family without his consent precedent or assent subsequent. 21 Hen. VII. 40.

A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. *Seaton v. Benedict*, 5 Bing. 28, 2 Moore & P. 66, 6 L. J. C. P. 208.

The law, therefore, does, out of the considerations of public policy above shown, and out of regard to the fact that, in the absence of statute, a husband has by marriage all of the personal property of the wife, and the rents, issues, and profits of her real estate (*Christmas* 65 L. R. A.

St. Rep. 362, 50 N. W. 77; *Raynes v. Bennett*, 114 Mass. 424; *Compton v. Bates*, 10 Ill. App. 78; *Davis v. Caldwell*, 12 Cush. 512.

The tradesman sells at the peril of having the husband show, in defense, that his wife was already sufficiently supplied, or that she had a sufficient allowance from him to supply them for herself.

Compton v. Bates, 10 Ill. App. 78; 2 Lawson, Personal Relations, § 726; Schouler, Dom. Rel. § 61; *Renaux v. Teakle*, 20 Eng. L. & Eq. 345, 8 Exch. 680, 22 L. J. Exch. N. S. 241, 17 Jur. 351, 1 Week. Rep. 312; *Burghart v. Angerstein*, 6 Car. & P. 690, 1 Moody & R. 458; *Freestone v. Butcher*, 9 Car. & P. 643; *Reid v. Teakle*, 13 C. B. 627, 22 L. J. C. P. N. S. 161, 17 Jur. 841;

v. Smith, 10 Tex. 126), imply his assent on the theory that what is his moral duty to do, he will consent to have another do for him.

That the reason on which the legal implication of assent is founded is the moral obligation of the husband to furnish necessities for his wife, was intimated in *Cany v. Patton*, 2 Ashm. (Pa.) 140.

A husband may be liable for necessities when he does not furnish his wife with them on the ground of implied assent. *Montague v. Espinasse*, 1 Car. & P. 356.

That by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessities to the wife, under an implied agency in law, was declared in *Cromwell v. Benjamin*, 41 Barb. 558.

If a husband omits to furnish his wife with necessities he makes her impliedly his agent to purchase them. *Seaton v. Benedict*, 5 Bing. 28, 2 Moore & P. 66, 6 L. J. C. P. 208.

The wife is entitled at least to support from the husband regardless of his financial condition; by the marriage, the wife becomes an irrevocable agent to pledge her husband's credit for necessities for her support if he fails to supply them. *Sauter v. Scrutcheff*, 28 Mo. App. 150.

The law creates an agency as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessities which the husband himself has neglected or refused to provide. *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77.

It is not essential, in order to make a husband liable, that he should refuse to supply his wife with necessities; his neglect to do so will make him equally liable. *Arnold v. Allen*, 9 Daly, 198.

This, then, is the theory upon which the so-called "implied agency in law," "agency of necessity," or "special agency," is founded.

And those statements, mostly *arguendo* or *dicta*, which regard the liability of the husband as directly created by the marriage relation (*Sauter v. Scrutcheff*, 28 Mo. App. 150), are not theoretically correct. The contract entered into by the fact of the marriage relation is the ground of his liability, but the implied agency created by the law is the direct means by which he is bound.

The court, in *Johnson v. Bliscoe* (Mo. App.)

Bentley v. Griffin, 5 Taunt. 356; *Montague v. Benedict*, 3 Barn. & C. 631, 5 Dowl. & R. 532, 3 L. J. K. B. 94, 27 Revised Rep. 444, 2 Smith, Lead. Cas. 273; *Atkins v. Curwood*, 7 Car. & P. 756; *Lane v. Ironmonger*, 13 Mees. & W. 368, 14 L. J. Exch. N. S. 35; *Cornelia v. Ellis*, 11 Ill. 584; Story, Sales, § 57; *Cromwell v. Benjamin*, 41 Barb. 588; *Keller v. Phillips*, 39 N. Y. 351.

Plaintiff must show that the goods were suitable and necessary, and that Mrs. Weaver was not otherwise provided for, or that she was authorized by her husband to make the purchases in suit.

Schwartz v. Bisland, 4 Misc. 534, 24 N. Y. Supp. 700; *Arnold v. Allen*, 9 Daly, 198; *McQuhae v. Rey*, 3 Misc. 550, 52 N. Y.

79 S. W. 498, does not freely accept of the doctrine of "agency of necessity," saying that, if a husband refuses to provide for a wife, she may, nevertheless, supply herself with necessities at his expense; but that she cannot be said to do so as his agent or by his authority, except as a legal fiction, and that the "agency notion" is theoretically unsound because indispensable things may be furnished at the husband's cost notwithstanding a notice from him not to furnish her. The court, however, arrives at no definite conclusion, saying that whether a woman is treated, by legal fiction or by an inference from the facts, as an agent in the matter, or is regarded as exercising a prerogative attached by the law to the status of wife, is, for practical purposes, immaterial.

In the minority opinion in *Manby v. Scott*, Sid. pt. 1, p. 109, 2 Smith, Lead. Cas. 450, it seems to be the doctrine that the power to bind the husband for all things necessary for the support of the wife is given by marriage.

But "it is a mistaken notion that the married woman has from the marital relation the right to make contracts, even for necessities, which shall be binding on her husband," as it is said, *arguendo*, in *Cany v. Patton*, 2 Ashm. (Pa.) 140.

The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority, according to an *arguendo* statement in *Eastland v. Burchell*, L. R. 3 Q. B. Div. 432, 47 L. J. Q. B. N. S. 500, 38 L. T. N. S. 568, 27 Week. Rep. 290.

The power of the wife to bind her husband by her contracts is founded upon the sole ground of agency, she having, as wife, no original and inherent power to bind him by any contract made by her, as is said, *arguendo*, in *Sawyer v. Cutting*, 23 Vt. 486, and *Savage v. Davis*, 18 Wis. 608.

It is intimated in *Woodward v. Barnes*, 43 Vt. 330, that a tradesman has a right to deal with a wife as her husband's agent, *ex necessitate*, and to furnish her with such articles as in law are denominated necessities; that this right flows from the duty which the law casts upon the husband.

If the husband and wife are living together, and he omits to furnish her with necessities, and she has not the means of procuring them, he makes her his agent to procure them. *Smith v. Fletcher*, 1 Wilson Super. Ct. (Ind.) 34.

A wife, in purchasing necessities, such as food, drink, clothing, washing, physic, medical

S. R. 484, 23 N. Y. Supp. 16; *Bloomington v. Brinckerhoff*, 2 Misc. 49, 49 N. Y. S. R. 142, 20 N. Y. Supp. 858; *Cromwell v. Benjamin*, 41 Barb. 558; *Monroe County v. Budlong*, 51 Barb. 516; *Hatch v. Leonard*, 71 App. Div. 32, 75 N. Y. Supp. 726; *Schouler*, Dom. Rel. §§ 64, 65; Story, Sales, §§ 56, 57.

Messrs. Brown & Poole, for respondent:

Mrs. Weaver acted, apparently, within the scope of her authority, since the articles purchased were of an ordinary and simple kind, and the merchant had the right to rely upon this agency in law, to charge the husband for the goods sold, and was not compelled to ascertain whether defendant's family was abundantly supplied with similar goods.

attention, instruction, and a suitable place of residence, is, by operation of law, the agent of her husband. *Reed v. Crissey*, 63 Mo. App. 184.

A husband was held liable for professional services rendered his wife upon the principle that she has an implied agency to bind him for necessities where he fails to supply them, in *Langbein v. Schneider*, 27 Abb. N. C. 228, 16 N. Y. Supp. 943.

The wife's right is recognized in a number of cases without any discussion of the theory upon which it is based.

A wife may charge her husband for necessities, as apparel, diet, and lodging, in case he does not provide them for her. *Dent v. Scott*, Aleyn, 61.

If the husband will not supply the wife with necessities or the means therefor, she can then pledge his credit for necessities strictly, according to *arguendo* statements in *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578, and *Bonney v. Perham*, 102 Ill. App. 634.

When a wife is living with her husband, if he gives her nothing but the shelter of his house, she will have a right to provide food and apparel for herself at his expense and he will be bound to pay for them. *Debenham v. Mellon*, L. R. 5 Q. B. Div. 304, 49 L. J. Q. B. N. S. 497, *arguendo*.

A husband was admitted to be liable for necessities furnished his wife, in *Marshall v. Perkins*, 20 R. I. 34, 78 Am. St. Rep. 841, 37 Atl. 301.

If it appears that supplies are absolutely necessary on account of the husband's failure to provide them, his liability to those who trust his wife for them on his credit is recognized, in *Keller v. Phillips*, 39 N. Y. 351.

So, a husband was held liable for the employment of a physician for his sick wife on the ground that it was a necessary, in *Cothran v. Lee*, 24 Ala. 380.

That a person providing necessary medical attendance to the wife may recover therefor from the husband is inferentially decided in *Harris v. Lee*, 1 P. Wms. 482, Prec. in Ch. 502.

It is the husband's duty to furnish, so far as he can, the necessary physician's services for his wife. *Toledo v. Duffy*, 13 Ohio C. C. 482; *Nelson v. Spaulding*, 11 Ind. App. 453, 39 N. E. 168.

Although a wife agrees in writing not to incur any debt against her husband, this will not exempt him from being charged in equity for

Stewart, Husb. & W. § 94; 15 Am. & Eng. Enc. Law, p. 872; Schouler, Dom. Rel. § 61; 2 Bright, Husb. & W. 7, 8; Selwyn, N. P. 260; *Dennys v. Sargeant*, 6 Car. & P. 419; Note to 2 Kent, Com. 10th ed. 138, 139, 146; 1 Bl. Com. 442; *Waithman v. Wakefield*, 1 Campb. 120, 10 Revised Rep. 654; Reeve, Dom. Rel. p. 161; *Keller v. Phillips*, 39 N. Y. 354; *Zimmer v. Settle*, 124 N. Y. 45, 21 Am. St. Rep. 638, 26 N. E. 341.

The presumption of authority arises from cohabitation.

15 Am. & Eng. Enc. Law, 2d ed. p. 881; Schouler, Dom. Rel. § 63; *Manby v. Scott*, 1 Mod. 124; *Dier v. East*, 1 Vent. 42; *Waithman v. Wakefield*, 1 Campb. 120, 10 Revised Rep. 654; *Johnston v. Sumner*, 3

money loaned her wherewith she obtained special surgical attendance, of which she stood in extreme need, and which he refused to allow her. *Reed v. Crissey*, 63 Mo. App. 184.

An implied agency in law can never arise, *prima facie*, when a husband and wife are living together, because if, in point of fact, she is maintained, there can be no *prima facie* evidence that the husband is neglecting to discharge his proper duty, or that there is any necessity for the wife to run him into debt for the purpose of keeping herself alive, or supplying herself with necessary clothing, according to a statement of Lord Selborne upon the appeal of *Debenham v. Mellon* to the House of Lords. 1. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 43 L. T. N. S. 873, 29 Week. Rep. 141, 45 J. P. 252.

The *arguendo* statement in *Hatch v. Leonard*. 165 N. Y. 435, 59 N. E. 270, that it is the cohabitation of the parties upon which the law founds the duty of the husband, and, in case of his neglect to perform it, sustains the right of another to recover for supplying necessities to his wife, is an erroneous confusion of the implied agency in law, and the presumption of an agency in fact arising from cohabitation, afterwards discussed (VI.). As above shown, it is upon the marriage contract that the law founds the duty of the husband to provide the bare necessities to his wife. It is from the fact of cohabitation or living together that the law presumes an authority in the wife, *prima facie* only, to purchase all things necessary and suitable for the domestic establishment at the head of which she is placed by her husband.

b. Effect of notice to tradesmen.

It is obvious that if a wife is in actual need of articles which the husband neglects or refuses to provide, a notice by him forbidding a merchant to furnish such articles to her on his credit will afford him no protection, since he cannot, by so simple a means, escape his duty to her or to the public.

That a husband may be liable notwithstanding his dissent is previously made known to the merchant, if the latter shows that the articles furnished were absolutely necessary, is recognized in *Devendorf v. Emerson*, 66 Iowa, 698, 24 N. W. 515.

"Having failed to provide his wife with sufficient funds, a notice to tradesmen not to furnish does not relieve a husband from liability 65 L. R. A.

Hurlst. & N. 266, 27 L. J. Exch. N. S. 341, 4 Jur. N. S. 462, 6 Week. Rep. 574.

Haight, J., delivered the opinion of the court:

This action was brought to recover the purchase price of goods sold by the plaintiff to the defendant's wife, in the city of Philadelphia, without the defendant's knowledge or consent. The defendant and his wife resided in the city of Rochester, and at the time the goods were purchased lived together as husband and wife. It was claimed on behalf of the defendant that, while the goods might ordinarily be deemed necessities, they were not in fact such, for the reason that the defendant lived on a salary of \$2,000 per year, out of which he de-

for necessities furnished." *Gordon v. Caldwell*, 31 Pittsb. L. J. 154, as reported in 3 Brightly, Dig. (Pa.) 3945.

So, a husband is free from liability for goods furnished his wife on credit when he previously gave notice to the tradesman not to furnish goods to her, only when he himself supplies the necessities that his family should have; and if he fails to supply them, or does not furnish all that is necessary, he may be liable for articles purchased by her on credit on that account. *McGrath v. Donnelly*, 131 Pa. 549, 20 Atl. 382.

IV. Family necessities.

Except as appears in the cases below referred to in this subdivision, no distinction is made between the principle upon which a husband may be held for the personal necessities of his wife, and the principle upon which he may be held for the general family expenses; therefore, in the subdivisions hereafter no special division of the two classes of necessities will be made.

The husband may be held liable for family necessities ordered by the wife upon the theory above shown (III. a, *Implied agency in law*), if they were absolute necessities as to her; he may also be held upon the theory of presumed agency in fact arising from cohabitation afterwards discussed (V. VI.); but very often he may more properly be held upon another principle.

The husband has the right to regulate his style of living, and may, if he chooses, provide only the barest necessities for his wife; and it is only when he fails to do even this, and she is obliged to seek outside aid, that the law intervenes, and, upon the theory of the implied agency in law above shown, holds him liable for her necessities.

While the husband has a right to say when and how his house shall be supplied, nevertheless, he cannot repudiate his obligation altogether, as the court says *obiter* in *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834.

But, as for the husband himself, he may deprive himself, if he chooses, absolutely, and, in the absence of laws against self-destruction, he may not be brought to account for his conduct; therefore, he may not be charged, without his consent, for goods brought into his house, although absolute necessities as to him.

In the absence of some special reason for re-

livered to his wife \$1,500 in monthly instalments of \$125 with which to supply his table and purchase her necessary wearing apparel; and at the time she purchased the goods in Philadelphia she was amply supplied with articles of a similar character, and was not in need of the articles purchased. Upon the trial the defendant sought to show the character and the amount of clothing possessed by the defendant's wife at the time she made the purchase of the plaintiff in Philadelphia. This was objected to. The objection was overruled, and an exception was taken. The court, in discussing the question, stated the law to be as follows: "That if a married woman goes to a merchant, and within reasonable limitations buys articles suitable for the family

use and for her own wardrobe, the presumption is, in the absence of evidence to the contrary, that the husband is liable. But if it appears affirmatively that the lady was abundantly supplied with similar articles, purchased elsewhere, and that there was not, in fact, any reasonable necessity for such expenditure, the husband cannot be held responsible, unless there is some affirmative proof of actual authority outside of the authority the law infers from their marital relations." This view was substantially repeated by the trial judge in his charge to the jury, and an exception was taken thereto. The trial court also submitted to the jury the question as to whether the plaintiff gave credit to the defendant or

garding the wife as the husband's agent for the purchase of general household supplies, it lies in him to give her authority to pledge his credit if he desires she shall have it, according to *Bramwell, L. J., in Debenham v. Mellon, L. R. 5 Q. B. Div. 394, 49 L. J. Q. B. N. S. 497.*

As afterwards appears (V. VI.), however, by the style of life he maintains, and by the fact of cohabitation, a *prima facie* presumption arises, until the contrary appears, that his wife has authority from him to purchase general supplies suitable and necessary to the style of life he maintains; but this vesting of authority is purely a question of fact, rebuttable by evidence of facts irreconcilable with it. If, however, after the goods are brought into the house, the husband jointly uses them with the knowledge that they were purchased upon his credit, then he is liable for them upon the principle of estoppel or ratification.

A man is bound by such contracts of his wife as he has the advantage of, as is said, *arguendo*, in 20 Hen. VI. 21b; 27 Hen. VIII. 25a.

And if the wife buys any goods for him or the family, and the husband does any act to show his assent, he shall be liable upon an assumption in fact. *Manby v. Scott, Sid. pt. 1, p. 109, 2 Smith, Lead. Cas. 450.*

If goods purchased by his wife on his credit come to the use of the husband with his knowledge, he is chargeable. *Mackinley v. McGregor, 3 Whart. 369, 31 Am. Dec. 522, arguendo.*

Necessary articles of food, purchased on credit and consumed at a husband's table, will be charged to him when he knew they were being purchased upon his credit. *Ryan v. Nolan, Ir. Rep. 3 C. L. 319.*

If a husband allows family supplies, purchased upon his credit, to be brought into his house and used in his family, knowing that they were purchased upon his credit, he thereby becomes chargeable for them. *Woodward v. Barnes, 43 Vt. 330.*

If the wife contracts for goods that go to the use of the husband the law presumes her to be his agent. *Williams v. Coward, 1 Grant, Cas. 21.*

Family supplies sold and delivered to a wife will be presumed to have gone to the use of the husband. *Berreblocq v. Michel, Cro. Jac. 257.*

But if necessities are furnished a wife for the marriage, the husband is not liable, although he uses them, according to *Turner v. Trisby, 1 Strange, 168.*

65 L. R. A.

A husband was held liable for the price of coal ordered by his wife and charged to him. in *Robertson v. Caskey, 45 N. Y. S. R. 623, 19 N. Y. Supp. 138, without its appearing on what ground.*

Even money, borrowed by the wife, which comes to the husband's use in a convenient and necessary way, may be recovered of him. *Jenkins, 4.*

The husband, though an infant, will be presumed to have assented to the purchase of necessities from the fact of the goods being consumed in his family. *Dunbar v. Meyer, 43 Miss. 679.*

That the authority of the husband may be implied for the purchase of necessary provisions for the family, without further proof than that they are bought for the family, was admitted in *Bennett v. Chamberlain, 5 Harr. (Del.) 391.*

Goods purchased by the wife upon credit for family use are the goods of the husband, and he is liable to pay for them. *Smith v. Allen, 1 Lans. 101.*

Groceries furnished by the tradesman in the belief that the wife was carrying on a boarding house are chargeable against the husband when it appears that this was not true, and that the husband was in reality the principal. *Mott v. Grunhut, 8 Daly, 544.*

A presumed agency of the wife to buy goods upon her husband's credit exists where the evidence shows that the goods purchased were used in the husband's house for more than a year, and that, after he knew that they had been bought by his wife on his credit, he failed to return them. *Walling v. Hannig, 73 Tex. 580, 11 S. W. 547.*

Where the wife purchases furniture, and she and her husband jointly use it, he is charged with her contract of purchase as if it were his own act, if he does not promptly repudiate her purchase and restore the goods. *Hamilton v. Peck (Tex. Civ. App.) 38 S. W. 403.*

The husband is liable if he has so conducted himself as to make it inequitable or to estop him from denying his wife's authority, according to *Thesiger, L. J., in Debenham v. Mellon, L. R. 5 Q. B. Div. 394, 49 L. J. Q. B. N. S. 497.*

If he is afterwards informed of the contract of purchase made by his wife, and acquiesces in it by using the goods and treating them as his own, he cannot avoid the legal responsibility which the law throws upon him, as it is said,

to his wife. The verdict was in favor of the defendant.

The only question which we deem it necessary to consider is that raised by the exception to the charge as made submitting to the jury the question as to whether the defendant's wife was abundantly supplied with similar articles to those purchased at the time of the purchase, and therefore the articles were not necessary for her support and maintenance. The majority of the judges of the appellate division appear to have entertained the view that, if the articles purchased by the wife were of the character ordinarily deemed necessities, such as clothing, table linen, towels, and napkins, the merchant was at liberty to furnish her therewith, and charge her husband therefor,

obiter, in *Mackinley v. McGregor*, 3 Whart. 369, 31 Am. Dec. 522.

In *Ruddock v. Marsh*, 38 Eng. L. & Eq. 515, 1 Hurlst. & N. 601, 5 Week. Rep. 359, the goods purchased by the wife were ordinary provisions consumed in the family and by the husband when he was at home, and he was held liable for them, notwithstanding he had provided his wife with an allowance for that purpose, when it appeared that he had not given notice of the allowance to the tradesman.

Even though a husband had previously notified a tradesman not to furnish any goods to his wife on his credit, according to *Adams, J.*, in his dissenting opinion in *Devendorf v. Emerson*, 66 Iowa, 698, 24 N. W. 515, where family supplies are retained and consumed in the husband's family, he ought to pay for them because he has had the advantage of them.

The foundation of the husband's liability in all cases is that he has received the benefit of the property of another for the use of his family. *Sulter v. Mustin*, 50 Ga. 242.

But, in *Segelbaum v. Ensminger*, 117 Pa. 248, 2 Am. St. Rep. 682, 10 Atl. 759, it was held that, even though a husband allows household goods, not actual necessities, purchased upon his credit, to remain in the house, and does not notify the tradesman to remove them, or do so himself, he will not be liable for them when he had, prior to their purchase, expressly notified the tradesman not to sell them to his wife, and had explicitly refused to pay for them in case the tradesman did so.

Knowledge, upon the husband's part, that the goods used by him were purchased upon his credit, is an essential element in order to hold him on the ground of estoppel or ratification, after an express prohibition from him to the tradesman further to furnish goods in that manner. *Woodward v. Barnes*, 43 Vt. 330.

If a wife buy goods, such as bread, etc., for the household, and the husband does not know it, he will not be charged therewith, although it is expended in the household, according to an *arguendo* statement in 21 Hen. VII. 40b.

The fact that goods were consumed in the husband's household is not conclusive evidence to hold him liable for them. *Manby v. Scott*, Sld. pt. 1, p. 109, 2 Smith. Lead. Cas. 450.

Even knowledge of the wife's purchase and joint use thereof may be rebutted by proof that the credit was given to the wife, and not to the husband. *Connerat v. Goldsmith*, 6 Ga. 14. 65 L. R. A.

without regard to the amount purchased or the necessity therefor. In commenting upon the charge of the trial court, they say in their opinion: "We have, therefore, this principle enunciated: That if a wife, living with her husband, seeks to purchase goods of a merchant, the latter must make an inquisitorial examination, and ascertain whether the family possess an adequate supply of the articles which the wife desires to purchase." [73 App. Div. 60, 76 N. Y. Supp. 390.] It will readily be observed that while the amount involved in this case is trivial, the principle is of considerable importance. While the question seems to have been considered in the lower courts, it does not appear to have been squarely decided in this court. In the case of *Keller v.*

V. Husband's liability affected by style of life he adopts.

a. In general.

A husband, upon the principle that he is the head of the house, has the undoubted right to regulate his household according to his own wishes, except that he may not so deny his wife the barest necessities as to make her a public charge.

In *Renaux v. Teakle*, 20 Eng. L. & Eq. 345, 8 Exch. 680, 22 L. J. Exch. N. S. 241, 17 Jur. 351, 1 Week. Rep. 312, occurs the following apropos discussion: *Pollock, C. B.*: "Suppose a man, from ascetic principles, insists on his wife wearing sober garments. She, living with him, orders better from her neighbors, and he immediately gives them notice, 'My wife shall only wear serge.' Have they a right, against his authority, to say, 'We think, from your condition in life, she ought to have better'?" *Martin, B.*: "I go farther. If a man says to his wife, 'You shall wear only a certain dress,' she has no right to order a better."

Nevertheless by adopting any particular degree or style of life he thereby lays himself open to liability for articles purchased by his wife on credit, suitable and necessary to that mode or style of life.

The husband, who may control the style of living, may, by the mode of life he adopts, confer upon the wife a power to pledge his credit for more than the mere necessities of life, as remarked in *Sauter v. Scruttsfield*, 28 Mo. App. 150; by a change in his style or mode of life he may enlarge or restrict the authority.

The husband is bound to provide his wife with whatever is necessary for her suitable clothing and maintenance according to his station and condition in life. *Keller v. Phillips*, 39 N. Y. 351.

That a tradesman may recover against a husband for goods furnished his wife suitable to her condition and necessary to her maintenance when she was not otherwise provided for, was conceded in *Schwartz v. Bisland*, 4 Misc. 534, 24 N. Y. Supp. 700.

A husband was held liable for merchandise which the wife bought and made into clothes for herself, and wore, although he knew nothing about it, in *Brownlow*, pt. 1, p. 47.

If a husband refuses or neglects to supply his wife with what is necessary for decency and comfort in his condition in life, he gives her

Phillips, 39 N. Y. 351, the husband had given the merchant notice not to give the wife further credit, and in the case of *Hatch v. Leonard*, 165 N. Y. 435, 59 N. E. 270, the husband and wife lived separate and apart; so that neither of these cases afford us much help in determining the question presented in this case. In the case of *Cromwell v. Benjamin*, 41 Barb. 558, the general term sustained the right of a merchant to recover of the defendant for the necessities furnished to his wife. J. C. Smith, J., in delivering the opinion, states the law as he understood it, as follows: "But the husband may be liable for necessities furnished to the wife in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evi-

dence; and this upon the ground of an agency implied in law, though there can be none presumed in fact. It is a settled principle in the law of husband and wife that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessities to the wife so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her with necessities himself or by his agents, or giving her an adequate allowance in money; and then he is not liable to a tradesman who, without his authority, furnishes her with necessities." In *Bloomington v. Brinckerhoff*, 2 Misc. 49, 20 N. Y.

credit to procure it for herself at his expense. *Eames v. Sweetser*, 101 Mass. 78.

The husband's duty to maintain his wife and family requires him, under ordinary circumstances, where his wife is living with him, and obtains upon his credit supplies needed in the conduct of their common domestic establishment, to become chargeable therefore, as stated, *arguendo*, in *Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028.

The duty of furnishing the wife with all articles necessary and suitable to his degree and condition in life falls upon the husband, and, if he disregards this duty, the wife may procure them of whom she pleases, and the husband will be liable. *Rea v. Durkee*, 25 Ill. 503, *arguendo*.

If a husband does not furnish his family with all those necessities according to his circumstances, his wife may supply the deficiency by the purchase of the necessary articles upon his credit. *McGrath v. Donnelly*, 131 Pa. 549, 20 Atl. 382.

A bill for groceries and sundries suitable to the condition and degree of the family will, when the husband makes no other provision, be charged against him. *Sterling v. Potts*, 5 N. J. L. 773.

Where the husband makes no provision at all for his wife he is liable for necessities suitable to his state and circumstances. *Atkins v. Curwood*, 7 Car. & P. 750.

It is in regard to the husband's liability for articles furnished his wife, suitable and necessary on account of his circumstances and the style of life he maintains, that the implied agency in law, and the presumption of an agency in fact (*infra*, VI.), come together, and blend in such a manner as to cause considerable confusion among the authorities, and to render it very difficult to keep the line of distinction between them. By some courts the theory of an implied agency in law is extended so as to bind the husband for this class of articles.

Thus, the doctrine that when a man places a wife at the head of his household, he thereby confers upon her the authority, upon his responsibility, to do those things necessary and proper for the well-ordered regulation and management of the domestic affairs of the family, is declared to be an evolution of the elementary principle that a husband is liable for the absolute necessities of his wife. *Phillips v. Sanchez*, 35 Fla. 187, 17 So. 363.
45 L. R. A.

And, that the term "necessaries" in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband, is the doctrine of *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77, and is recognized as the general rule in *Raynes v. Bennett*, 114 Mass. 424.

The ground of the husband's liability in the case of articles purchased by the wife suitable and necessary to her condition in life is his duty to make suitable provision for her; and, if he neglects to do so, she has the right to procure, upon his credit, such necessities as it is his duty to supply her. *Raynes v. Bennett*, 114 Mass. 424.

According to the appellate division opinion in *WANAMAKER V. WEAVER*, 73 App. Div. 60, 76 N. Y. Supp. 390, a husband, by the fact of his marriage, makes his wife his agent for whatever necessities she may purchase within the compass of her station in life.

So, the law requires the husband to provide his wife and family with that which is necessary for their suitable maintenance according to their station in life. *Hibler v. Thomas*, 99 Ill. App. 355, *arguendo*.

And a husband was held liable for the price of underwear, hosiery, handkerchiefs, gloves, and other articles of woman's use, purchased by his wife while living with him, when the evidence showed that the articles bought were suitable to the station in life of her husband and herself, and that she was destitute of such articles or the money with which to purchase them. *Wilcoxon v. Read*, 95 Ill. App. 33.

So, a husband was held liable for a calico dress purchased by his wife upon his credit, upon the ground that it was a necessary suitable to his degree and station in life, and that, it being his duty to provide for her suitable and necessary wants so long as they live together, his assent would therefore be implied. *Hughes v. Chadwick*, 6 Ala. 651.

The wife has implied authority to pledge her husband's credit for such things as are suitable to the style in which her husband chooses to live. *Vusler v. Cox*, 53 N. J. L. 518, 22 Atl. 347, *arguendo*.

A wife living with her husband has implied authority to order things which are necessary for the style in which he pleases her to live so

Supp. 858, it was held that, in order to entitle the tradesman to recover from the husband, it was incumbent upon him to show that "the articles supplied to the wife were not only of the kind usually denominated necessities, because their need is common to all persons, but that, in consequence of the inadequacy of the husband's provision, they were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse, and her station in the community."

There are numerous other cases reported in this and other states bearing upon the liability of the husband for necessities, but attention has been called to those most nearly in point upon the question involved in this case. There are, however, some cases

far as they fall within the domestic department, which is ordinarily intrusted to the wife. *Phillipson v. Hayter*, 40 L. J. C. P. N. S. 14, L. R. 6 C. P. 38, 23 L. T. N. S. 556, 19 Week. Rep. 130.

One doctrine advanced is that, for articles necessary to the well-ordered regulation and management of the domestic affairs of the family, there is an implied agency in law in the wife to purchase, but that, when the question arises whether a particular contract is within the scope of the wife's authority, the question becomes a mixed one of law and fact. *Phillips v. Sanchez*, 35 Fla. 187, 17 So. 363.

And, where a husband neglects or refuses to furnish his wife with what is necessary and suitable for her decency and comfort in his condition in life, the law allows her to pledge his credit for such necessities regardless of his non-consent thereto; but this presumed agency in law may be destroyed by showing that the husband has fulfilled his marital obligation by furnishing his wife with such necessities as are suitable to his and their situation in life and such as his estate would permit; and, when this appears, no liability attaches to the husband arising out of the necessities of the case, and the tradesman is remitted to his proofs of an authority in fact. *Compton v. Bates*, 10 Ill. App. 78.

But this doctrine of the implied agency in law of the wife to bind the husband for articles necessary according to his condition and style of life, as well as that of all cases charging him for such articles on the ground of duty, is open to criticism for the reason that it is not consistent with the theory upon which the implied agency in law is founded, *i. e.*, its necessity in order to protect the public from bearing the burdens which properly fall upon individuals.

The truer doctrine would seem to be that for the barest necessities of his wife a husband is liable under an irrevocable implied agency in law (it is only in cases of necessity that the law constitutes a wife her husband's agent with authority to pledge his credit, as remarked in *Dolan v. Brooks*, 168 Mass. 350, 47 N. E. 408); that, for all other articles purchased by her on his credit, his liability is a question of fact (if a husband provides for his wife he is not bound by her contracts unless there is evidence to prove his assent. *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578; *Bonney v. Perham*, 102 Ill. App. 634; *Jones v. Gutman*, 88 Md. 355, 41 65 L. R. A.

in England where the question appears to have been more thoroughly considered in the higher courts. In the case of *Debenham v. Mellon*, L. R. 5 Q. B. Div. 394, 49 L. J. Q. B. N. S. 497, *Bramwell, L. J.*, in stating the question involved, says: "The goods were necessities in the sense that they consisted of articles of dress suitable to the wife's station in life; but they were not necessities in the sense that she stood in need of them, for she had either a sufficient supply of articles of a similar kind, or at least sufficient means from her husband or otherwise to acquire them without running him into debt for them." He then proceeds to state the cases in which the husband would be liable; as, for instance, where he turns his wife out of doors, or conducts himself

Atli. 792. In *Poines's Case*, 2 Dyer, 234b, the wife purchased velvet and silk on her husband's credit, and had it made into clothes for herself without his "assent, command, or will." The husband paid the tailor for those clothes as well as others made for himself, but refused to pay the merchant, and was sustained in his refusal by the jury, who affirmed that they would also have given a verdict against the tailor; that the adoption by the husband of any particular style of life, and the placing of a wife at the head of his establishment, are, in accordance with the principles of the presumptive agency in law arising from cohabitation afterwards discussed (VI.), in the nature of a holding out of her by him as his agent to purchase articles on his credit, suitable and necessary to that condition and estate, but that this presumptive agency is purely a question of fact, rebuttable by evidence of withdrawal of authority and ample provision otherwise made.

Some of the reasons given by the majority opinion in *Manby v. Scott*, Sid. pt. 1, p. 109, 2 Smith, Lead. Cas. 450, in support of the proposition that marriage does not give the wife any uncontrollable power to charge the husband, are that the husband would be accounted a common enemy, and the mercer and the gallant would unite with the wife, and they would all combine against the husband; also, wives would be their own carvers, and, like hawks, fly abroad and find their own prey; also it would be left to a jury to determine in what apparel a wife should dress; also, wives who thought they had insufficient would have it tried by a mercer whether their dress was not too mean, and thus the mercer would be judge whether he would sell his own goods or not; also to charge a husband on the contract of his wife without his actual assent would tend to subvert the law of God and of nature, which gives the husband power and government over his wife.

The question to submit to the jury is not whether the goods supplied were necessities for a person in the station of life of the party, but whether, under all the circumstances, there was any authority in the wife, express or implied, to contract for them as her husband's agent. *Reid v. Teakle*, 13 C. B. 627, 22 L. J. C. P. N. S. 161, 17 Jur. 841.

In order that a tradesman may deal with a woman as the agent, *ex necessitate*, of her husband, it is declared in *Woodward v. Barnes*, 43

in such manner as to oblige her to leave him, she may provide herself at his expense, and pledge his credit for necessities, such as food, apparel, lodging, and medicine. In case they are living and cohabiting together, and there has been a custom of contracting short credit as to a class of articles, such as grocery and meat bills, her authority to order the same may be inferred, not for the reason that it springs out of the contract of marriage, but because of her existing relation as the head of his household; that the same authority would be inferred in favor of a sister, or a housekeeper, or other person who presided over the management of his house. The judge concluded by holding that the husband was not liable. The same case was subsequently brought up for re-

view in the House of Lords. *L. R. 6 App. Cas. 24*, 60 *L. J. Q. B. N. S. 155*, 43 *L. T. N. S. 673*, 29 *Week. Rep. 141*, 45 *J. P. 252*. Lord Chancellor Selborne then considered two questions. The first was whether the mere fact of marriage implies a mandate by law, making the wife the agent in law of her husband, to bind him by her contract, and to pledge his credit. Upon this point he says that, "according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity, a necessity which may arise when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her,—but not when the husband and wife are living together,

Vt. 380, that something more must be shown than that the articles are, at the time of the purchase, needed for the reasonable clothing, sustenance, and comfort of the wife and family according to the husband's condition and position in life.

When the articles purchased by a wife on her husband's credit are not necessities in the strict sense of the word, but are such articles as are needed to equalize her in comfort with other women of her condition, the sounder doctrine is stated to be that the husband's responsibility stands on the wife's agency, and that the necessity of the articles bought, the means of the parties, their condition in life, and the previous conduct of the husband with reference to the wife's purchases, all enter into the inquiry as circumstances bearing on the measure of authority she has received, or appears to have received, from him. *Johnson v. Briscoe* (Mo. App.) 79 S. W. 498.

The wife's authority to purchase what is necessary for her comfort in her husband's position in life is an authority in fact rebuttable by proof of provision otherwise made. *Compton v. Bates*, 10 Ill. App. 78.

And the husband was held liable for provisions suitable to his estate, in *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 534, when he had not otherwise provided them, on the ground of an agency in fact.

Although clothing purchased by a wife on her husband's credit was suitable according to the wife's station in life, the husband will not be liable therefor if it does not appear that he refused or neglected to otherwise provide his wife with suitable clothing. *Dolan v. Brooks*, 168 Mass. 350, 47 N. E. 408.

Although a wife contracts for necessities suitable to her husband's degree and estate, he may not be charged therefor when he had otherwise amply provided for his family, and she purchased the goods contrary to his order to her. *Jolly v. Rees*, 15 C. B. N. S. 628, 33 L. J. C. P. N. S. 177, 10 Jur. N. S. 319, 10 L. T. N. S. 298, 12 *Week. Rep. 473*.

It is a question of fact whether the husband does or does not provide suitably for his wife's support. *Cromwell v. Benjamin*, 41 Barb. 558.

A husband living with his wife is bound to provide her with necessities suitable to her situation and his condition in life, and, if the articles are necessities, the jury have a right to infer authority from the husband from the mere

fact of cohabitation. *Furlong v. Hysom*, 35 Me. 332.

The jury were held justified in finding that the wife was her husband's agent to make certain purchases when it appeared that he was a man of considerable means, and that the goods were necessary and suitable to the wife's position in life, in *Gotts v. Clark*, 78 Ill. 229.

The appearance which the husband's style of life presents to the world is regarded in *Morgan v. Chetwynd*, 4 Fost. & F. 451, as a material consideration for the jury in determining whether articles purchased by the wife on the husband's credit are reasonably necessary in regard to her position in life; for, as the court says, "the tradesman who supplies goods to the wife's orders can only judge by appearances, and has no means of ascertaining the actual means of her husband. And if he lives at a certain rate, and the question arises between himself and a tradesman as to whether certain articles supplied to his wife were suitable to his estate and degree, the jury may reasonably have regard to the income he appeared to the world to possess, and which he held himself out as possessing."

In the same case, in determining whether there was an implied authority in fact from the husband allowing the wife to pledge his credit, it was deemed a proper consideration for the jury whether the husband had not acquiesced in his wife's going hunting and to balls, and frequenting high society, when he knew that her personal means were not sufficient to meet her expenses thereby incurred.

The fact that a husband wears diamonds and keeps a fast horse is competent testimony in determining whether articles purchased by his wife on his credit should be considered as necessities suitable to his style of life. *Raynes v. Bennett*, 114 Mass. 424.

But the mere fact that a wife lives with her husband and rides in an expensive carriage will not be considered to his prejudice, when it appears that the carriage belongs to a friend of the wife. *Bentley v. Griffin*, 5 Taunt. 356.

It is the estate and degree of the husband, not the wife's position in life, which is the material consideration in determining whether articles are necessities or not. *Manby v. Scott*, Sid. pt. 1, p. 109, 2 Smith, Lead. Cas. 450; *Compton v. Bates*, 10 Ill. App. 78.

It is a question for the jury whether the goods are necessities on account of the condition

and when the wife is properly maintained, because there is, in that state of circumstances, no prima facie evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt for the purpose of keeping herself alive or supplying herself with lodging or clothing." The second question considered by the lord chancellor was whether the law implied such a mandate from the fact of cohabitation. Upon this point he says: "If, therefore, the law did imply any such mandate from cohabitation, it must be as an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities which show that the ordinary state of cohabitation between husband and wife does carry with it

some presumption—some prima facie evidence—of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do, . . . because in that state of circumstances the husband may truly be said to do acts, or habitually to consent to acts, which hold the wife out as his agent for certain purposes. . . . But where there has been nothing done—nothing consented to by the husband—to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact, he has given the wife authority, must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had

of life of the parties (*Sauter v. Scrutchfield*, 28 Mo. App. 150; *Raynes v. Bennett*, 114 Mass. 424); and whether household goods purchased were necessaries (*Walling v. Hannig*, 73 Tex. 580, 11 S. W. 547; *Compton v. Bates*, 10 Ill. App. 78); and whether the necessary supplies were furnished by a husband to his family (*McGrath v. Donnelly*, 131 Pa. 549, 20 Atl. 382); and both questions are recognized as for the jury, in *Arnold v. Allen*, 9 Daly, 198; *Wiler v. Fiegl*, 10 W. N. C. 240, and *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77.

b. Effect of notice to tradesmen.

An express prohibition by the husband to the tradesman from furnishing articles to his wife upon his credit will, of course, relieve him from liability for articles subsequently so sold her, provided he otherwise suitably supplies her, even though the things furnished are suitable to his circumstances and mode of life; for an express notice will rebut the presumption of a holding out of the wife by the husband to purchase articles suitable and necessary to the grade of the establishment at the head of which he places her.

When a husband has expressly forbidden a tradesman to furnish goods to his wife on his credit he is not liable for goods subsequently so furnished, unless he has not suitably provided for his family according to his and their condition. *Keller v. Phillips*, 39 N. Y. 351; *Black v. Bryan*, 18 Tex. 453.

A husband was held liable for a physician's services rendered his wife when it did not conclusively appear that he had forbidden his wife, in the physician's presence, to receive the services upon his credit. *Harrison v. Grady*, 13 L. T. N. S. 309, 12 Jur. N. S. 140, 14 Week. Rep. 139. This decision is based upon the doctrine that it is the privilege of the husband to regulate the style in which his wife shall live.

If a husband notifies a tradesman to sell no more goods to his wife on credit he cannot afterwards be made liable for articles so purchased by her, unless he neglects otherwise to procure supplies necessary to the condition and station of his family. *Hibler v. Thomas*, 99 Ill. App. 355; *Therlott v. Baglioli*, 9 Bosw. 578.

The fact of express prohibition, however, is not of itself sufficient ground for a strict consideration of the term "necessaries," as that may be rebutted by evidence of the husband's

penuriousness, cruelty, bad temper, etc., according to *Black v. Bryan*, 18 Tex. 453.

c. Burden of proof.

The cases are not in harmony as to where the burden of showing whether the husband had or had not suitably provided for the wife lies, but the weight of authority is, without doubt, in favor of its being upon the tradesman.

The burden is upon the husband to show first his notice not to sell, and then it shifts to the tradesman to prove that the husband failed to furnish the necessary and suitable support to his wife and family. *Hibler v. Thomas*, 99 Ill. App. 355.

So, the burden is upon the tradesman to show that the goods sold were such as the reasonable necessities of the wife required her to have, and that the husband refused or neglected to supply his wife with them. *Therlott v. Baglioli*, 9 Bosw. 578.

Similarly, the burden of proof is upon the tradesman to show that the husband refused or neglected to supply the wife with what was necessary for decency and comfort in his condition in life, and that the goods were such as the reasonable necessities of the wife required her to have. *Raynes v. Bennett*, 114 Mass. 424.

And the burden is upon the tradesman to show that the things purchased by the wife were necessities according to the style in which her husband desired her to live. *Phillipson v. Hayter*, 40 L. J. C. P. N. S. 14, L. R. 6 C. P. 38, 23 L. T. N. S. 556, 19 Week. Rep. 130.

So the presumption was declared to be that a husband does his duty by his family, and, in the absence of any proof besides the book of original entries, a rule for judgment against the husband was discharged, in *Debreham v. Walker*, 3 W. N. C. 26.

And the burden of proof was declared to be upon the tradesman to show, first, that the husband refused or neglected to provide a suitable support for his wife, and second, that the articles furnished were necessities, in *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77.

But the burden was held to be on the husband to show that he provided necessary medical attendance for his wife according to his circumstances in life, in an action against him for services of that nature, rendered her. *Tebbets v. Hapgood*, 34 N. H. 420.

And, a tradesman was declared to sell neces-

authority, the husband may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted, he may be bound; but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption *prima facie*, and not absolute; not a presumption of law, but one capable of being rebutted." The chancellor then proceeds to consider the facts in the case, and concludes by holding the husband not liable, stating that "it was argued that, because these articles were found to be in some sense 'necessaries' in their nature, the husband ought, therefore, to be bound. But,

articles at the peril of having a husband show, in defense, that his wife was already sufficiently supplied, or that she had a sufficient allowance from him to supply herself, in *Compton v. Bates*, 10 Ill. App. 78.

VI. Presumptive agency arising from cohabitation.

a. In general.

With the exception of articles strictly necessary to his wife in order to sustain life, for which a husband is liable upon an implied agency in law or agency of necessity, above shown (III.), his liability, upon principle, for all other purchases made by her is purely a question of fact. It is true that the law, out of the recognized custom that a wife at the head of her husband's household has authority to purchase those things suitable and necessary for it and herself, raises a presumption of an agency in the wife for the purchase of such articles, called the presumptive agency arising from cohabitation. *Harrison v. Grady*, 13 L. T. N. S. 369, 12 Jur. N. S. 140, 14 Week. Rep. 139; *Etherington v. Parrot*, 1 Salk. 118, 2 Ld. Raym. 1006, Holt, 102; *Freestone v. Butcher*, 9 Car. & P. 643; *Emmett v. Norton*, 8 Car. & P. 506; *Reld v. Teakle*, 13 C. B. 627, 22 L. J. C. P. N. S. 161, 17 Jur. 841; *Jolly v. Rees*, 15 C. B. N. S. 628, 33 L. J. C. P. N. S. 177, 10 Jur. N. S. 319, 10 L. T. N. S. 298, 12 Week. Rep. 473; *Morgan v. Chetwynd*, 4 Fost. & F. 451; *Phillipson v. Hayter*, 19 Week. Rep. 130, 40 L. J. C. P. N. S. 14, L. R. 6 C. P. 38, 23 L. T. N. S. 556; *Debenham v. Mellon*, L. R. 5 Q. B. Div. 394, 49 L. J. Q. B. N. S. 497, Affirmed in L. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 43 L. T. N. S. 873, 29 Week. Rep. 141, 45 J. P. 252; *Hardenbrook v. Harrison*, 11 Colo. 9, 17 Pac. 72; *Fredd v. Eves*, 4 Harr. (Del.) 385; *Compton v. Bates*, 10 Ill. App. 78; *Hibler v. Thomas*, 99 Ill. App. 355; *Litson v. Brown*, 26 Ind. 489; *Henderson v. Stringer*, 2 Dana, 291; *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834; *Furlong v. Hysom*, 35 Me. 332; *Dolan v. Brooks*, 168 Mass. 350, 47 N. E. 408; *Flynn v. Messenger*, 28 Minn. 208, 41 Am. Rep. 279, 9 N. W. 759; *Wagner v. Nagel*, 33 Minn. 348, 23 N. W. 308; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77; *Harshaw v. Merryman*, 18 Mo. 106; *Sauter v. Scrutcheff*, 28 Mo. App. 150; *Vusler v. Cox*, 53 N. J. L. 518, 22 Atl. 347; *Wilson v. Herbert*, 41 N. J. L. 454, 32 Am. Rep. 465 L. R. A.

even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessities if he made a reasonable allowance to his wife, and duly paid it; much less can he be bound in a case like this, where they were not living apart, and when he made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing." In the still more recent case of *Morel Bros. v. Westmoreland* [1903] 1 K. B. 64, 72 L. J. K. B. N. S. 66, 51 Week. Rep. 290, 87 L. T. N. S. 635, 19 Times L. R. 43, it was held that the presumption which arises that the husband has given the wife authority to pledge his credit for necessities may be rebutted by proof of an arrangement under which a substantial allow-

243; *Keller v. Phillips*, 39 N. Y. 351; *Cromwell v. Benjamin*, 41 Barb. 558; *Hatch v. Leonard*, 165 N. Y. 435, 59 N. E. 270; *McMillan v. Auerback*, 7 Ohio N. P. 376, 3 Ohio S. & C. P. Dec. 688; *Cany v. Patton*, 2 Ashm. (Pa.) 140; *Wiler v. Flegel*, 10 W. N. C. 240; *Myers v. Filley*, 19 Montg. Co. L. Rep. 49; *Mackinley v. McGregor*, 3 Whart. 369, 31 Am. Dec. 522; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713; *Day v. Burnham*, 36 Vt. 37; *Woodward v. Barnes*, 43 Vt. 330; *Savage v. Davis*, 18 Wis. 608.

"Where a wife is living with her husband, and where, in the ordinary arrangement of her husband's household, she gives orders to tradesmen for the benefit of her husband and family, and these orders are proper and not extravagant, it is presumed that she has the authority of her husband for so doing. This rule is founded on common sense, for a wife would be of little use to her husband in their domestic arrangements if she could not order such things as are proper for the use of a house and for her own use, without the interference of her husband. The law therefore presumes that she does this by her husband's authority." Lord Abinger in *Emmett v. Norton*, 8 Car. & P. 506.

The husband shall be bound because, by a presumption of law, his wife understands as well as he does how to purchase necessities for herself, house, and family, though she does it without his knowledge. *Garbrand v. Allen*, Comb. 450.

This presumption is founded upon the well-known fact that in modern society almost universally the wife, as manager of the household, is clothed with authority to pledge her husband's credit for articles of ordinary household use. *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77.

b. May be rebutted.

1. In general.

This presumption of the wife's agency arising from cohabitation is *prima facie* merely, and always subject to rebuttal by evidence of facts irreconcilable with it. *Etherington v. Parrot*, 1 Salk. 118, 2 Ld. Raym. 1006, Holt, 102; *Montague v. Benedict*, 3 Barn. & C. 631, 5 Dowl. & R. 532, 3 L. J. K. B. 94, 27 Revised Rep. 444; *Clifford v. Laton*, 3 Car. & P. 15, *Moody & M. 101*; *Harrison v. Grady*, 13 L. T. N. S. 369, 12 Jur. N. S. 140, 14 Week. Rep. 139;

ance has been made by the husband to the wife for household expenses. In this case Mathew, L. J., concludes his opinion by stating: "There is no real hardship to tradesmen involved in such cases as this. They should understand that the question is always one of agency, and it is incumbent on them to prove the wife's agency. They can easily protect themselves from any great risk in such cases, but, if they think it answers their purpose better to go on giving credit for goods ordered by the wife without taking any steps to ascertain whether she has authority to pledge her husband's credit, they must run the risk of its ultimately turning out that she has no such authority."

Schouler on Husband and Wife, § 107, sums up the authorities upon the subject as

follows: "Not only is the husband permitted to show that articles in controversy are not such as can be considered necessities, but he may show that he supplied his wife himself, or by other agents, or that he gave her ready money to make the purchase. This is on the principle that the husband has the right to decide from whom and from what place the necessities shall come, and that, so long as he has provided necessities in some way, his marital obligation is discharged, whatever may be the method he chooses to adopt. Accordingly, in the class of cases which we are now considering, namely, where the spouses dwell together, so long as the husband is willing to provide necessities at his own home he is not liable to provide them elsewhere. In general, while

Reld v. Teakle, 13 C. B. 627, 22 L. J. C. P. N. S. 161, 17 Jur. 841; Freestone v. Butcher, 9 Car. & P. 643; Morgan v. Chetwynd, 4 Post. & F. 451; Jolly v. Rees, 15 C. B. N. S. 628, 33 L. J. C. P. N. S. 177, 10 Jur. N. S. 319, 10 L. T. N. S. 298, 12 Week. Rep. 473; Debenham v. Mallon, L. R. 5 Q. B. Div. 394, 49 L. J. Q. B. N. S. 497, Affirmed in L. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 43 L. T. N. S. 673, 29 Week. Rep. 141, 45 J. P. 252; Hardenbrook v. Harrison, 11 Colo. 9, 17 Pac. 72; Connerat v. Goldsmith, 6 Ga. 14; Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421; Compton v. Bates, 10 Ill. App. 78; Bonney v. Perham, 102 Ill. App. 634; Baker v. Carter, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834; S. E. Olson Co. v. Youngquist, 76 Minn. 27, 78 N. W. 870; Harshaw v. Merryman, 18 Mo. 106; Johnson v. Briscoe (Mo. App.) 79 S. W. 498; Keller v. Phillips, 39 N. Y. 351; Cromwell v. Benjamin, 41 Barb. 558; Cany v. Patton, 2 Ashm. (Pa.) 140; Wiler v. Flegel, 10 W. N. C. 240; Gilman v. Andrus, 28 Vt. 241, 67 Am. Dec. 713.

The mandate which the law implies from cohabitation is a presumption of fact *prima facie* only and capable of being rebutted, and arising under the ordinary state of circumstances which usually accompanies cohabitation, when there is a house and establishment, and the purchases were made for the ordinary necessary purposes of providing for the daily wants of the establishment, as stated by Lord Selborne upon the appeal of Debenham v. Mallon to the House of Lords as reported in L. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 43 L. T. N. S. 673, 29 Week. Rep. 141, 45 J. P. 252.

This presumption may be rebutted by proof that the credit was given to the wife. Connerat v. Goldsmith, 6 Ga. 14.

It is a question for the jury whether there was any authority direct or implied, from the husband to the wife, for the purchase of the goods on his credit. Reld v. Teakle, 13 C. B. 627, 22 L. J. C. P. N. S. 161, 17 Jur. 841.

A tradesman who sells goods to the wife upon the credit of her husband must show her authority by a preponderance of the evidence. Gaffield v. Scott, 33 Ill. App. 317.

2. By proof of ample provision otherwise made by husband.

(a) In general.

So long as a husband suitably provides for his 65 L. R. A.

wife and family, there is, in the absence of any specific act or omission on his part which would constitute an express or implied holding out by him of his wife as his agent, no ground for the presumption of an agency in fact in his wife, arising merely from cohabitation, to purchase goods on his credit, since there is no duty undone on his part for the law to step in and authorize another to do on account of his omission. Therefore, proof of suitable provision otherwise made by the husband serves to destroy the presumption of an agency in fact arising from cohabitation.

Thus, a husband whose wife purchased articles of dress without his knowledge or subsequent sanction, was held not liable therefor in *Seaton v. Benedict*, 5 Bing. 28, 2 Moore & P. 66, 6 L. J. C. P. 208, where he had amply furnished her with all necessary apparel.

The presumption, arising from cohabitation, that the husband assents to the wife's contracts for necessities, was held rebutted in part by evidence that the wife was very extravagant, and needed no clothes when she bought the goods sued for, in *Etherington v. Parrot*, 1 Salk. 118, 2 Ld. Raym. 1006, Holt, 102.

So, the presumptive agency of the wife to purchase household supplies while living with her husband was declared, *arguendo*, to be subject to be disproved by him, in *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834, by showing that he had abundantly supplied the house with all things necessary and suitable.

An instruction to the effect that, if the husband was living with his wife, and the goods purchased by her on his credit were of a character suitable and necessary to her position in life, the husband was chargeable therefor, unless he had forbidden the tradesman to trust her on his credit, was held too broad a statement of the law, for the reason that by it cohabitation was made conclusive evidence of the authority of the wife to purchase goods of the character named, when it is but presumptive evidence, and not conclusive; since, if the wife had been previously fully supplied with necessities suitable to the condition in life of the parties, the husband would not be liable for other goods which might be purchased by her, although of the same character of necessities. *Compton v. Bates*, 10 Ill. App. 78.

Compton v. Cooper, 10 Ill. App. 86, involved

the spouses live together, a husband who supplies his wife with necessaries suitable to her position and his own is not liable to others for debts contracted by her on such an account without his previous authority or subsequent sanction." For further authorities and discussions upon the subject, see 10 Cent. L. J. 341; 54 Cent. L. J. 472; *Eastland v. Burchell*, 18 Am. L. Reg. N. S. 412-416 (Judge Bennett's note); *Debenham v. Melton*, 20 Am. L. Reg. N. S. 324 (Judge Bennett's note); *Clark v. Cox*, 32 Mich. 204.

The discussion of the English cases, to which attention has been called, covers the points involved in this case. They, in effect, hold, in accordance with the charge made by the judge in this case, that the husband, in defense, may show that the wife

was amply supplied with articles of the same character as those purchased, or that she had been furnished with ready money with which to pay cash therefor; that the question of her agency is one of fact, and is not a conclusion of law to be drawn alone from the marital relation. The conclusions reached in these cases are in accord with the rule as stated by Schouler and some of the decisions alluded to in this state, and we incline to the view that the rule recognized by them is the safer and better rule to follow. It compels the husband to pay in a proper case, and at the same time affords him some financial protection against the seductive wiles exerted by tradesmen to induce extravagant wives to purchase that which they really do not need. We do not participate in

the same questions as *Compton v. Bates*, 10 Ill. App. 78, and was decided accordingly.

Evidence of a prior sufficiency of articles similar to the ones purchased by the wife rebuts the presumption of an implied authority upon her part to procure them. *Morgan v. Chetwynd*, 4 Fost. & F. 451.

The presumption of the husband's assent arising from cohabitation may be rebutted by proof that he supplied his wife himself, or made her an adequate allowance. *Wiler v. Fiegl*, 10 W. N. C. 240.

The husband has the right to furnish necessaries suitable to his condition in life in the mode and from whom he chooses, and when he has furnished them no other person can have the right to do so, because another's right arises only when he has failed in the performance of his duty. *Rea v. Durkee*, 25 Ill. 503, *arguendo*.

So long as a husband reasonably discharges his duty to support and maintain his family, no one has the right to step in and discharge it for him, or to treat his wife as his accredited agent for that purpose. *Woodward v. Barnes*, 43 Vt. 330.

Affirmative proof of liberal provision by a husband for his wife will prevent a recovery against him for articles purchased by her upon his credit, in the absence of express or implied authority given by him to her for that purpose. *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77.

Justice Cooley, in *Clark v. Cox*, 32 Mich. 204, holds that if tradesmen with whom the wife or husband has had no previous dealings sell to the wife, on her husband's credit, goods which, under some circumstances, might be necessaries, but which are not as to her because she is already sufficiently supplied with such articles by her husband, he cannot be held liable on the ground of an implied authority, when he has given her no express authority to make the purchases; since any presumption that the husband authorizes his wife to employ his credit in the purchase of necessaries is rebutted by his purchasing them himself or giving her money for that purpose. This decision seems to be one almost parallel with *WANAMAKER V. WEAVER*.

Where there is a suitable provision made for the wife, and a tradesman, having notice thereof, still supplies her, the husband will not be liable. *Harshaw v. Merryman*, 18 Mo. 106. 65 L. R. A.

The fact that the tradesman is not aware that the wife's wants have been suitably met by the husband is declared immaterial by some decisions.

If the husband has supplied her properly she is not his agent, and it is not incumbent upon him to show that the tradesman knew at the time of the purchases by the wife that she was already supplied with or possessed sufficient means of support, is the conclusion arrived at in *Smith v. Fletcher*, Wilson Super. Ct. (Ind.) 34.

"Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril; and, if it turns out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge," as stated in *Montague v. Benedict*, 3 Barn. & C. 631, 5 Dowl. & R. 532, 3 L. J. K. B. 94, 27 Revised Rep. 444.

In the dissenting opinion to the decision of *WANAMAKER V. WEAVER*, rendered by the appellate division (73 App. Div. 60, 76 N. Y. Supp. 390), the judge says: "The husband will not be liable for goods purchased by his wife without his knowledge or consent if such goods are purchased from one with whom there have been no previous dealings by the wife on the credit of the husband, provided the husband has suitably supplied his wife with such necessaries or with the money to purchase them. A merchant, under such circumstances, supplies goods to the wife at his peril if the husband is guilty of no neglect in furnishing necessaries."

But a contrary doctrine appears in a few instances. Thus, in *Morton v. Withens*, Skinner, 348, a husband was held liable for purchases made by his wife although they were shown to be unnecessary. The judge directed that, if the merchant delivered the goods innocently in the belief that they were appropriate purchases for the wife to make, the husband would be obliged to pay for them.

So, upon the principle that the acts of a general agent within the apparent scope of his authority are binding, it was declared in *Sauter v. Scruttsfield*, 28 Mo. App. 150, that a husband will be liable for articles purchased by his wife on credit if they are such as are ordinarily used in households, notwithstanding it may turn out that the articles are not necessary to the comfort of the family, unless it is known to the tradesman that they are not need-

the alarm which appears to have possessed the learned justices of the appellate division on account of the possible inquisitorial examination to which the wives may be subjected. The anxiety of tradesmen to sell will be sufficient to protect them from any improper "inquisitorial examination." If a wife is going to a merchant to trade, with whom she is acquainted, and with whom she has been accustomed to trade upon the credit of her husband, she may still continue to do so until the husband gives notice prohibiting the merchant from longer giving credit to her. But when she goes to a stranger, with whom she has never traded before, and where, consequently, there is no implied au-

thority on the part of the husband to give her credit, and seeks to purchase upon her husband's credit, it is but reasonable and proper that she disclose to the merchant her authority therefor, or for the merchant to request such disclosure.

We have discovered no errors in the rulings of the trial court. *The judgment of the Appellate Division should, therefore, be reversed*, and that entered upon the verdict affirmed, with costs.

Gray, Vann, Cullen, and Werner, JJ., concur. **Parker, Ch. J.,** dissents. **Martin, J.,** absent.

ed. "A tradesman, in such cases, will not be required to look into the state of the family larder, or the condition of the family wardrobe."

And one of the doctrines upon which *WANAMAKER v. WEAVER* was decided in the appellate division (73 App. Div. 60, 76 N. Y. Supp. 390), was that the husband, by the fact of his marriage, makes his wife his agent to purchase whatever articles are within the compass of her station in life, unless he has expressly forbidden the merchant to sell to her upon his credit; which decision was reversed in the court of appeals as above reported.

(b) *Allowance.*

Evidence of an ample allowance made by the husband to the wife for the purpose of providing the necessary household articles or clothing for herself and family has the same effect in rebutting the presumption of an agency on her part for the purchase of such articles as proof that the husband himself suitably provided them (*supra*, VI. b. 2, (a)).

Thus, if the husband allows his wife a stipend for necessaries, such as apparel, diet, and lodging, and pays it to her, then he cannot be charged for purchases of such articles made by her on his credit. *Dent v. Scott*, Aley, 61.

So, if a wife has an allowance from her husband so that she could supply herself with necessaries without pledging his credit, the presumption of an implied authority on her part to do so is rebutted, as stated in *Morgan v. Chetwynd*, 4 Fost. & F. 451.

And so it is said, *arguendo*, in *Compton v. Bates*, 10 Ill. App. 78, that a tradesman sells at the peril of having the husband show in defense that his wife had a sufficient allowance from him to supply herself with the things she had purchased on his credit.

Lord Chancellor Selborne in the appeal to the House of Lords of *Debenham v. Mellon*, L. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 43 L. T. N. S. 673, 29 Week. Rep. 141, 45 J. P. 252, said that it was perfectly clear that when a reasonable allowance is made by the husband to the wife, sufficient to cover a proper expenditure for her own and children's clothing, it is totally impossible to imply, *ex necessitate*, any authority of hers in law to bind him.

In *Morel Bros. v. Westmoreland* [1903] 1 K. B. 64, 72 L. J. K. B. N. S. 66, 51 Week. Rep. 290, 87 L. T. N. S. 635, 19 Times L. R. 43, referred to in the opinion in *WANAMAKER v.* 65 L. R. A.

WEAVER, an action against a husband and wife jointly to recover the price of wines and provisions furnished on the order of the wife, the facts showed an arrangement whereby the husband set aside a substantial allowance for household expenses, and that the wife also had a separate income for her personal expenses. It was held that the case exactly came within the authority of *Debenham v. Mellon*. L. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 43 L. T. N. S. 673, 29 Week. Rep. 141, 45 J. P. 252, and *Jolly v. Rees*, 15 C. B. N. S. 628, 33 L. J. C. P. N. S. 177, 10 Jur. N. S. 319, 10 L. T. N. S. 298, 12 Week. Rep. 473, *infra*, VI. b. 4; that the arrangement as to the allowance clearly implied that that fund was to be substituted for any authority of the wife to pledge the husband's credit which might prima facie be presumable from the fact of cohabitation, and therefore rebutted the existence of such an authority; and, it appearing that the wife had allowed judgment to be entered against her, the judgment in the case at bar was entered for the husband.

Morel Bros. v. Westmoreland [1903] 1 K. B. 64, 72 L. J. K. B. N. S. 66, 51 Week. Rep. 290, 87 L. T. N. S. 635, 19 Times L. R. 43, was affirmed in the House of Lords (Weekly Notes [1903] p. 190), holding that, as to goods supplied the wife after the husband had made her an allowance, any presumption as to her having authority to pledge his credit was rebutted.

Where a husband had made suitable provision for his wife during his absence in the army he was held not liable for wines furnished her, on the ground that the allowance supplied her was ample. *Dennys v. Sargeant*, 6 Car. & P. 419.

Where it appeared that a husband's property was in the hands of a receiver, and one half of the rents thereof had been ordered to be paid to the wife; and also that he had placed in the hands of a grocer a certain amount to be used in furnishing supplies to his family,—it was held error to take from the jury the consideration of those facts in determining whether the husband had not properly provided for the wife's support and maintenance so as to relieve himself from liability for the price of goods purchased by her upon his credit. *Hentze v. Marjenhoff*, 42 S. C. 427, 20 S. E. 278.

When the evidence showed that a husband had previously given his wife a substantial amount of money to do with as she pleased, and had also deeded to her a house and lot with

the agreement that the rent therefrom should be applied on household expenses, and had also told her that, if she needed anything, she could go to another tradesman whom he named and purchase such articles on his credit, it was held a question for the jury whether he had given his assent to her purchasing goods on his credit. *Jones v. Gutman*, 88 Md. 355, 41 Atl. 792.

A husband who, while temporarily absent from home, promptly supplied his wife with an allowance for the purchase of necessary family supplies, and gave notice thereof to a tradesman, was held not liable to the latter for supplies furnished his wife during his absence, and not paid for. *Holt v. Brien*, 4 Barn. & Ald. 252.

The husband may prove that he made suitable provision or furnished a reasonable allowance of money to his wife, and this will disprove her authority to bind him,—certainly if the tradesman sold her with knowledge of the facts, and perhaps if he were ignorant of them, as the court says, *arguendo*, in *Johnson v. Briscoe* (Mo. App.) 79 S. W. 498.

If a husband makes a reasonable allowance to the wife for necessities during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable unless the tradesman can show that the allowance was not supplied. *Harshaw v. Merryman*, 18 Mo. 106.

Before the wife's allowance becomes an element of importance, it must be determined whether it was adequate, and whether it was paid. *Morgan v. Chetwynd*, 4 Fost. & F. 451.

An allowance which was insufficient was one of the grounds for holding the husband liable, in *Ryan v. Nolan*, Ir. Rep. 3 C. L. 319.

But knowledge on the part of the tradesman of the fact of an allowance by the husband to the wife seems to be regarded as a prerequisite in order to relieve the husband from liability, in an early English case, *Morton v. Withens, Skinner*, 349, where a husband was held liable for purchases made by his wife, although they were shown to be unnecessary, and it appeared that she had a yearly allowance, and had threatened to ruin him by her extravagance. The judge directed that, if the merchant delivered the goods innocently in the belief that they were appropriate purchases for the wife to make and without notice of the facts above shown, the husband would be obliged to pay for them; but, if the merchant had had notice of the wife's allowance, and of the differences between her and her husband, and her intention to accomplish his financial ruin, then the husband would not be chargeable for the goods.

And in *Ruddock v. Marsh*, 38 Eng. L. & Eq. 515, 1 Hurlst. & N. 601, 5 Week. Rep. 359, although a wife received an allowance from her husband for the purchase of household necessities, he was held liable for goods of that nature bought by the wife on his credit, on the ground that a wife has authority with reference to such matters as are usually under the control of the wife until that authority is broken in upon by special circumstances, such as, for instance, notice to the tradesman, which it did not sufficiently appear in the case at bar had been given. It appears from the facts in this case, however, that the goods, which were provisions, were in part consumed by the husband; and, although the decision is not placed upon the ground of estoppel, that would have

been a sufficient ground to charge him if he knew that the goods had been purchased upon his credit, even though an allowance for such purposes were given by him to his wife (IV.). *Bramwell, L. J.*, in *Debenham v. Mellon*, L. R. 5 Q. B. Div. 394, 49 L. J. Q. B. N. S. 497, questions the conclusion arrived at in this case, and says that, "unless the decision was based upon the theory that where parties live in a certain style the wife will presumably have authority to pledge her husband's credit for ordinary household supplies for which people do not usually pay on delivery, but for which bills are run, and that, if the husband desires to negative this authority, he should give distinct intimation to that effect to the tradesman, that judgment cannot be supported."

In view of the almost unanimous consent to the doctrine that, in the absence of complicating circumstances, if a husband has amply provided for his wife by allowance or otherwise he cannot be held liable for goods supplied her upon his credit, and also in view of the doctrine which, although opposed, is favored by the weight of authority, and especially by the later cases,—that a private revocation by the husband of the wife's authority to pledge his credit will protect him from subsequent liability if he otherwise amply provides for her, and has not actually or constructively held her out as his agent for that purpose, so that the merchant in selling the goods did so in reliance upon the wife's supposed agency (VI. b, 4),—it is safe to say that the decision in *WANAMAKER V. WEAVER* was rightly made; since the facts in this case show an ample provision by the husband for general household purposes, and no evidence appears to the effect that the merchant, in making the sale, did so in reliance upon the supposition that the wife had authority from her husband to buy on his credit induced by any act of his; and neither does any evidence appear of a subsequent use by the husband of the articles purchased upon his credit, with knowledge that they were so purchased, so as to charge him upon the ground of estoppel or ratification (IV.). The fact that there is some conflict upon the specific question as to whether a husband can be held liable, even when he had made ample provision, when that fact is not known to the tradesman, does not render the correctness of the decision uncertain when it is considered that in the opposing cases the point upon which this case really turns, *i. e.*, whether there had been a previous actual or constructive holding out by the husband of the wife as his agent to purchase supplies upon his credit, was not brought up. It was not touched upon in *Morton v. Withens, Skinner*, 348, an early English case and briefly considered. The declaration in *Sauter v. Scrutchedfield*, 28 Mo. App. 150, is in the nature of *dictum*. The case of *Ruddock v. Marsh*, 38 Eng. L. & Eq. 515, 1 Hurlst. & N. 601, 5 Week. Rep. 359, holding that, notwithstanding a husband gives his wife an allowance, he is liable in the absence of notice to the tradesman, and the broad statement in *Johnston v. Sumner*, 3 Hurlst. & N. 261, 27 L. J. Exch. N. S. 341, 4 Jur. N. S. 462, 6 Week. Rep. 574 (VI. b, 4), that when a man and wife are living together, it matters not what private agreement they may make, etc., have both been criticised and limited to the effect that, if they are living in such a way as to constitute, by the acts of the

husband or by his assent to the acts of his wife, a holding out by him of her as his agent, then notice to the tradesman may be necessary; and, too, in *Ruddock v. Marsh* the facts show that the goods, which were provisions, were consumed in part by the husband, which might have been sufficient to charge him on the ground of estoppel, notwithstanding the allowance made by him for the purchase of family supplies. *Morgan v. Chetwynd*, 4 Fost. & F. 451, holding to the view that any limitation of the powers of an agent clothed with a known special character will be of no effect if unknown to the party dealing with him, and that a wife is such a special agent (VI. b, 4), was not an express decision.

3. By proof of notice to tradesmen.

If the husband can show that, prior to the purchase by his wife on his credit of the goods sought to be charged against him, he expressly notified the tradesman to furnish no more goods to her upon his credit, he will, in the absence of proof that he otherwise failed to provide for her, escape liability for the purchases so made.

Admitting a husband to be liable in "assumpsit" in law, yet, if he specially prohibits persons from trusting his wife, he shall not be liable contrary to his prohibition; a general prohibition, however, that no one shall trust the wife is void, as declared in the minority opinion in *Manby v. Scott*, Sid. pt. 1, p. 109, 2 Smith, Lead. Cas. 450.

A husband must pay for his wife's necessities unless he gives notice not to trust her, according to *Dyer v. East*, 1 Mod. 9.

A husband has the right, by notice to a tradesman, to withdraw the agency which the law presumptively gives to the wife to make for him on his credit such purchases as are usually made by wives for use in the family. He has the right to make all such purchases himself. *Woodward v. Barnes*, 43 Vt. 330.

When the husband dissents beforehand to the purchase of goods on his credit no presumption of her agency can arise, according to an *arguendo* statement in *Mackinley v. McGregor*, 3 Whart. 369, 31 Am. Dec. 522.

The presumption arising from cohabitation, that the husband assents to his wife's contracts for necessities, is rebutted by evidence that the husband, when last he paid the plaintiff, warned the latter's servant not to trust his wife any more, and to give his master notice of such warning. *Etherington v. Parrot*, 1 Saik. 118, 2 Ld. Raym. 1006, Holt, 102.

A husband was held not liable for goods furnished his wife in return for her promissory note without his knowledge, when a former account with the same merchant without the husband's knowledge had been paid by her father, and the merchant had been requested by him not to trust her again without her husband's sanction. The decision was based on the ground, however, that the credit was given to the wife, not to the husband. *Metcalfe v. Shaw*, 3 Campb. 22.

A husband having given notice to the plaintiff that he would not be responsible for goods furnished to his wife, who had withdrawn herself from his protection, was not liable for goods furnished to her by the plaintiff without his knowledge after she had returned to him again. *Weaver v. Lawrence*, E. T. 2 Vict. according to vol. 1, Ont. Rep. Dig. 1875. 65 L. R. A.

The presumption of an agency in fact on the wife's part, arising from cohabitation, to purchase goods, was held rebutted in part by evidence that a husband had notified the tradesman of his town not to charge goods to him. *Cromwell v. Benjamin*, 41 Barb. 558.

A notice by a husband forbidding a tradesman to furnish his wife with goods on credit can be effective only when he himself supplies the necessities his family should have. *McGrath v. Donnelly*, 131 Pa. 549, 20 Atl. 382.

When a husband has several times refused to pay for goods purchased by his wife on his credit, and has also orally and by writing notified the tradesman to sell no more goods to her without his authority, he will not be liable for goods, not actual necessities, subsequently sold to her without his knowledge. *Segelbaum v. Ensminger*, 117 Pa. 248, 2 Am. St. Rep. 662, 10 Atl. 759.

A judgment against a husband for the price of goods furnished his wife upon credit by a tradesman whom he had previously notified to extend no more credit to her was reversed in *Hibler v. Thomas*, 99 Ill. App. 355, when it appeared that he had otherwise provided for her.

So long as a husband furnishes ample family supplies, a tradesman whom he has prohibited from furnishing his wife supplies upon his credit may not recover from him for supplies so furnished. *Devendorf v. Emerson*, 66 Iowa, 698, 24 N. W. 515.

In order to bind a husband for goods sold a wife after the seller has had notice not to do so, the seller will be bound to show that the goods were absolutely necessary for the wife's comfort, and that the husband had failed to provide them. *Barr v. Armstrong*, 56 Mo. 577.

A tradesman who furnishes goods to the wife on her husband's credit after the husband has forbidden him to do so does so at his peril, since he may recover for them only by showing that the articles furnished were actually needed for present use in the family according to the husband's condition in life, and that the husband had so far neglected his duty that, unless the tradesman, or some other one sustaining like relation to the husband with himself, did furnish them, the wife and children could not reasonably be supplied with them, and must suffer for the want thereof. *Woodward v. Barnes*, 43 Vt. 330; *Sauter v. Scrutcheveld*, 28 Mo. App. 150.

If the husband expressly prohibits his wife from making purchases upon his credit, no one, having notice thereof, may trust her in reliance upon his credit, unless it appears that the supplies are absolutely necessary on account of his failure to otherwise provide them. *Keller v. Phillips*, 39 N. Y. 351; *Theriot v. Baglioli*, 9 Brw. 578.

Where a husband during cohabitation himself supplies his wife with necessities suitable to her condition in society, and expressly gives notice to store keepers not to furnish her with goods, then he is not liable even for necessities supplied her subsequently to such notice; but a general notice in a newspaper will not be sufficient to charge the husband without proof that the paper reached the party furnishing the goods. *Fredd v. Eves*, 4 Harr. (Del.) 385.

In *Black v. Clements*, 2 Penn. (Del.) 499, 47 Atl. 617, the court, in charging the jury, expressly adopted the argument of the opinion in *Fredd v. Eves*, 4 Harr. (Del.) 385.

But a judgment against a husband for dresses ordered by his wife upon his credit was affirmed in *Whelen v. Halcomb*, 18 Misc. 611, 42 N. Y. Supp. 1135, where there was evidence to the effect that, although a husband had expressly given notice to the plaintiff to furnish his wife with no more dresses on credit, he had afterwards rescinded these instructions.

And a husband is estopped from questioning the authority of his wife to make purchases of goods upon his credit when he is present with her at the time she does so, and offers no protest or objection, although he had previously notified the tradesman to extend no credit to her without his written order. *Kreiger v. Smith*, 13 Mont. 235, 33 Pac. 937.

4. *By proof of authority in wife privately withdrawn.*

Whether proof of a private withdrawal upon the husband's part, without notice to the tradesman, of the wife's authority to purchase ordinary household supplies upon his credit, is a sufficient rebuttal of the presumption of an authority in her for that purpose, is a question upon which the authorities are not entirely in harmony, although the great weight of authority is in favor of the proposition that, in the absence of an express or implied holding out by the husband of the wife as his agent for the purchase of general household supplies, a private revocation made by him to her of her authority to pledge his credit will save him from liability if she subsequently does so, provided he amply furnishes her with all things needful.

The doctrine is advanced in a few instances that notice to the tradesman is a prerequisite to the husband's freedom from liability, upon the theory that a wife in charge of a household is presumed to have authority to purchase the articles necessary therefor, until notice to the contrary is given the tradesman by the husband.

In regard to the question as to whether an express prohibition—not to the tradesman against his supplying the goods, but to the wife against her ordering them—will avail as against the tradesman who has supplied articles suitable to her degree, the court states, in summing up, to the jury, in *Morgan v. Chetwynd*, 4 Fost. & F. 451, that there is a difference of opinion,—that according to the latest decision (*Jolly v. Rees*, 15 C. B. N. S. 628, 33 L. J. C. P. N. S. 177, 10 Jur. N. S. 319, 10 L. T. N. S. 298, 12 Week. Rep. 473) such a prohibition, unknown to the tradesman, would be a sufficient defense to the husband; but, in another view of the law, which the court thought might turn out to be the correct one, when an agent is clothed with a known "special" character, any limitation of his powers, unknown to the party dealing with him, will be of no effect; so, a wife being an agent, clothed with a special character, according to a presumption of law, authorized to pledge her husband's credit for necessities in the absence of adequate means and supplies, her authority may not be rebutted by evidence of any private, secret limitation unknown to the party supplying the articles. No express instruction, however, was given in this question, it being stated that in case the jury thought from the evidence that an express prohibition had been made by the husband, the court would reserve the question for decision.

45 L. R. A.

Byles, J., in a dissenting opinion to *Jolly v. Rees*, 15 C. B. N. S. 628, 33 L. J. C. P. N. S. 177, 10 Jur. N. S. 319, 10 L. T. N. S. 298, 12 Week. Rep. 473, declares that a private arrangement between husband and wife limiting her ordinary and apparent authority, without notice to a tradesman who has supplied her with necessities, is no answer to an action by the tradesman against the husband, for the reason that the wife's power to bind her husband upon such contracts rests upon the apparent authority with which he invests her by cohabitation, and that no private revocation of authority, not communicated to a tradesman honestly dealing with the wife by supplying necessities for the family in the ordinary course of domestic affairs, can affect the tradesman's right to rely upon the apparent authority of the wife.

It is said, *arguendo*, in *Johnston v. Sumner*, 3 Hurlst. & N. 261, 27 L. J. Exch. N. S. 341, 4 Jur. N. S. 462, 6 Week. Rep. 574, that if a man and his wife are living together it matters not what private agreement they may make; the wife has all the usual authorities of a wife. But Lord Chancellor Selborne, in his opinion given upon the appeal of *Debenham v. Mellon*, 49 L. J. Q. B. N. S. 497, L. R. 5 Q. B. Div. 394, says, in regard to this statement, that he apprehends that the judge making it had in view that state of facts where a wife is living with her husband and managing his house and establishment, which usually raises the presumption which, when once raised by the husband's acts or by his assent to the acts of his wife, doubtless, as against the person relying upon that appearance of authority, might not be got rid of by mere private agreement between the husband and wife.

In conflict with the doctrine shown by the above cases, are a number of decisions, including the later English authorities on the question, which go on the theory that, since the wife's authority is based entirely on the husband's assent, express or implied, a revocation of that authority by him, although without the tradesman's knowledge, is sufficient to protect him against liability for further purchases made by her on his credit, provided he suitably maintains her, and has not expressly or impliedly held her out as his agent for the purchase of general household supplies.

The judges in *Manby v. Scott*, Sid. pt. 1, p. 100, 2 Smith, Lead. Cas. 4, after the decision in that case, resolved in argument that where wives have been allowed by their husbands to be housekeepers, and are in the habit of buying things for the household, without ready money, the husband is liable for the purchases made on credit. But that if the wife is in the habit of buying things with ready money, and the husband has empowered her to act in this way only; or if, after he has empowered her, he countermands her authority,—in such cases, though the wife buys goods on credit and employs them in the service of the household, yet the husband is not liable for them. For it is not the employment by the wife, but the assent by the husband, which is the foundation of the action.

If a tradesman fails to make inquiries regarding a wife's authority to make purchases on her husband's credit, it seems to be regarded in *Renaux v. Teakle*, 20 Eng. L. & Eq. 345, 8 Exch. 680, 22 L. J. Exch. N. S. 241, 17 Jur. 351, 1 Week. Rep. 312, that he must take his

chance of such an express or implied authority existing.

A husband of limited means was held not liable for extravagant purchases made by his wife against his remonstrance. *Atkins v. Curwood*, 7 Car. & P. 756. In this case, however, the parties, while not formally separated, were not living in the same house.

The husband has a right to limit the expenses of his own household, and to say to the wife, "You must not pledge my credit;" but mere grumbling at the wife's expenditures will not be considered a sufficient prohibition. *Shoolbred v. Baker*, 16 L. T. N. S. 356.

The doctrine of *Jolly v. Rees*, 15 C. B. N. S. 628, 33 L. J. C. P. N. S. 177, 10 Jur. N. S. 319, 10 L. T. N. S. 298, 12 Week. Rep. 473, is that a husband is not liable for a contract made by his wife, although for necessities suitable to his estate and degree, when he has otherwise made ample provision for his family, and the purchases are against his will and contrary to his order to her, although the tradesman has no notice of such order. One judge dissents. The judgment in this case was emphatically approved in *Debenham v. Mellon*, L. R. 5 Q. B. Div. 394, 49 L. J. Q. B. N. S. 497, where *Thesiger, L. J.*, says that it put the law in regard to the question discussed upon the proper footing, and Lord Chancellor Selborne, upon the appeal to the House of Lords (L. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 43 L. T. N. S. 673, 29 Week. Rep. 141, 45 J. P. 252), says that, if the principles which run through the authorities from first to last are regarded, rather than casual *dicta*, it will be seen that they are all consistent with reason and justice—and are also consistent with the decision arrived at by the majority of the court in the case of *Jolly v. Rees*; and this statement was coincided in by Lord Watson, who said that both upon principle and upon authority the case of *Jolly v. Rees* was well decided. And *Jolly v. Rees* was emphatically approved in *Ryan v. Nolan*, Ir. Rep. 3 C. L. 319, the judge regarding it as founded upon a correct understanding of the authorities, and consistent with good sense.

In *Ryan v. Nolan*, Ir. Rep. 3 C. L. 319, the husband had made the wife a certain allowance, and prohibited her from purchasing any supplies on his credit; but, on account of increasing needs, the supply became insufficient, and the wife obtained goods on credit without, so far as appears, any express prohibition against that practice on her husband's part. The court, approving of *Jolly v. Rees*, 15 C. B. N. S. 628, 33 L. J. C. P. N. S. 177, 10 Jur. N. S. 319, 10 L. T. N. S. 298, 12 Week. Rep. 473, said that, if the jury had simply found that the husband had bona fide prohibited his wife from buying any goods on credit, it would have been of the opinion that the verdict should have been entered up for the husband; but, it appearing that he knew his wife was getting goods upon credit, although contrary to his direction, or wilfully kept himself from knowing that the allowance was being exceeded, these facts were held to amount to a tacit withdrawal of his earlier prohibition, such as to reclothe his wife with her previous authority to pledge her husband's credit.

Debenham v. Mellon, 49 L. J. Q. B. N. S. 497, L. R. 5 Q. B. Div. 394, referred to at length in *WANAMAKER v. WEAVER*, was an action against the husband to recover the price of various articles of dress supplied his wife while living

with him for the use of herself and children. The goods were admitted to be necessities in the sense that they were suitable to her station in life. The husband was able and willing to supply the wife with necessities or the means of obtaining them, and an agreement existed between them, not made public in any way, that the wife should not pledge her husband's credit. The tradesman, without notice of that agreement, and without having had any previous dealings with the wife, supplied her upon the credit of her husband, but without his knowledge or assent, with the articles the price of which was sued for. The question given to the jury was whether or not there had been a revocation by the husband of the wife's authority to buy goods on his credit, which was found in the affirmative, and judgment rendered for the husband. Upon appeal this judgment was unanimously affirmed in several opinions. *Bromwell, L. J.*, in his opinion declares that there is no need for the law to imply the husband's authority to the wife to pledge his credit for general household supplies, since the tradesman need not trust or give credit; he may do business for ready money, or inquire whether the wife has her husband's authority, or trust her individually. Upon appeal to the House of Lords, Lord Chancellor Selborne, in affirming the decision of the lower court, holds that where, as in the case at bar, the husband and wife lived in a hotel, and there was no household to be managed, the mere fact of cohabitation could not be considered as a holding out of the wife as having authority to make purchases upon the husband's credit, so as to bind him if he had not in fact given express or implied authority to her of that nature; and that the evidence conclusively showed that there was no authority in fact.

Proof of an understanding and long-continued course of dealing between the husband and wife, that he would pay the household expenses and she would pay her personal expenses out of her own private income, rebuts the presumption of an agency in her to pledge his credit for articles of clothing for herself. *Dolan v. Brooks*, 168 Mass. 350, 47 N. E. 408.

The presumptive agency of the wife to purchase household supplies while living with her husband was declared subject to be disproved by him by showing that he had furnished the wife with money sufficient for that purpose, and requested her not to purchase on credit; or had provided suitable places where all things necessary could be had, and had forbidden her to purchase elsewhere. *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 704, 21 Atl. 834.

The doctrine of these cases last above shown does not invade the rule that the principal is liable for the acts of an agent when he has expressly or impliedly held him out as having the authority to do the acts in question.

So it is expressly said in *Jolly v. Rees*, 15 C. B. N. S. 628, 33 L. J. C. P. N. S. 177, 10 Jur. N. S. 319, 10 L. T. N. S. 298, 12 Week. Rep. 473, that the conclusion arrived at in that case does not militate against the rule that the husband, as well as any principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority acted on in making the contract sought to be enforced. This language is used in *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77.

It is intimated in *Compton v. Bates*, 10 Ill. App. 78, that any contract of the husband leading the tradesman to suppose that the wife had authority to pledge her husband's credit will bind him for articles supplied her under that assumption, although he had not in fact authorized her to pledge his credit.

And the remarks of Bramwell, L. J., in *Debenham v. Mellon*, 49 L. J. Q. B. N. S. 497, L. R. 5 Q. B. Div. 394, in regard to *Ruddock v. Marsh*, 38 Eng. Law & Eq. 515, 1 Hurlst. & N. 601, 5 Week. Rep. 359, *supra*, IV. a, 2, (b), and Lord Chancellor Selborne in *Debenham v. Mellon*, in regard to *Johnston v. Sumner*, 3 Hurlst. & N. 261, 27 L. J. Exch. N. S. 341, 4 Jur. N. S. 462, 6 Week. Rep. 574, *supra*, this division, both recognize as the rule that where the husband, by act or omission, has allowed it to appear that the wife has authority to pledge his credit, he cannot escape liability for the purchases so made by mere private prohibition.

And in the appeal of *Debenham v. Mellon*, to the House of Lords (L. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 43 L. T. N. S. 673, 29 Week. Rep. 141, 45 J. P. 252), Lord Chancellor Selborne says that perhaps a husband may be made liable for ordinary household supplies purchased on credit when such articles are usually so purchased by people living in the style in which the husband and wife are living; and that, if he desires to negative this authority, he should give distinct intimation to that effect to the tradespeople.

Upon the same appeal Lord Blackburn, *arguendo*, says that, if the husband allowed tradesmen to suppose that he sanctioned his wife's transactions by paying them, or in other ways, it might be that he would have given such evidence of authority that, if he revoked it, he would be bound to give notice of the revocation to the tradesmen, and to all who had acted upon the faith of his authority and sanction.

So, in *Watts v. Moffett*, 12 Ind. App. 399, 40 N. E. 533, it was held that, if a husband has regularly paid bills for purchases of household supplies made by his wife while living with him, he thereby impliedly holds her out to the tradesman as his agent for the purpose of purchasing such supplies, so that he will be liable for the price of goods subsequently purchased, although in the meantime he had expressly forbidden her to purchase anything on credit at the tradesman's store; since, although her agency, regarded as an ordinary agency created by the consent of the husband, was undoubtedly revoked, this revocation would not be effectual to the tradesman if he continued to deal with the wife as an agent in reliance upon her authority as such, unless the revocation was made known to him.

And so the court says, *arguendo*, in *Rea v. Durkee*, 25 Ill. 503, if a husband has previously allowed his wife to make such contracts, and has recognized them as binding, then the law will imply that she is acting as his agent, and to revoke that implied authority he must give notice that he will not be held bound by her agreements.

From a long course of dealing by the wife as her husband's agent it will be assumed, in the absence of oral or written notice or circumstances showing contrary, that the agency continues. *Myers v. Filley*, 19 Montg. Co. L. Rep. 49.

A husband cannot deny that his wife has 65 L. R. A.

such authority to use his credit as she has been held out by him to have, if a person acting upon such appearances, and in the belief of her agency, has furnished her with goods on the credit of her husband, as declared, *arguendo*, in *Jones v. Gutman*, 88 Md. 355, 41 Atl. 792.

Also, the mere fact that a husband had privately forbidden his wife to pledge his credit will not relieve him from liability where he had previously recognized her authority, or in some way allowed her to appear to have charge of the house, as declared, *arguendo*, in *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834.

Consistently with this doctrine, it is said in the opinion in *WANAMAKER V. WEAVER* that, "If a wife is going to a merchant to trade, with whom she is acquainted, and with whom she has been accustomed to trade upon the credit of her husband, she may still continue to do so until the husband gives notice prohibiting the merchant from longer giving credit to her. But when she goes to a stranger, with whom she has never traded before, and where, consequently, there is no implied authority on the part of the husband to give her credit, and seeks to purchase upon her husband's credit, it is but reasonable and proper that she disclose to the merchant her authority therefor, or for the merchant to request such disclosure."

5. By proof of extravagance of the purchases.

Since a tradesman, in supplying a wife with goods upon her husband's credit, can, if the goods are not absolute necessities, recover for their value against the husband only if an authority existed in the wife to purchase them; and, while he may rely upon the presumptive agency arising from the mere fact of cohabitation, he can do so only to the extent that the articles sought to be purchased by her are within the compass of the station in life in which her husband pleases that she shall live.—It is obvious that an extravagant order upon her part should awaken the tradesman's doubts, and place upon him the burden of inquiring into the extent of her agency, or of selling the goods at the risk of their being no authority in her to contract for them.

It is the duty of every tradesman, when a wife purchases goods to a large amount and not suitable to her degree, within the tradesman's knowledge, to ask her husband whether he has given her any authority to purchase them. *Montague v. Espinasse*, 1 Car. & P. 356.

The extravagance of an order rebuts the presumption of an agency arising from cohabitation. *Emmett v. Norton*, 8 Car. & P. 506.

Parke, B., says in *Lane v. Ironmonger*, 13 Mees. & W. 368, 14 L. J. Exch. N. S. 35: "It is because she is the agent of her husband that the tradesman ought to be careful not to supply her to an extravagant extent, for her giving orders to such an extent would go to show she was not acting as the husband's agent and to the extent authorized by him."

It is proper for the jury, in determining whether a wife had authority from her husband to make purchases upon his credit, to consider whether the merchant ought not to have taken warning from the extravagance of her purchases that she was exceeding her husband's authority, and thereby have been induced to make inquiries of him. *Ibid.*

"If my wife take goods, and array herself

better than comports with my estate, I shall not be charged to pay for the taking, since, in order to result to the use and profit of the husband, the wife should array herself from necessity; but when she exceeds his estate the husband shall not be charged." *Scot v. Abbe de Fontaines*, 11 Hen. VI. 30b.

If the goods ordered are altogether unsuited to the husband's station in life the presumption will be that he did not authorize his wife to order goods of that character. *Harrison v. Grady*, 13 L. T. N. S. 369, 12 Jur. N. S. 140, 14 Week. Rep. 139.

And so, when articles furnished to the wife as necessities are altogether extravagant and beyond the husband's circumstances and degree in life the law will not infer an agency upon her part to purchase them on her husband's credit. *Cany v. Patton*, 2 Ashm. (Pa.) 140, *arguendo*.

If goods purchased by the wife are not suitable to her quality and estate, the husband will not be chargeable therefor; and if part only are suitable, he will be charged for that part only. *Morton v. Withens, Skinner*, 349.

The authority of the husband cannot be implied with regard to articles of jewelry or ornament for his wife, unless they are articles suitable for his condition and his ability to pay. *Bennett v. Chamberlain*, 5 Harr. (Del.) 391.

The presumptive agency in fact of the wife, arising from cohabitation, does not extend beyond what may be regarded as suitable to the situation and condition in life of the parties, as said, *obiter*, in *Baker v. Carter*, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834.

Where goods furnished are not necessities according to a wife's station in life, the husband will not be held liable. *Dennys v. Sargeant*, 6 Car. & P. 419.

In determining whether there was an implied authority the suitability of the articles to the estate and degree of the wife may be considered. *Montague v. Espinasse*, 1 Car. & P. 356.

It was regarded as a question for the jury in *Jewsbury v. Newbold*, 40 Eng. L. & Eq. 518, whether goods very expensive in character were not on that account outside the authority of a wife to purchase when her husband was of the degree and state of the one at bar.

In *Freestone v. Butcher*, 9 Car. & P. 643, an action against a husband for a very large number of birds sold his wife, it was declared that, if the husband's income was small, and the wife's order extravagant, the jury will infer that there is no agency.

If it is notorious in the neighborhood that a wife is living beyond her husband's means, evidence to that effect will go to rebut the presumption of her agency in fact to buy goods on his credit. *Dennys v. Sargeant*, 6 Car. & P. 419.

6. Burden of proof.

It goes without saying that, since the right is in the husband to rebut the presumption of an agency in the wife, the burden to do so is upon him. *Clifford v. Laton*, 3 Car. & P. 15, *Moody & M.* 101; *Hardenbrook v. Harrison*, 11 Colo. 9, 17 Pac. 72; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421; *Bonney v. Perham*, 102 Ill. App. 634; *S. E. Olson Co. v. Youngquist*, 76 Minn. 27, 78 N. W. 870; *Harshaw v. Merryman*, 18 Mo. 106; *Keller v. Phillips*, 39 N. Y. 351.

But an unusual and undoubtedly erroneous 65 L. R. A.

doctrine is presented in a few cases, including *Spreadbury v. Chapman*, 8 Car. & P. 371, where the right of a merchant to recover against a husband for goods furnished his wife was held to rest upon the implied contract, with the burden on the merchant to show that the wife contracted the debt upon the authority of her husband, and with no obligation upon him to show that he gave the merchant notice not to supply his wife with goods. This case may, perhaps, be distinguished, however, by the fact that the goods, which were liquors, were purchased without her husband's knowledge by a wife who, it was known in the neighborhood, was addicted to the use of liquors in her husband's absence.

The tradesman takes the burden of showing express authority on the part of the wife to make the purchase, or of making proof of such facts and circumstances as will establish such authority by implication. *Compton v. Bates*, 10 Ill. App. 78.

When a third person gives a wife credit for necessities there can be no presumption that the husband is liable to pay for them, but the facts which render him liable must be averred. *Brown v. Worden*, 39 Wis. 432.

And the burden of proof is declared to be upon the party alleging the agency, in *Phillips v. Sanchez*, 35 Fla. 187, 17 So. 363.

VII. Authority implied from husband's assent to previous transactions.

As a foundation of the doctrine above shown (VI. b. 4), that a private revocation by the husband to the wife of his assent to her making purchases of general household supplies on his credit is not sufficient when he has in some way previously held her out as his agent for that purpose, are the cases holding that the payment by the husband of bills for goods previously purchased by the wife on his credit is regarded in the law as such a holding out by the husband of the wife as his agent as will bind him in subsequent similar transactions with tradesmen who act upon his apparent authority.

Several years dealing by the tradesman with a wife, and payment of the bills thus incurred, by the husband, bind him to pay for subsequent purchases made by his wife on his credit, in the absence of a notice by him forbidding such sales. *Keller v. Phillips*, 39 N. Y. 351.

If a husband should permit his wife to assume authority to pledge his credit, and should recognize his liability by paying the debt thus created, the law would imply, in favor of the same tradesman in cases of other purchases of like character, that she had power to bind him to the extent of this apparent authority, according to *Compton v. Bates*, 10 Ill. App. 78.

If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has the right to assume, in the absence of notice to the contrary, that the authority of the wife, which the husband has recognized, continues; the husband's quiescence is in such a case tantamount to acquiescence; in regard to a tradesman dealing with a wife for the first time, however, there can be no such holding out, according to an *arguendo* statement in *Debenham v. Mellon*, L. R. 5 Q. B. Div. 394, 49 L. J. Q. B. N. S. 497.

Although a husband amply supplies his wife

with articles necessary according to the condition in which he maintains her, he may render himself liable for articles purchased upon his credit if he clothes her with an ostensible agency, or an apparent authority to contract for goods on his credit by, for instance, paying such bills previously incurred. *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77.

So, if the husband in prior years paid the bills run by his wife for necessities, such as meat and vegetables, and there was no notice, actual or constructive, of the termination of the agency, then the tradesmen, by their long course of dealing with the wife, have the right to assume that the agency still continues. *Myers v. Filley*, 19 Montg. Co. L. Rep. 49.

If the husband has previously allowed his wife to make contracts on his credit for necessities, and has recognized them as binding, the law will then imply in subsequent similar transactions that she was acting as his agent, according to an *arguendo* statement in *Rea v. Durkee*, 25 Ill. 503.

The previous payment by a husband of bills for purchases of household supplies, made by his wife, is regarded as an implied holding out of her by the husband as his agent for that purpose, sufficient to charge him in similar subsequent transactions in the absence of express notice to the contrary to the tradesman. *Watts v. Moffett*, 12 Ind. App. 399, 40 N. E. 533.

A presumed agency of the wife to buy goods upon her husband's credit was held properly found in *Walling v. Hannig*, 73 Tex. 580, 11 S. W. 547, partly because the evidence showed that the wife had previously bought goods on credit from the same tradesman, for which the husband had paid.

So, the fact that the tradesman had previously dealt with the wife was held in *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713, to support the presumption of the wife's agency.

The facts that the wife and her husband had, before the purchase on credit by her of a watch for herself, traded with the merchant for a year or two, and that the husband had always been in the habit of allowing his wife to pledge his credit for household supplies, which bills he had paid without complaint, were with other facts proved, held to be a material consideration for the jury in determining whether the wife acted within the scope of her ostensible or actual agency when she bought the watch. *Johnson v. Briscoe* (Mo. App.) 79 S. W. 498. A watch is considered as a necessary in this case only on the theory as being, perhaps, necessary in order to equalize the wife in comfort with other women of her condition.

Evidence that a husband had previously paid to tradesmen bills for goods ordered by his wife was held admissible in *M'George v. Egan*, 7 Scott, 112, 5 Bing. N. C. 196, 3 Jur. 266, as evidence of the wife's authority to charge the husband with the education of a child living in the family, although the court admitted that it was a very slender case.

It is admitted as unquestionably true in *Manby v. Scott*, Sid. pt. 1, p. 109, 2 Smith, Lead. Cas. 450, that, if the wife buys any goods, and the husband does any act, precedent or subsequent, to show his assent, the husband shall be liable upon that,—if not upon assumption in law, yet by reason of his assumpsit in 65 L. R. A.

fact, whether the goods were bought for himself or family.

VIII. Liability of husband, by reason of estoppel or ratification, for wife's purchases upon his credit of articles for personal use.

The effect of ratification by the husband will be considered here only in regard to the wife's purchase of articles for herself, since the cases showing that his use of family supplies with knowledge that they were purchased upon his credit renders him liable therefor upon the principle of estoppel or ratification, are collected in III., *supra*.

There is no doubt that a subsequent ratification, express or implied, by the husband of the wife's purchases of articles for herself upon his credit, will bind him.

A subsequent ratification by the husband of purchases made by his wife on his credit was held equivalent to prior authority, in *Hardenbrook v. Harrison*, 11 Colo. 9, 17 Pac. 72.

It is said in *Seaton v. Benedict*, 5 Bing. 28, 2 Moore & P. 66, 6 L. J. C. P. 208, that, if a husband supplies his wife properly, she is not his agent for other articles of apparel purchased on his credit, unless he sees her wear the things purchased without disapproval.

Where the husband had allowed his wife to retain and wear a silk gown which she had purchased on his credit, he was held liable therefor on the ground of ratification, in *Graham v. Schleimer*, 28 Misc. 535, 59 N. Y. Supp. 689.

If a husband sees his wife wear articles purchased on his credit without disapprobation, he thereby makes himself liable therefor, as it is said, *obiter*, in *Wiler v. Fiegel*, 10 W. N. C. 240.

So, a husband was held liable to pay for bonnets purchased by his wife on his credit when he knew that she had them, and saw her wear them without expressing any disapprobation. *Ogden v. Prentice*, 33 Barb. 160.

And so, where a husband permits his wife to retain a plate of mineral teeth purchased by her on his credit, after the fact of its purchase came to his knowledge, he will be liable therefor. *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

If articles of jewelry are brought into the family with the husband's knowledge, and not returned, he will be chargeable therefor, according to *Bennett v. Chamberlain*, 5 Harr. (Del.) 391.

A husband living in the same house with his wife is liable to any extent for goods which he permits her to receive there, according to an *arguendo* statement by Lord Ellenborough in *Waithman v. Wakefield*, 1 Campb. 120, 10 Revised Rep. 654.

If a husband, after he became aware of purchases made by his wife upon his credit, approved, either directly or indirectly, of her act, he would be bound. *Jones v. Gutman*, 88 Md. 353, 41 Atl. 792.

If the husband saw and approved of dresses which his wife had purchased, knowing that she had no funds of her own, then the approval of her dresses would imply authority on her part to pledge his credit for them, since otherwise she could not obtain them, as the court charged the jury in *Morgan v. Chetwynd*, 4 Fost. & F. 451.

But the fact that a wife lives with her husband, and wears clothes in his presence pur-

chased on credit, was held in *Bentley v. Griffin*, 5 Taunt. 356, not to be sufficient to charge the husband therefor, when the evidence showed that she had directed her servant to put away some of the articles purchased so that the husband might not see them, and that, in the presence of him and of one of the tradesmen, she had said that he never paid her bills; she always paid her own.

Undoubtedly if a wife has a separate income or a sufficient allowance, the mere fact that the husband sees and approves of articles does not prove that he has given any authority to pledge his credit for them, as is said in *Morgan v. Chetwynd*, 4 Fost. & F. 451.

A subsequent promise to pay the bill will, of course, bind the husband. *Therlott v. Baglioni*, 9 Bosw. 578.

So, the promise of a husband to pay for articles of clothing purchased by his wife binds him therefor, although he did not know of the purchase at the time it was made, or that his wife at that time requested the tradesmen to refrain from calling upon her husband for payment as she wished to pay for the goods herself, according to *Day v. Burnham*, 36 Vt. 37.

And a promise by the husband to pay for goods purchased by his wife on his credit, although accompanied by a direction to sell her no more goods, was held to be a ratification of her purchase, even if she had not previous authority from him to make it, in *Conrad v. Abbott*, 132 Mass. 330.

A husband who objected to the employment of a physician for his sick wife, whereupon a son volunteered to assume the responsibility for payment, but who, when the physician came, made no objections, and gave no notice of his refusal to become liable, was held liable for the services rendered, for the reason that his silence in the presence of the physician was equivalent to an acknowledgment of his liability as head of the family. *Cothran v. Lee*, 24 Ala. 380.

The fact that a husband subsequently sells some of the goods purchased by his wife on credit, and takes the money, is material, although not conclusive, evidence as to his liability for them, when it appears that his wife has a separate allowance. *Freestone v. Butcher* 9 Car. & P. 643.

Whether there was subsequent approval upon the husband's part is a question for the jury. *Jones v. Gutman*, 88 Md. 355, 41 Atl. 792.

IX. When husband is an infant.

The fact that a husband is an infant makes no difference in his liability.

If he neglects to provide necessaries convenient and suitable to their station in life the wife may make the purchases, and though he dissent he shall, nevertheless, be liable for them; his assent will be presumed from the circumstance of cohabitation. *Dunbar v. Meyer*, 43 Miss. 670.

In some instances, however, the liability of an infant husband is placed upon the ground that a contract made by his wife for necessaries is the same as though made by himself, and therefore, being for necessaries, it cannot be avoided by him.

Thus, an infant is regarded as liable for necessaries furnished his wife, on the ground that it is the same as though they were furnished to himself, and, being a contract for necessaries, cannot be avoided by him on account of his minority, according to an *arguendo* state-
65 L. R. A.

ment in *Chapple v. Cooper*, 13 Mees. & W. 252, 13 L. J. Exch. N. S. 286.

So, necessaries for an infant's wife are necessaries for him. *Turner v. Trisby*, 1 Strange, 168.

An infant is liable for necessaries furnished his family on the ground that, although infants are not liable for contracts in general, made by them, they are liable for contracts which they make from necessity. *Cantine v. Phillips*, 5 Harr. (Del.) 428.

X. Money loaned wife to purchase necessaries.

There is a decided reluctance to permit a recovery in law against a husband on account of money borrowed by his wife for the avowed purpose of procuring necessaries.

A husband was held not liable for money loaned his wife with which to buy necessaries, on the ground that it might be misapplied. In *Marshall v. Perkins*, 20 R. I. 34, 78 Am. St. Rep. 841, 37 Atl. 301.

The statement of plaintiff's claim must set forth specifically what the necessaries were which were procured by the wife with the money loaned. *Donahue v. Tobin*, 11 Pa. Co. Ct. 496.

The rule that a husband may be charged for necessaries furnished his wife does not apply to a case where money is loaned her, as, in the absence of proof that the husband knew of or assented to the loan, it will not be presumed that he assumed responsibility for anything other than what he might have reasonably expected that the tradesman would furnish in the ordinary course of his trade. *Schwartz v. Bisland*, 4 Misc. 534, 24 N. Y. Supp. 700.

So, a husband was held not liable for money loaned his wife, although she expended it in the payment of debts for necessaries for which he would have been liable, and for her passage in going to him according to his direction; but the court was of the opinion that the money must be considered to have been advanced as a loan to the wife personally, notwithstanding the use to which she put it. *Knox v. Bushell*, 3 C. B. N. S. 334.

It is a question of fact for the jury whether advances made to a wife were made on account of her necessities, and under such circumstances that the same should be chargeable to the husband. *Wells v. Lachenmeyer*, 2 How. Pr. N. S. 252.

If, however, the money, or articles purchased with it, came in any way to his use, he may be held.

Thus, in *Jenkins*, 4, where it appeared that a wife received money on her husband's credit which came "to the use of her husband in a convenient or necessary way, although the husband did not command it, or consent afterwards, he is liable to this debt."

So, a husband is not chargeable for money borrowed by his wife to redeem clothes which she had pawned, unless he consents thereto, or unless the money received from pawning the goods came to his use. *Anonymous*, 2 Show. 283.

While, as above shown, the authorities are not in favor of a recovery at law against the husband, there is some authority that he may be charged in equity.

Thus, money borrowed by the wife and used by her for the purpose of being cured from sickness, concededly not recoverable at law against the husband, was held recoverable in equity, on the theory that the person loaning it stood in

the place of the person who provided the necessary medical attendance to the wife. *Harris v. Lee*, 1 P. Wms. 482, Prec. in Ch. 502.

And, although a wife agreed in writing not to incur any debt against her husband, he will be liable in equity to one who lent her money with which she obtained necessary medical and surgical attendance, which he refused to allow her, and of which she was in extreme need. *Reed v. Crissey*, 63 Mo. App. 184.

XI. *In absence of certainty as to whom credit was given.*

If a married woman living with her husband and children, and known to the tradesman, purchases groceries necessary for family use on credit, without expressly indicating that she makes the purchase on her personal responsibility, it will be presumed, in the absence of proof to the contrary, that she makes the purchase as the agent of her husband, and that he alone is liable to pay the bill. *Lindholm v. Kane*, 92 Hun, 369, 36 N. Y. Supp. 665.

Ordinarily, and in the absence of an express intention on the wife's part to assume the liability for the purchases made, the presumption of the law is that the husband is responsible for all articles needed to support his family. *Strong v. Moul*, 22 N. Y. S. R. 762, 4 N. Y. Supp. 299.

The presumption is that a married woman who purchases groceries for the use of the family does so as the agent of her husband, in the absence of an agreement on her part to become personally responsible for the indebtedness. *Bradt v. Shull*, 46 App. Div. 347, 61 N. Y. Supp. 484.

A married woman living with her husband cannot be held liable for the necessities of life furnished her, unless she expressly agrees to pay therefor, and they are furnished on her credit; the right of recovering, if any exists, is against the husband. *Nelson v. O'Neal*, 11 Ind. App. 296, 39 N. E. 207.

A promissory note given by the wife for family supplies purchased by her in the lifetime of her husband and while he was providing for his family is utterly without consideration and void, it being a promise to pay his debt, which she was under no legal, equitable, or moral obligation to pay, in the absence of some special agreement between the parties by which they are sold to the wife for her exclusive use and upon the credit of her separate property. *Smith v. Allen*, 1 Lans. 101.

If the evidence fails to disclose an intention on the part of the wife to become personally liable upon a contract for a servant's services to be performed in the family of the husband, it will be considered that the contract of employment was with the husband, and he will be held liable thereon. *Winkler v. Schlager*, 64 Hun, 83, 10 N. Y. Supp. 110.

XII. *Statutes.*

In a number of states statutes have been passed affecting this question generally or specifically.

In Georgia it is declared by the legislature that the husband is bound to support and maintain his wife, and that his consent shall be presumed to her agency in all purchases of necessities suitable to her condition and habits of life, made for the use of herself and family; and that this presumption may be rebutted.

According to the Minnesota statute, no married woman shall be liable for any debts of her 65 L. R. A.

husband; nor shall any married man be liable for any debts or contracts of his wife, entered into with her before or during coverture except for necessities furnished to the wife after marriage, where he would be liable at common law.

The statutory provisions regulating the rights and liabilities of married women were held, in *Flynn v. Messenger*, 28 Minn. 208, 41 Am. Rep. 279, 9 N. W. 759, not to change the common-law obligation of the husband to support and maintain his family, nor take away from the wife the presumption of authority arising out of the marital relation to act in his behalf in supplying the ordinary wants of his household; so that, if a tradesman dealing with a wife knows that she is a married woman living with her husband, and her order is of a character to indicate that it is intended for the benefit of the family, the tradesman is bound to presume that she is acting for her husband, and cannot hold her personally liable unless she expressly agrees to become so. In the case at bar the wife employed a seamstress to sew by the day, for the payment of which services the action was brought.

So in *Wagner v. Nagel*, 33 Minn. 348, 23 N. W. 308, it was held that the common-law rule in regard to the presumed authority of the wife to act for her husband in ordinary domestic matters is not changed by the statutes relating to the rights and liabilities of married women; and that it is within the presumed authority of the wife to act for her husband, to employ a servant for ordinary domestic service in their family.

Under the Kentucky statute, which provides that the husband shall be liable for necessities furnished to the wife after marriage, a husband, in *Towery v. McGaw*, 22 Ky. L. Rep. 155, 56 S. W. 727, 982, was held entitled to no claim for reimbursement out of his wife's estate for the amount paid for medical attendance and care of his wife during her last illness.

In New York it is provided that a contract made by a married woman does not bind her husband or his property.

But this provision has been held not to change the common-law liability of the husband for necessities purchased by his wife, on the ground that in the purchase of such articles she acts as the agent of her husband. *Ruhl v. Heintze*, 89 N. Y. Supp. 1031.

And in *Grandy v. Hadcock*, 85 App. Div. 173, 83 N. Y. Supp. 90, an action against a wife for the rent of a dwelling house, the court states that the common-law duty of a husband to support his family has not been changed by legislation relating to married women; that the liability for necessities furnished to the family of a married man is presumptively and primarily upon the husband, unless the wife, by express agreement, charges herself personally with the same.

So, the statute providing that a married woman may make contracts and enjoy all the rights in respect to her property as if she were unmarried was held, in *Graham v. Schleimer*, 28 Misc. 535, 59 N. Y. Supp. 689, not to absolve the husband from liability for such articles as she may purchase for herself, provided they are suitable in quantity and quality to the station of the wife in life, the means of her husband, and the manner in which he permits her to live.

And in holding that a married woman was not

liable, in the absence of an express intention on her part to become so, for articles of clothing purchased by her on credit, it was stated in *Kegney v. Ovens*, 18 N. Y. S. R. 482, 2 N. Y. Supp. 319, that the common-law rule that a married woman living with her husband is presumed to have authority from him to order such goods as are ordinarily required for family use is not changed by the statute regulating the rights and liabilities of married women; and that, if the party dealing with the wife knows that she is a married woman living with her husband, and the order is of a character to indicate that it is for the benefit of her husband's family, the tradesman is bound to presume that she is acting for her husband, and cannot hold her personally liable unless she expressly agrees to become so.

It is said in *Keller v. Phillips*, 39 N. Y. 351, *arguendo*, that modern legislation in preserving to the wife all her own property has taken away some of the ground upon which the duty of the husband was placed by common law; but that it has not yet gone so far as to invest the wife with a discretion which the husband cannot control, and enable her to spend his money, or involve him in debt, against his will.

According to *Cook v. Ligon*, 54 Miss. 368, the Mississippi statute granting immunity to the husband from the wife's debts contracted after marriage does not relieve him from his primary liability for purchases of necessary household supplies made by her, unless she consents to herself become liable therefor.

Other statutes regulating the rights of married women have been held not to interfere with the common-law liability of the husband for necessities purchased by his wife on his credit.

Thus, it was held in *Kooker v. Williams*, 3 Pa. Dist. R. 446, that, although the act of 1887 provides that a married woman shall be capable of rendering herself liable upon any contract for necessities the same as if she were a *feme sole*, in order to bind her separate estate, even under this statute, it must be shown, as heretofore, that she acted in her own right, for the reason that the primary presumption is that, when a wife obtains necessities for the family of the husband and herself, that she is acting as his messenger or agent, as on him lies the primary duty of furnishing and paying for them.

And in *Moore v. Copley*, 165 Pa. 204, 44 Am. St. Rep. 664, 30 Atl. 829, an action against a married woman for a physician's services rendered to herself and children, the court, in reversing the judgment against her, said, in discussing the husband's liability for the debt, that, while the power of a husband over the separate estate of his wife has been taken away by statute, his liability for her support and that of his children remains; that he is liable for necessities furnished to them whether with or without his knowledge, his wife not being liable unless she expressly undertakes to become so; and that her undertaking is never presumed, but must be shown affirmatively.

So, in *McMillan v. Auerback*, 7 Ohio N. P. 376, 3 Ohio S. & C. P. Dec. 688, an action against a married woman living with her husband for goods sold to her for the use of the family, it was held that the common-law rule that a married woman living with her husband is presumed to have authority from him to order such goods as are ordinarily required for family use is not changed by the statutes regulating

the rights of married women; so that, when a married woman living with her husband purchases articles for family use, she is not personally liable, unless she expressly agrees to become so.

The statutes enacted in regard to the rights and liabilities of married women do not change the peculiar incidents of the marital relation so as to bind the wife for the price of necessities purchased by her, unless she voluntarily assumes a personal responsibility. *Wilson v. Herbert*, 41 N. J. L. 454, 32 Am. Rep. 243.

Notwithstanding the changes wrought by statute in regard to a wife's separate property, the rule is not changed as to the primary duty of the husband to provide for the support of his family. *Hentze v. Marjenhoff*, 42 S. C. 427, 20 S. E. 278.

The court states, *arguendo*, in *Christmas v. Smith*, 10 Tex. 123, that under laws where the husband has the active administration and disposition of all community property, and is in receipt of the proceeds of the separate property of the wife, it is reasonable that he should at least be primarily liable for all charges incurred during the marriage for necessities for his wife and children, provided the proceeds of such property in his hands are sufficient for the discharge of such expenses.

In California, Montana, Nevada, North Dakota, Ohio, and Oklahoma acts have been passed to the effect that, if the husband neglects to make adequate provision for the support of his wife, any other person may in good faith supply her with the articles necessary for her support, and recover the reasonable value thereof from the husband, unless it appears that the wife has abandoned the husband without cause.

In Colorado, Illinois, Iowa, Oregon, Utah, and Washington it has been provided that the expenses of the family are chargeable upon the property of both husband and wife, or of either of them, and, in relation thereto, they may be sued jointly or separately. In Alabama and Pennsylvania suit is brought against both husband and wife; but the husband's property must be first exhausted before execution may be had against the wife. And in Arizona execution is levied, first, upon the common property, second upon the separate property of the husband, third, upon the separate property of the wife. And in Nebraska the wife is surety only for her husband for the payment of necessities. Her separate estate is not chargeable until execution therefor against the husband is returned unsatisfied.

Under the Illinois statute providing that the expenses of the family shall be chargeable upon the property of both husband and wife, or either of them, etc., where parties were living together as husband and wife the reputed husband was held liable for groceries purchased, although they were purchased by the reputed wife, in *Hoyle v. Warfield*, 28 Ill. App. 628. The decision in this case was followed in *Warrington v. Anable*, 84 Ill. App. 593, to the effect that where husband and wife are living together the husband is liable for the family expenses, although goods may have been ordered by the wife alone.

In *Gaffield v. Scott*, 40 Ill. App. 380, the common-law doctrine of the agency of the wife binding the husband in ordinary domestic matters is declared to have become unimportant in Illinois on account of the statute making both

husband and wife responsible for family expenses.

But in *Hudson v. Sholem*, 65 Ill. App. 61, the statute is declared not to change the liability of the husband, except that he may be held jointly with the wife for family expenses; but that, when he is sued with her, it must be shown that the cause of action is within the statute; if it is not he may be liable separately, but cannot be held liable jointly with her; the statute merely imposes a liability upon the wife by which she may be held severally or jointly with her husband, who otherwise would, alone, be responsible.

The Iowa statute providing that the expenses of the family are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or severally, was declared in *Devendorf v. Emerson*, 66 Iowa, 698, 24 N. W. 515, to have evidently been enacted for the purpose of subjecting the property and means of both husband and wife to the support of the family so far as necessary for that purpose, so that they cannot, by each holding family property, or by transferring it from one to the other, avoid the payment of debts contracted by either for family expenses; and the court remarks that such a provision of the law is a just and reasonable one, serving to protect the tradesman who in good faith furnishes goods for family use, and authorizing him to look either to the husband or wife for payment, without any investigation as to which of them is the owner of the family property. In this case it was contended that a husband who, in writing, had forbidden a tradesman to sell goods to his wife on credit was, nevertheless, liable under the statute for goods subsequently so purchased by her, although it did not appear that he failed otherwise to furnish the necessary supplies; but the court, in refusing to hold the husband liable, said that there was no statute in the state which denied the husband the right to make the necessary purchases of such persons as he saw fit, and that the statute in question demanded no such construction as would empower a tradesman to promote and aggravate disagreements between husband and wife.

According to *O'Connor v. Chamberlain*, 59 Ala. 431, the statute in Alabama declaring a

liability upon the separate estate of a married woman for articles of comfort and support of the household and for the tuition of the children of the wife, suitable to the degree and conditions in life of the family, and for which the husband would be responsible at common law, to be enforced by action at law against the husband, or husband and wife jointly, with execution taken out against the husband and returned unsatisfied before proceeding against the wife, requires a fixing of the liability of the husband according to the common-law rules regulating his responsibility for the support and maintenance of his wife, and execution against him, returned unsatisfied before her separate estate, can be proceeded against under the statute. "It is the common-law liability of the husband which is to be enforced, and not another new and distinct liability."

So, in *Gayle v. Marshall*, 70 Ala. 522, it is reiterated that, in order to fasten a liability on the wife's separate estate under the statute, there must first exist the common-law responsibility of the husband for necessities supplied the wife.

According to *Wireman v. Ervin*, 8 W. N. C. 237, under the Pennsylvania act of 1848 it must be alleged that the goods were ordered by the wife; then both husband and wife must be sued, as the husband is liable for necessities ordered by the wife, inasmuch as the law implies that she bought as his agent, and he has the right to plead and answer the demand.

And in *Markley v. Wartman*, 9 Phila. 236, notwithstanding the wife had been decreed a *feme-sole* trader, this was held not to relieve the husband from his liability for necessities furnished his wife for the support of the family, under the statute providing that for such debts the creditor may sue both husband and wife; and, after exhausting the husband's estate, he may have execution of the wife's.

It was held, incidentally, in *Noreen v. Hansen*, 64 Neb. 858, 90 N. W. 937, that, under the Nebraska statute, the liability of a wife for necessities furnished to her family is secondary; that she is a surety for her husband, and that the cause of action does not arise against her until an execution based upon the judgment against her husband has been returned unsatisfied. M. M. M.

MICHIGAN SUPREME COURT.

Burwell HINCHMAN

v.

PERE MARQUETTE RAILROAD COMPANY, *Plff. in Err.*

(.....Mich.....)

1. A railroad company may be found negligent in permitting the emission of

steam from an engine in the highway at a railroad crossing at a time when a traveler is attempting to drive a horse across the track, if the one in charge of the engine could foresee and prevent such emission.

2. That an injury to one attempting to drive a horse across a railroad track would not have happened but for the unsnapping of a line does not relieve the railroad company from liability for the

NOTE.—For a case in this series holding that where, by the negligent blowing off of a gas well, a teamster's horses become frightened, and, in attempting to control them, a line breaks, and he is injured, the proximate cause of the injury is the blowing off of the well, see *Snyder v. Philadelphia Co.* 63 L. R. A. 896.

As to liability of railroad company generally 65 L. R. A.

for frightening horses by escape of steam or blowing of whistle, see also, in this series, *Sellick v. Lake Shore & M. S. R. Co.* 18 L. R. A. 154; *Bittle v. Camden & A. R. Co.* 23 L. R. A. 283; *Omaha & R. Valley R. Co. v. Clarke*, 23 L. R. A. 504; *Mitchell v. Nashville, C. & St. L. R. Co.* 40 L. R. A. 426; and *Kentucky & I. Bridge Co. v. Montgomery*, 57 L. R. A. 781.

injury, if the horse was frightened by defendant's negligence, and the unsnapping of the line was caused by its rearing because of the fright.

3. The mere fact that an engine is within the limits of the highway more than five minutes does not make its presence wrongful, so as to charge its owner with responsibility for injuries caused by steam emitted from it, regardless of the question of negligence, if it does not obstruct the highway, under a statute forbidding the obstruction of any street or highway by cars or trains for more than five minutes at any one time.
4. A railroad company does not, by obstructing a highway with an engine contrary to the provisions of the statute, become liable for injuries to persons attempting to use the highway, which are caused by the emission of steam from the engine, if such emission does not result from its negligence, or have any relation to its wrongful act.
5. Negligence will prevent one injured while attempting to drive over a crossing obstructed by an engine from holding the railroad company liable for the accident, although his act was not foolhardy.
6. The assumption of facts by counsel in argument to the jury, which are not in evidence, is improper.
7. Counsel must not, in argument, attempt to convey to the jury suggestions as to what impression excluded evidence would have made upon them.

(April 19, 1904.)

ERROR to the Circuit Court for Berrien County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Victor M. Gore, with **Mr. Frederick W. Stevens**, for plaintiff in error:

The defendant is not liable for frightening horses by noises necessarily incident to the operation of its engines and cars; and, before a recovery can be permitted, the plaintiff must prove that the volume of steam and the noise were unusual and unnecessary.

Scaggs v. Delaware & H. Canal Co. 145 N. Y. 201, 39 N. E. 716; *Duvall v. Baltimore & O. R. Co.* 73 Md. 516, 21 Atl. 496; *Philadelphia, W. & B. R. Co. v. Burkhardt*, 83 Md. 516, 34 Atl. 1010; *Riley v. New York, P. & N. R. Co.* 90 Md. 53, 44 Atl. 994; *Louisville, N. A. & C. R. Co. v. Schmidt*, 134 Ind. 16, 33 N. E. 777; *Whitney v. Maine C. R. Co.* 69 Me. 208; *Abbot v. Kalbus*, 74 Wis. 504, 43 N. W. 367; *Cahoon v. Chicago & N. W. R. Co.* 85 Wis. 570, 55 N. W. 900; *Omaha & R. Valley R. Co. v. Clark*, 35 Neb. 867, 23 L. R. A. 504, 53 N. W. 970; *Wilson v. New York C. & H. R. R. Co.* 41 App. Div. 36. 58 N. Y. Supp. 617. 45 L. R. A.

The proximate cause of the accident was the fact of the right line becoming unfastened from the bridle.

Louisville Mut. Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 284; *McClary v. Sioux City & P. R. Co.* 3 Neb. 44, 19 Am. Rep. 631; *Beall v. Athens Twp.* 81 Mich. 536, 45 N. W. 1014; *Bartlett v. Boston Gaslight Co.* 117 Mass. 533, 19 Am. Rep. 421; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Tutein v. Hurley*, 98 Mass. 211, 93 Am. Dec. 154; *Marble v. Worcester*, 4 Gray, 395; *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 569, 20 N. W. 320; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 73; *Powers v. Thayer Lumber Co.* 92 Mich. 533, 52 N. W. 937; *Louisville & N. R. Co. v. Kelsey*, 89 Ala. 287, 7 So. 648; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070.

The burden is upon the plaintiff to show some negligent act or negligent omission of the defendant, resulting in his injury.

The escapement of steam from the safety valve was not "an essential link in the chain of causation." The accident to the line was an intervening event, not to be anticipated in the natural and ordinary course of events.

Shearm. & Redf. Neg. 5th ed. § 32.

The unsnapping of the line from the bridle is an accident pure and simple, for which the defendant is not to blame.

Grand Rapids & I. R. Co. v. Judson, 34 Mich. 506; *Quincy Min. Co. v. Kitts*, 42 Mich. 40, 3 N. W. 240; *Marquette, H. & O. R. Co. v. Kirkwood*, 45 Mich. 51, 40 Am. Rep. 453, 7 N. W. 209; *Brown v. Congress & B. Street R. Co.* 49 Mich. 153, 13 N. W. 494; *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236, 38 Am. Rep. 566, 16 N. W. 388; *Early v. Lake Shore & M. S. R. Co.* 66 Mich. 349, 33 N. W. 813; *Werhowsky v. Ft. Wayne & E. R. Co.* 86 Mich. 236, 24 Am. St. Rep. 120, 48 N. W. 1097; *Toomey v. Eureka Iron & Steel Works*, 89 Mich. 249, 50 N. W. 850; *Robinson v. Charles Wright & Co.* 94 Mich. 283, 53 N. W. 938; *Redmond v. Delta Lumber Co.* 96 Mich. 545, 55 N. W. 1004; *Guilloz v. Ft. Wayne & B. I. R. Co.* 108 Mich. 41, 65 N. W. 666; *Vogt v. Michigan Peninsular Car. Co.* 112 Mich. 504, 70 N. W. 1103; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744.

Mr. James O'Hara, for defendant in error:

The statutes of this state prohibit the obstruction of public streets by cars or trains for more than five minutes at any one time.

Comp. Laws 1897, § 6234, subdiv. 5.

This engine being in the highway, great

precaution should have been taken by the engineer to avoid the escape of steam, and the frightening of horses caused thereby. He did nothing of the kind. If, for purposes of sport, he caused this steam to escape, then the company is liable for any injury caused thereby.

Nashville & C. R. Co. v. Starnes, 9 Heisk. 52, 24 Am. Rep. 296; *Chicago, B. & Q. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; 7 Am. & Eng. Enc. Law, 2d ed. p. 826; 20 Am. & Eng. Enc. Law, 2d ed. p. 169; *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426, 21 L. R. A. 278, 56 N. W. 9; *Lucas v. Michigan C. R. Co.* 98 Mich. 1, 39 Am. St. Rep. 517, 56 N. W. 1039; *Redson v. Michigan C. R. Co.* 120 Mich. 671, 79 N. W. 939; *Texas & P. R. Co. v. Seoville*, 27 L. R. A. 179, 10 C. C. A. 479, 23 U. S. App. 506, 62 Fed. 730; *Galveston, H. & S. A. R. Co. v. Zantzeinger*, 93 Tex. 64, 47 L. R. A. 282, 77 Am. St. Rep. 829, 53 S. W. 379; *Mechem, Agency*, §§ 740, 741; *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 46 L. R. A. 314, 71 Am. St. Rep. 729, 54 N. E. 471; *Pierce v. North Carolina R. Co.* 124 N. C. 83, 44 L. R. A. 316, 32 S. E. 399; 2 Thomp. Neg. § 1910; *Baltimore Consol. R. Co. v. Pierce*, 89 Md. 495, 45 L. R. A. 527, 43 Atl. 940; *Andrews v. Mason City & Ft. D. R. Co.* 77 Iowa, 669, 42 N. W. 513; *Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387, 8 L. R. A. 464, 21 Am. St. Rep. 840, 24 N. E. 658; *Dorsey v. Kansas City, P. & G. R. Co.* 104 La. 478, 52 L. R. A. 92, 29 So. 177; *Oates v. Metropolitan Street R. Co.* 168 Mo. 535, 58 L. R. A. 447, 68 S. W. 906; *Alsever v. Minneapolis & St. L. R. Co.* 115 Iowa, 338, 56 L. R. A. 748, 88 N. W. 841.

Unnecessarily standing in the highway as he was, and knowing, as he did, that steam would escape through this pop valve when the pressure reached 140 pounds, and knowing that he could reduce the pressure in the manner aforesaid, and that an explosion of steam through this valve when the engine was on the highway would scare horses of ordinary gentleness, and that Hinchman was about to cross,—it became and was the engineer's duty to have done something to prevent an escape of steam, or at least to have warned the plaintiff of the danger.

Presby v. Grand Trunk R. Co. 66 N. H. 615, 22 Atl. 554; *Louisville, N. A. & C. R. Co. v. Schmidt*, 147 Ind. 638, 46 N. E. 344; *Kalbus v. Abbot*, 77 Wis. 621, 46 N. W. 810.

If the steam escaped because of the wilful and wanton act of the engineer, then it matters not whether plaintiff was in the exercise of due care or not.

7 Am. & Eng. Enc. Law, 2d ed. p. 443; 65 L. R. A.

Indianapolis Union R. Co. v. Boettcher, 131 Ind. 82, 28 N. E. 551; *Bouwmeester v. Grand Rapids & I. R. Co.* 63 Mich. 557, 30 N. W. 337; *Battishill v. Humphreys*, 64 Mich. 514, 38 N. W. 581; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185.

The proximate cause of the injury was the negligence of the defendant in permitting steam to escape, which frightened the horse.

Phillips v. New York C. & H. R. R. Co. 127 N. Y. 657, 27 N. E. 978; *Putman v. New York C. & H. R. R. Co.* 47 Hun, 439; *Patchen v. Walton*, 17 App. Div. 158, 45 N. Y. Supp. 145; *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 375, 18 L. R. A. 154, 53 N. W. 556; *Needham v. King*, 95 Mich. 303, 54 N. W. 891; *Simons v. Casco Twp.* 105 Mich. 588, 63 N. W. 500; *White v. Riley Twp.* 113 Mich. 295, 71 N. W. 502; 21 Am. & Eng. Enc. Law, 2d ed. p. 495.

Carpenter, J., delivered the opinion of the court:

Plaintiff brings this suit to recover compensation for personal injuries. He recovered a verdict and judgment in the court below. His claim, as appears from his testimony, may be stated as follows: On the afternoon of September 24, 1900, he was traveling with his wife in a carriage on a highway which crossed defendant's road. When he reached this crossing he found it obstructed by one of defendant's engines. He waited about ten minutes, and then asked the engineer to move. The engineer replied, "We don't have to," but subsequently he moved the engine, not from the highway, but so that its nearest point (the tender) was "something over 10 feet" distant from the plank crossing. Plaintiff told the engineer that he was still in the road, but the engineer replied, with an oath, "Why don't you cross?" Plaintiff then attempted to cross, but just as he got "to the edge of the planking," steam was emitted from the engine, the horse threw up his head and reared, "the right line unsnapped," and plaintiff jumped, and caught the bridle of his horse, the horse spun around and threw him, and he was injured. The evidence of the plaintiff did not indicate with any certainty just what caused the emission of the steam, and defendant's engineer testified positively that he did no act to occasion its emission. It also appeared that there was an automatic safety valve, through which the steam which frightened plaintiff's horse might have been emitted.

It is the contention of the defendant that we are bound to assume that the emission of the steam was through the automatic safety valve, and numerous authorities are cited to the proposition that such emission is not negligence. There was testimony from

which the jury might have inferred that, though the steam was emitted from the automatic safety valve, its emission could have been prevented by appliances under control of defendant's engineer, and that defendant's engineer could have foreseen this emission, and have provided against the consequences by moving his engine farther from the crossing. From this evidence, we think that the jury might infer negligence.

It is contended that the proximate cause of plaintiff's injury was the fact that this line became unfastened, and not the negligent emission of the steam. It is not contended that the line became unfastened in consequence of plaintiff's negligence. The verdict of the jury negatives any such claim. But as plaintiff testifies that he would not have been injured "if that line had not come unsnapped," it is contended that the unsnapping of the line is the sole proximate cause of his injury. Defendant's argument assumes that the unsnapping of the line was not a result of its negligence. If it was, then, on principle and authority, such unsnapping would not lessen its liability. *McKeller v. Monitor Twp.* 78 Mich., at page 488, 44 N. W. 412; *Putman v. New York C. & H. R. R. Co.* 47 Hun, 439. We are unable to agree with defendant in the proposition that we are bound to assume that this unsnapping did not result from its negligence. According to the testimony of the plaintiff, he had been able to control his horse for ten minutes by the use of this line. When the steam was emitted, the horse threw his head up, and the line unsnapped. We are unable to see why a jury could not infer from this evidence that defendant's negligence, by frightening the horse, caused the line to unsnap. But assuming that neither plaintiff's negligence nor defendant's negligence caused the line to unsnap, we cannot agree with defendant that the unsnapping of the line thereby became the sole cause of plaintiff's injury, and consequently relieved defendant from all liability. Because the line unsnapped, plaintiff jumped from his buggy and seized his horse by its bridle, and the horse spun him around and threw him, not merely because the line was unsnapped, but because the horse was still frightened, as a result of defendant's negligence. We think we go quite as far as we are warranted in holding, under this hypothesis, that plaintiff's injury resulted from two causes, viz., the unsnapping of the line and defendant's negligence. We think it clear that under such circumstances defendant is responsible. In *Phillips v. New York C. & H. R. R. Co.* 127 N. Y. 657, 27 N. E. 978, defendant's employees, in lowering a gate, hit a horse attached to a vehicle. The horse became frightened and ran away. The court said: 65 L. R. A.

"It may be assumed that the plaintiff would have escaped injury if the rein had not broken. . . . The jury specifically found that the gate was then being lowered, and it did hit the horse; and it may be assumed that they also found that this rendered the horse unmanageable, and caused the situation from which resulted the calamity, although the immediate cause may have been the inability of the driver to control the course of the horse, occasioned by the breaking of the rein, thus causing or permitting him to make so short a turn as to upset the wagon and throw the plaintiff out of it. The facts so found may have been a proximate cause of the injury, and it may be that they produced a condition which required strong reins for protection against the injury which followed. This was not, therefore, necessarily attributable solely to the breaking of the rein, which may have been one of two proximate causes; and in that view, if the latter occurred without fault of the plaintiff, she would not be denied the right to recover." In *Hunt v. Pownall*, 9 Vt. 411, plaintiff, while traveling on a highway, was injured as a result of two joint causes, viz., the insufficiency of a nut or bolt on the carriage (not chargeable to plaintiff's negligence), and the neglect of defendant to keep its highway in suitable repair. The court, speaking through Mr. Justice Redfield, said (p. 418): "The loss, then, is the combined result of accident and of defendants' neglect to repair the road. We think, under such circumstances, the defendants are liable for the loss. It is no doubt true that, had the accident not occurred, no damage would have been sustained. And had the defendants performed their duty the same result would have followed."

Defendant contends that this conclusion is opposed to numerous authorities. Among others, he cites three Michigan cases, *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; *Beall v. Athens Twp.* 81 Mich. 536, 45 N. W. 1014, and *Powers v. Thayer Lumber Co.* 92 Mich. 533, 52 N. W. 937. In *Lewis v. Flint & P. M. R. Co.* plaintiff, a passenger on the defendant railway, was carried past his station on a dark night. On leaving the train he was misinformed by the conductor as to his whereabouts, but he soon discovered where he was, and started for his home. In crossing a cattle guard, his eyes deceived him, his foot slipped, he fell, and was seriously injured. It was held that the defendant's negligence in carrying him past the station and in misinforming him as to his whereabouts was not the proximate cause of his injury. In that case the wrong of the defendant had only this to do with the plaintiff's injury: It led to his being

in the position he was, where he was injured by another cause. In this case, however, the force which injured plaintiff resulted directly from defendant's wrong. In *Beall v. Athens Twp.* plaintiff's horse became frightened at a log, not in, but alongside, the highway. He shied, plaintiff struck him with the whip, he sprang forward, and went down an embankment, upsetting the buggy and injuring plaintiff. To show the question involved and its disposition, we quote from the opinion: "The important question in the case is whether the narrowness of the highway and the neglect to place railings or barriers along it primarily caused the accident. The township is only liable where the neglect complained of was the proximate cause of the injury. If such neglect was the secondary or remote cause, the township is not liable. The testimony shows conclusively, and without contradiction, that the primary cause of the accident arose from the horse taking fright at a log at the side of the road, and the act of the driver in striking the horse a blow with his whip." This reasoning—and in accordance therewith the case was decided—is not helpful to defendant, but is distinctly helpful to plaintiff, in the case at bar. It leads to the conclusion that the fright of the horse—the direct result in this case of defendant's wrong—was the primary cause of plaintiff's injury. In *Powers v. Thayer Lumber Co.* plaintiff's intestate, a brakeman on defendant's railroad, was riding on a train of logs loaded by himself. One of these logs came in contact with a tree standing close to the railroad. A piece fell from it, and killed him. He knew of this tree, and it was his duty so to load his train as to avoid the collision which occurred. It was held that the defective loading, for which he alone was responsible, was the proximate cause of the injury. No argument is necessary to show that this case is clearly distinguishable from the case at bar.

Defendant cites many decisions from other courts. Some of these (see *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264) are like the case of *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744, and therefore, as we have already shown, are clearly distinguishable. Others relate to the liability of one who negligently starts a fire, for the spreading of that fire. These cases have, at most, a remote bearing on the case at bar. If they have any, the liability of the wrongdoer, as settled in this state by *Hoyt v. Jeffers*, 30 Mich. 181, furnishes an argument which supports plaintiff's contention.

The only case cited by defendant's counsel

which needs distinguishing from the case at bar, in our judgment, is the case of *Marble v. Worcester*, 4 Gray, 395. In that case, a horse being driven on the highway became frightened at a defect in the highway, broke loose from the vehicle, and, after running over 50 rods, injured plaintiff, who was traveling on the highway in the exercise of due care. It was held, in a majority opinion written by Chief Justice Shaw, that this injury was not a proximate result of defendant's neglect to keep the highway in suitable condition; the court basing its decision upon "the remoteness and distance between the alleged defect in the highway and the place where the injury occurred," and "the entire want of connection of the plaintiff with the horse and sleigh and the accident which happened to them." For the purposes of this case, we are not called upon either to approve or disapprove this reasoning. It is sufficient to say that it clearly has no application to the case at bar. In deciding the case, however, the court laid down this rule, which is relied upon by defendant: "The general rule of law, we understand, is that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether, without the concurrence of both, it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence, so that it cannot be attributed to that cause for which he is answerable." This statement was no necessary part of the decision, and we do not think it supported by authority. Our own decisions, holding the employer responsible for injuries to an employee, resulting from the concurrent negligence of himself and a fellow servant (see *Town v. Michigan C. R. Co.* 84 Mich., at pages 221, 222, 47 N. W. 665; *Hayes v. Stearns*, 130 Mich., at pages 292 *et seq.*, 89 N. W. 947), are opposed to this principle.

We forbear any discussion of defendant's contention that plaintiff was, as a matter of law, guilty of contributory negligence. We think its argument rests upon the assumption that the jury were bound to believe defendant's testimony, and to discredit the testimony of plaintiff himself. We cannot, as a matter of law, say that the jury could not credit plaintiff's testimony, no matter how many witnesses contradicted him.

In charging the jury, the court said: "Now, if the engine had been standing in the highway for more than five minutes, and was then standing upon the highway at the

time the plaintiff crossed, any emission of steam through the safety valve of this engine by the act or permission of the engineer would be an act of negligence; and, even if it were a fact that the engineer could not control or govern the amount of steam pressure upon the valve, or control the amount of steam generated, that would be no defense at law whatever. In other words, in that case the engine would be upon the highway unlawfully, and the engineer must take the consequences in case steam was emitted. The law would not recognize any defense, in such case, of the emission of steam by which the party crossing the track would be injured, unless the driver—the person crossing the track—was careless himself." It is apparent from this language—and this is made more certain by other portions of the court's charge—that the jury were instructed that defendant was responsible for injuries resulting from any emission of steam, regardless of negligence, if the engine was on the highway more than five minutes. We think this was clearly error. In giving this charge the trial court must have assumed that the law of this state prohibited an engine standing upon the highway more than five minutes. This is a mistake. Comp. Laws 1897, § 6234, subdiv. 5, provides that the railroad shall not "obstruct any public highway or street by cars or trains for more than five minutes at any one time." The court could not, as a matter of law, say that, because the engine was within the limits of the highway, it obstructed the crossing. See *Lewless v. Detroit, G. H. & M. R. Co.* 65 Mich., at page 295, 32 N. W. 790. Plaintiff's counsel suggests that the charge is correct because, before the engine moved, it had obstructed the crossing for more than five minutes. This argument will not stand analysis. The responsibility of defendant for emitting the steam must depend upon the circumstances then existing, and not upon those which had formerly existed.

There is, however, a more serious vice in this charge. If defendant's engine, 11 feet from the crossing, constituted an unlawful obstruction, defendant would be responsible only for injuries resulting proximately from its unlawful act or from some other wrong done by it. See *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744. The charge violates this principle. It makes defendant responsible for injuries caused by the emission of steam, though that emission did not result from its negligence or have any relation to its wrongful obstruction of the crossing. It cannot be contended that *Young v. Detroit, G. H. & M. R. Co.* 56 Mich., at page 435, 23 N. W. 69, justified the charge. We there held: "It was the

duty of the railroad company not to obstruct the traveled portion of the highway at the crossing by placing cars thereon and permitting them to remain an unreasonable time. If it did not discharge this duty resting upon it in this respect, the defendant is liable to the plaintiff for damages arising from any injury which was the direct consequence of such negligence."

In charging the jury respecting the plaintiff's care, the court said: "Now, gentlemen, you will scrutinize carefully this question with regard to the care of plaintiff in driving across that track, and determine whether, on his part, it was a foolhardy act or not to drive that horse at the time and in the manner he did, and under the circumstances, across that track." The jury would naturally infer from this language that though plaintiff was negligent, and that negligence contributed to his injury, if his act was anything less than foolhardy he might recover. We need cite no authority to prove that this is wrong.

In his argument to the jury, plaintiff's counsel said: "We have not heard the sound of the fireman's voice, but he is still living and in the employ of the company in this state. . . . The fireman's testimony might possibly be of some benefit to somebody, gentlemen. If the testimony of the fireman would have a tendency to be of benefit to this defendant, then the fireman is still in their employ. He was there that day. He saw what happened. If his testimony would be beneficial to the defendant, he would be here to testify, would he not? Haven't we a right to infer that?" There was no testimony that the fireman was still in the employ of the company, and the foregoing argument was therefore improper.

Plaintiff's counsel also stated, in his argument to the jury: "We got the horse down here so all you could see it,—this vicious horse. No; don't want to see it. Why, you would laugh to see the horse that we had here some three days. My brother, in his fairness, wants everything submitted to your consideration, my very fair brother indeed, but he didn't want you to see this horse." It appears that the jury were not permitted to see the horse, and yet plaintiff's counsel, by this language, undertakes to convey to them the suggestion that an inspection of the horse would show that it was not vicious. It is unnecessary to say that this was improper.

We refrain from noticing other complaints of this argument, in the belief that they relate to questions which will not again arise.

For the errors pointed out, *the judgment must be reversed*, and a new trial granted.

The other Justices concur.

PEOPLE of the State of Michigan
v.

Charles L. BERNARD, *Plff. in Err.*

(125 Mich. 550.)

1. A small boat used for the common carriage of passengers for hire, and having neither sleeping apartments nor places for meals, is not within the rule justifying the forcible resistance of an attempt to enter a dwelling house, although a seat in the boat is used for a sleeping place by the person in possession of the boat.
2. An assault upon an officer with a deadly weapon by one upon whom he is attempting to serve process is not excused by the fact that the process is not fair on its face.

(January 29, 1901.)

ERROR to the Circuit Court for Van Buren County to review a judgment convicting defendant of assault with intent to kill. *Affirmed.*

The facts are stated in the opinion.

Mr. Dwight Goss for plaintiff in error.

Mr. William G. Howard, with *Mr. James E. Chandler*, for the People.

Long, J., delivered the opinion of the court:

Respondent was convicted of the crime of assault with intent to kill and murder one John Britton, undersheriff of Van Buren county. In the summer of 1899, the respondent, together with one M. J. Maloney, brought from Chicago to South Haven, this state, a small steam launch, which they ran as a public conveyance on Black river and the harbor at South Haven as a pleasure boat. They tied the boat, when not in use, to a certain dock on Black river; and, refusing to pay dockage, the parties owning the dock commenced proceedings against the boat under the water-craft act of this state to recover the amount due them for wharfage and dockage. The process issued in that case was delivered to one Gleason, a deputy sheriff, for service. He attempted to serve the same, and in July, 1899, went aboard the boat of respondent, called the Louise, for that purpose, when the respondent and Maloney steamed the boat up the river for a distance, and forcibly ejected Gleason therefrom. On the evening of the same day Gleason again attempted to serve the process, when, as Gleason testified, respondent told him that if he came aboard

the boat he would shoot him. Respondent was thereafter arrested for resisting an officer in attempting to serve process. The People claim that when respondent was taken before the justice for that offense he stated that he would shoot the first man who came aboard his boat to serve process. It is shown by the people that after Gleason failed to make service of the process, it was turned over to the sheriff of the county, and that he, on the 4th of August, 1899, accompanied by Undersheriff Britton, went down to the dock where the boat was tied for the purpose of serving the process; that they met the respondent on the dock in front of the boat, and the sheriff introduced himself to the respondent, saying, "I am the sheriff of the county, and I have come to serve process on your boat, and here is a copy of it, and I would like to explain the matter to you;" that he got no further with the explanation when the respondent jumped upon his boat, ran around the boiler to the tool box, took out a revolver, and said that he would shoot them if they came upon the boat; that they went upon the boat, when respondent shot and wounded Britton. The defense was: (1) That the writ under which the officers were acting was void, and not fair upon its face, and afforded them no protection for what they did; (2) that respondent was defending his own person, that he was protecting his castle, and that he had reason to believe that a forcible felony was being attempted.

We shall discuss the second question first. The People's testimony tended to show that the sheriff and his undersheriff went to the dock, and the sheriff introduced himself, and told respondent what he was there for, and gave him a copy of the process. He must have known from the acts and conduct of the officers that they were not there for the purpose of offering him any personal violence. When the sheriff attempted to explain the situation to him, he would not listen, but at once rushed to the tool box, where his revolver was kept, and, according to the People's witnesses, fired the first shot, wounding Mr. Britton. He fired directly at him with apparent intention to kill. It is shown by the testimony that shots were fired by the officers, but the whole testimony, aside from respondent's, tends to show that he fired the first one. It is also shown by testimony introduced by the People that at the time of the first arrest of the respondent prior to that time, for resisting an officer, he

NOTE.—For a case in this series holding that a covered wagon in which prostitution is carried on is a house of ill fame within the meaning of a statute prohibiting the keeping of such houses, see *State v. Chauvet*, 51 L. R. A. 630.

For another case holding that a tent occupied by a divorced man and his child is a private residence occupied by a family, within the meaning of a statute punishing gaming except when it occurs at such residence, see *Hipp v. State*, 62 L. R. A. 973.

made threats he would kill any officer who attempted to seize his boat. This is undisputed by the respondent, but his testimony in regard to the shooting was that, before he attempted to make any resistance, the sheriff fired on him first, and that he only acted in self-defense. As to the shooting by himself, he testified: "Britton told me to throw down my revolver. When he said that, he had a gun in my face, and I had been shot, and I stood there paralyzed, with the revolver in my hand as I grabbed it out of the box. Britton says, 'Drop that, or I will put a hole through you.' I simply opened my hand, and the revolver fell out of my hand. It was of no use to me. I was paralyzed." Upon his cross-examination respondent admitted that after the shooting he immediately left South Haven, and fled to the state of Virginia. The question as to whether respondent fired the first shot and whether he was acting in self-defense was fairly left to the jury in the charge by the trial court. The court instructed the jury upon the question of the elements of the crime: "You are instructed that while the law requires, in order to constitute an assault with intent to commit murder, that the assault to kill and murder must have been committed under such circumstances and with such premeditation and design as would have made the killing murder had death ensued, while it does not require that wilful intent, premeditation, or deliberation shall exist for any length of time before the crime was committed, it is sufficient if there was a design and determination to kill distinctly formed in the mind at any moment before or at the time the blow was struck or pistol fired. In this case, if you believe from the evidence beyond reasonable doubt that the respondent discharged his pistol at the undersheriff, and that before or at the time he did so he had formed in his mind a wilful, deliberate, and premeditated design to take the life of Britton, or any person who should attempt to seize the boat Louise under the warrant introduced in this case; and that the pistol was fired in furtherance of that design or purpose, and without justifiable cause or legal excuse therefor, then you should find the respondent guilty. . . . In determining the respondent's intent, you may consider the threats made by him, if you are satisfied beyond reasonable doubt that they were so made; and you will also consider the fact of his leaving the state in the manner he claimed he did, as well as the fact that some of the witnesses testified to having heard only four shots, as claimed by the respondent." We think the court correctly stated the law in this charge, and that the testimony introduced by the People fully sustains the claim made by the prosecution

45 L. R. A.

that the shot fired by the respondent was without any reasonable or justifiable excuse whatever. These were questions of fact, which were fully settled by the verdict of the jury.

The claim made by counsel for respondent that this boat was a dwelling house, and that respondent was justified in resisting an attempt to enter it or seize it, finds no warrant in this record. The boat was a common carrier of passengers for hire. The fact that respondent slept at night on a seat in the boat could in no manner change the character of the boat, and transform it into a dwelling house. A somewhat similar question was raised in *State v. Smith*, 100 Iowa, 1, 69 N. W. 269. In that case the sheriff had for service an order issued by a justice of the peace for the removal of respondent and his goods and office furniture from a certain building in the village. He found the premises described in the order occupied by the respondent and his brother. The respondent, who was a physician, moved the medicines out of the building, but claimed that the groceries belonged to his brother. The latter was not named in the order, and refused to move the property. The sheriff insisted upon his right to do so, and, while attempting to enter the building after respondent had left it, the brother discharged a gun at him. The shot missed the sheriff, but hit four children who were on the opposite side of the street. It was claimed that respondent was an accessory to the act. The respondent requested the court to charge the jury: "You are instructed to determine as to whether or not that was the dwelling house or habitation of John T. Smith [the brother], and, if you find that it was his dwelling house or habitation, you are then instructed that he did not, under the law, have to retreat from it, but could defend himself, and resist intrusion by any means, if he, as a reasonable man, had an apprehension that the party making the attempt to enter was intending to do great bodily harm, and that his entering was for the purpose of committing said bodily harm." This request was refused, and the refusal assigned as error. The supreme court of that state said upon that question: "It is urged by the defendant that the evidence authorized the jury to find that the room in which John T. Smith carried on his business was his living apartment in which he resided. It appears that the defendant and his brother occupied the front part of a room 12 by 24 feet in size for business purposes. It was separated from the back part by a partition which extended but a part of the way across the room, and did not reach the ceiling. John T. Smith had occupied the room with the defendant for about three months hav-

ing some groceries in the front part, and sleeping and keeping a satchel and some clothing in the back part. His occupation was by virtue of some arrangement with the defendant, who claimed that he had leased the premises, and he obtained his meals outside the building. We find nothing in the record which would have justified the giving of the instruction refused. The evidence did not show that the place was a dwelling house or private habitation, but a public place of business to which the people of the community were expected to resort. The fact that John T. Smith slept and kept a few articles of clothing there did not change its character." The boat in question had no sleeping apartment, and, so far as the record shows, no place for meals, but was a small river boat, with seats extending around it, used in carrying passengers for hire. The public were invited to come there, and it cannot be regarded in any sense as a dwelling house or castle of the respondent,

which he had a right to defend from intrusion. He was not assaulted in his dwelling house. The officers were there simply for the purpose of serving process, and, according to the testimony offered by the People, without any reasonable or justifiable excuse the respondent fired upon Mr. Britton.

In view of the above facts, we think it is not important to discuss the first question raised by respondent's counsel. Whether the writ under which the officers were acting was void, and not fair upon its face, or not, is of no importance. The respondent could not take the law into his own hands, and, with so little excuse as here shown, assault another with a deadly weapon.

The conviction must be affirmed.

The other Justices concur.

Writ of error dismissed by Supreme Court of United States, March 17, 1902.

MISSISSIPPI SUPREME COURT.

Mayor, etc., of CANTON, *Appt.*,
v.

CANTON COTTON WAREHOUSE COMPANY *et al.*

(.....Miss.....)

1. A contract by which an ice manufacturing company undertakes to sell waste water to a railroad company which needs it to supply its engines cannot be held void for collusion because the railroad company undertakes to lay the necessary pipes, which the ice company has no power to do for want of a franchise to lay pipes in the streets.
2. A provision in a lease to a foreign corporation of a domestic railroad, which it executed by authority of the legislature and confers upon the lessee the right to have, hold, exercise, and enjoy all the rights, powers, privileges, and franchises which can be lawfully exercised and enjoyed in or about the said railroad as fully, amply, and entirely as the same might have been held, exercised, or enjoyed by the lessor, confers upon the lessee the right to lay water mains along the right of way if the lessor had that right.
3. A legislative grant to a railroad company of the right of way through the state carries with it the power to

cross over highways of every description when necessary for the completion of the railroad; and such crossings cannot be prevented by the municipal corporations through which the road is laid.

4. A grant to a railroad company of a right to cross highways in municipal corporations includes the right to lay along the right of way pipes to conduct water needed to supply locomotives, and the other needs attendant upon the operation of the road.
5. A municipal corporation has no such title to the fee of its streets as entitles it to claim compensation from a railroad company which, by virtue of a legislative franchise, occupies a portion of a street for a crossing.
6. Equity will not, at the suit of the municipality, enjoin the digging of a trench to lay a water main across a public street under legislative authority, where there is no proof that the free use of the street will be permanently interfered with, or that any irremediable injury will be inflicted thereby.

(Calhoun, J., dissents.)

(1904.)

A PPEAL by complainant from a decree of the Chancery Court for Madison Coun-

NOTE.—For a case in this series as to estoppel of city to deny right of railroad company to cross highways within its limits, see *Chicago v. Union Stockyards & Transit Co.* 35 L. R. A. 281.

As to power of municipalities over railroads generally, see note to *Marshfield v. Wisconsin Teleph. Co.* 44 L. R. A. 565; also *State ex rel.* 65 L. R. A.

Indianapolis v. Indianapolis Union R. Co. 60 L. R. A. 831.

For some examples of implied powers of railroad corporations generally, see *Abraham v. Oregon & C. R. Co.* 64 L. R. A. 391, and *State ex rel. Sheets v. Pittsburgh, C. C. & St. L. R. Co.* 64 L. R. A. 405.

ty in defendant's favor in a suit to enjoin the laying of a water main across a highway. *Affirmed.*

The facts are stated in the opinions.

Messrs. Green & Green and H. B. Greaves for appellant.

Mr. J. M. Dickinson, with **Messrs. Mayes & Harris, A. K. Foote, and Chrisman & Howell**, for appellees:

The authority of the legislature over highways is paramount. It has no need to say to communities, cities, or villages, "by your leave."

Independent of a chartered grant, the appellee railroad company has acquired title by prescription. Easements may be thus acquired.

Lanier v. Booth, 50 Miss. 410; *Alcorn v. Sadler*, 71 Miss. 634, 42 Am. St. Rep. 484, 14 So. 444; *People v. Kerr*, 27 N. Y. 192; *Dexter v. Tree*, 117 Ill. 532, 6 N. E. 506; *Jones, Easements*, 147; *McKenzie v. Elliott*, 134 Ill. 156, 24 N. E. 965; *Kent v. Waite*, 10 Pick. 138.

It only claims under dedication by another as an easement. For any additional servitude imposed, only the original donor of the easement can complain.

Perley v. Chandler, 6 Mass. 454, 4 Am. Rep. 159; *Adams v. Emerson*, 6 Pick. 56; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; *Knox v. New York*, 55 Barb. 404; *Jackson ex dem. Yates v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Spencer v. Metropolitan Street R. Co.* 120 Mo. 154, 22 L. R. A. 668, 23 S. W. 126; *Dubque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Jones, Easements*, § 208; *Lamar County v. Clements*, 49 Tex. 347.

The laying of the pipe in this case is an incident to the railroad right of way.

There is an implied grant in the grant of the easement of such incidental use as is necessary to its complete enjoyment.

Abbott v. Butler, 59 N. H. 317; *Walker v. Pierce*, 38 Vt. 94; *Gunson v. Healy*, 100 Pa. 42; *Holt v. Sargent*, 15 Gray, 97; *Bartlett v. Prescott*, 41 N. H. 493; *Wells v. Tolman*, 88 Hun, 438, 34 N. Y. Supp. 840.

Truly, J., delivered the opinion of the court:

The parties to this litigation are (1) the city of Canton, a municipality of this state incorporated by legislative authority in 1836, and by operation of law clothed with "full jurisdiction in the matter of streets," and having power to "regulate the crossing of railways;" (2) the Canton Cotton Warehouse Company, a private corporation operating under a charter authorizing it to manufacture ice and sell water, but possessing no municipal franchise empowering it to lay pipes under the streets of the city; 65 L. R. A.

(3) the Illinois Central Railroad Company, a foreign corporation operating and maintaining a railroad through this state from its southern to its northern boundary by virtue of a lease from the Chicago, St. Louis, & New Orleans Railroad Company. The city was complainant below, and the other parties defendant, to a bill filed in the chancery court of Madison county.

The facts giving rise to this litigation are these: The railroad operated and maintained by the Illinois Central Railroad Company runs through the city of Canton, traversing its streets with several tracks, and has so run for more than forty years. Canton is a division or relay station on the railroad, where a roundhouse is maintained, and where the cars and engines upon its trains are changed. In the ordinary operation of its business at that place, the railroad company consumes from 100,000 to 150,000 gallons of water daily. To procure the needful supply, it has several wells on its property, but the wells frequently failed, whereupon water was obtained from the municipal waterworks at 25 cents per 1,000 gallons by agreement and consent of the city authorities, or the engines were taken to other points where the necessary water could be procured. The result of this was that, if an engine had to be taken elsewhere for water, it entailed considerable inconvenience and delay, while, if the water was obtained from the city, there constantly arose disputes as to the amount consumed. The power house of the Canton Cotton Warehouse Company, where it conducted its business of manufacturing ice, was adjoining the right of way of the railroad, about 1,700 feet north of the roundhouse where the railroad water tanks were maintained. In the prosecution of its business of manufacturing ice, the warehouse company wasted and was compelled to drain off its premises more water each day than was needed by the railroad for the running of its locomotives and other incidental uses. This condition of affairs brought about negotiations between the parties which resulted in a contract being entered into between the warehouse company and the railroad company as follows: The warehouse company agreed to furnish and lay a 4-inch water pipe from its pumping station to the tanks of the railroad company, and to connect with said pipe two first-class meters, to determine the amount of water consumed by the railroad company; the railroad company agreeing to pay 3 cents per 1,000 gallons furnished; the contract to last five years from date. Before the pipes were laid according to the terms of this contract, it was discovered that the warehouse company had no franchise empowering it to lay pipes in or across the

public streets; and it was further seen that in laying the water main it would be necessary for it to cross two of the public streets of the city, namely, Peace and Fulton streets, across both of which the railroad maintained, and had maintained for many years, its crossing. Acting upon legal advice, to avoid a conflict with the municipal authorities over the legality of their action, this contract was abandoned, and subsequently another entered into, whereby, for the same price per 1,000 gallons, the warehouse company contracted to furnish the water, but the railroad company agreed to furnish and lay the requisite pipe. For purposes of convenience, a 6-inch main was substituted for the 4-inch as stipulated in the original contract. In pursuance of this contract the railroad company undertook to lay the water main from the pump station of the warehouse company into the right of way of the railroad company, and thence south on said right of way to its own water tanks, when it was prevented by an injunction issued on behalf of the city. The grounds upon which the city prayed for and obtained the issuance of the injunction restraining the prosecution of this work were: (1) That this was a collusive and evasive scheme between the warehouse company and the railroad company, whereby it was sought to evade the police power of the city, and afford the warehouse company an opportunity to further its private business by the sale of its water. (2) That the Illinois Central Railroad Company simply owned a leasehold estate in the railroad which it operated, and that it had no right to exercise the right of eminent domain under the terms of its lease, and that the laying of this water main necessitated the exercise of this power, because it constituted the establishment of a new servitude on highways; and it was further said, in this same connection, that the railroad lessor had no right of way through the city of Canton, and its tracks had been laid and were maintained simply by acquiescence on the part of the municipal authorities. (3) That in the prosecution of this work it would be necessary to dig a trench across the public streets mentioned, in order to install the water main, and that the digging of this trench, and the necessary reopening of the trench whenever repairs were needed, would constitute a continuous nuisance, and an unauthorized taking of public property for private purposes, and would inflict irreparable damage to public and city, for which there existed no adequate remedy at law.

To determine the question of whether or not the arrangement between the railroad company and the warehouse company was evasive or collusive, we need only look at the 65 L. R. A.

attendant circumstances, in order to ascertain that the contract was based upon strict business principles. Here was one corporation having a product to sell, and another corporation whose needs demanded that product; the one being clothed with power to sell, and the other being vested with power to buy. The record discloses that the contract was to the mutual advantage of the parties. The warehouse company was seeking to dispose of a waste or by-product at an advantage. The railroad company was procuring a needed supply of water, of a better quality, more suitable for its use, more conveniently obtained, and at less cost than it could be otherwise procured. The purpose of the contract was legitimate, and contravened no principle of law or morals. The fact that under its provisions the railroad company procured water cheaper than the municipal authorities would supply the private citizen in no wise affects the legality of the transaction. The railroad officials had the right to buy where they could procure the needed supply of water cheapest, and their action was based on good business principles, and was strictly in accordance with their duty to the stockholders of the company. Both parties to the contract were within their legal rights, and so there was nothing to conceal, and no necessity for collusion or evasion. Nor can any sinister motive be attributed to their action in the abandonment of the original contract, and entering into another by which the railroad company was to furnish and lay the water main. It is manifest that this change in the terms of the contract was due to the fact of the discovery that the warehouse company possessed no municipal franchise vesting it with power to construct water mains across the public streets, but, this fact being proved, it nevertheless remains true that the purpose of the contract, the object in view, the end which both parties sought to attain, was strictly legal. The railroad company wanted the water. The warehouse company wanted to sell it. The seller had no authority to lay the delivery pipes. It was thought the buyer had. So the buyer assumed the expense entailed by the construction of the requisite water main. This was not a violation of the law, but a commendable effort to keep within its pale; to prevent friction between the contracting parties, on the one hand, and the municipal authorities, on the other; and to still carry into effect in a perfectly legal way the contract which was for their mutual pecuniary benefit. Assuming the power of the railroad company to lay water mains for its own private purposes on its own right of way, it must be conceded that, if the mains were not intended to cross the public

streets, the contract in question would be above suspicion, and the warehouse company could, with the consent of the railroad company, have laid the main along its right of way. The change in the contract was in no sense an attempt to evade the police power of the city. If the Illinois Central Railroad Company had the power to construct and maintain water mains along its right of way and across the public streets, it had like power to contract with others to do the work. And this brings us to the consideration of the material inquiry presented by this record.

Has a railroad company the right to construct water mains along its right of way, and, if so, has it the like power to construct such mains over the public streets of a municipality? But first, and as preliminary to this question in the instant case, the attitude of the Illinois Central Railroad Company must be considered. It is contended by appellant that this company, being a foreign corporation, is not vested with any power to exercise the right of eminent domain in this state, and that the laying of the water main on its right of way is the imposition of an additional servitude, and hence calls for the exercise of the power of eminent domain before such main can lawfully be constructed. It is said, further, that, conceding, as an abstract question, that railroad companies owning their rights of way have the power to construct water mains for the purpose of procuring a needed supply of water, still in the instant case the Illinois Central Railroad Company is not vested with like power, for the reason it is the lessee only of the railroad which it operates, and is only clothed with the power and rights granted by the terms of its lease; and still further it is contended that its lessor never had a legally acquired right of way through the city and across the streets of Canton, and that the construction of its tracks and the subsequent maintenance thereof are solely due to the acquiescence of the citizens and the municipal authorities of said city. The consideration of these contentions requires a proper understanding of the underlying facts, and this renders indispensably necessary a brief examination of the laws to which the presence of the Illinois Central Railroad in this state is to be attributed. The Illinois Central Railroad Company in the year 1882, being first thereunto duly empowered by the legislative authority of the state (Laws 1882, p. 1023, chap. 559), entered into a contract of lease for the term of 400 years with the Chicago, St. Louis, & New Orleans Railroad Company. By virtue of this lease the lessor company leased, granted, and demised unto the Illinois Central Railroad Company its

railroad, "extending from the city of New Orleans, in the State of Louisiana, through the states of Louisiana, Mississippi, Tennessee, and Kentucky, to a point on the south bank of the Ohio river," including all rights of way, depot buildings and grounds, and all other property, with the appurtenances thereunto belonging, and containing this further delegation of power: It (the Illinois Central Railroad Company) was expressly granted the power "to have, hold, exercise, and enjoy all the rights, powers, privileges, and franchises which can be lawfully exercised and enjoyed in or about the said railroad and other demised premises, and the management, control, and operation of the same, as fully, amply, and entirely as the same might or could have been held, exercised, or enjoyed by the said party of the first part [the Chicago, St. Louis, & New Orleans Railroad Company], had this indenture not been made." This operated as a full and complete investiture in the Illinois Central Railroad Company of all the rights, powers, privileges, and franchises which its lessor held, enjoyed, or possessed. What were those rights, and what property did the lessee enter into possession of under this lease? The Chicago, St. Louis, & New Orleans Railroad Company was the result of several preceding consolidations between other and different railroad corporations. Its immediate predecessors were the Central Mississippi Railroad Company and the New Orleans, Jackson, & Northern Railroad Company, and by the supplementary act ratifying the consolidation of these two companies into the Chicago, St. Louis, & New Orleans Railroad Company, and incorporating the last-named company, the said Chicago, St. Louis, & New Orleans Railroad Company was expressly declared to be a corporation of the state of Mississippi, and, as such domestic corporation, was "invested with all the rights, powers, privileges, liberties, and franchises conferred by the act to which this is a supplement, and especially the rights and powers of § 10 of the act to insure the construction and completion of the New Orleans, Jackson, & Great Northern Railroad Company through the state of Mississippi, and of § 10 of the act incorporating the Mississippi Central Railroad Company." Referring to the acts of incorporation of the several companies, from the consolidation of which the Chicago, St. Louis, & New Orleans Railroad Company resulted, and to which by each successive act of incorporation or consolidation the rights, privileges, and franchises of such companies were expressly granted, we find that the existence of a continuous line of railroad from the southern boundary of the state, thence north through the state, is expressly recognized,

and its existence and enjoyment of franchises asquiesced in and continued. We find further, as bearing on this question, and showing the privileges, powers, and franchises granted by legislative act of this state, and all of which are expressly kept alive, and finally invested in the Chicago, St. Louis, & New Orleans Railroad Company, the following, arranged without reference to chronology:

"An Act to Authorize the Consolidation of the New Orleans, Jackson, & Great Northern and the Mississippi Railroad Companies, and for Other Purposes. Approved April 18th, 1873 [Laws 1873, p. 567, chap. 295].

"Whereas, the New Orleans, Jackson, & Great Northern Railroad Company owns a line of railroad from New Orleans, Louisiana, to Canton, Mississippi, and the line thence northward to Jackson, Tennessee, is owned by the Mississippi Central Railroad Company, but now leased to the Southern Railroad Association, a corporate body existing under the laws of this state, and this line the parties concerned are now rapidly extending to Cairo, Illinois, so that a continuous line of railroad shall be formed from New Orleans to St. Louis, Chicago, and all the railroads leading to the Atlantic seaboard and the Pacific coast, and looking to this end said parties have already entered into a contract with the Illinois Central Railroad Company."

Section 3 of an act entitled "An Act Granting the Right of Way through the State of Mississippi, and Other Privileges, to the New Orleans, Jackson, & Great Northern Railroad Company": "Sec. 3. Be it further enacted, that said company are hereby invested with all rights and powers necessary for the construction, repair, and maintenance of said railroad through this state, and may purchase such lands and materials for the same as they may consider necessary; and in case they or their agents cannot agree with any owner or owners of land or other material, upon the terms of purchase, or in case the owner shall be under the age of twenty-one years, or a non-resident of the state, *feme covert*, or *non compos mentis*, said company may proceed to obtain title to said lands and materials as in the manner prescribed, and shall be invested with all the powers conferred by the 6th, 7th, and 8th sections of an act to incorporate the Hernando Railroad Company, approved May 13, 1837, so far as the same may be applicable to the construction of a railroad through this state from New Orleans to the line of boundary, separating it from the states of Alabama and Tennessee."

Section 2 of an act entitled "An Act to Incorporate the Canton & Jackson Railroad

Company": "Sec. 2. Be it further enacted, that the president, directors, and company shall have power and authority to build and construct said railroad with one or more tracks or railways from Jackson, in Hinds county, to Canton, in Madison county; and they and their agents, engineers, or workmen may enter upon and use, or excavate or embank, any land which may be needed for the site of said railroad, or for the erection of any warehouses, depots, offices, or any other buildings or works necessary or useful in the construction of said road, and may take and use any land, timber, gravel, stone, or other materials necessary for the construction of said road, or its works, or to build, erect, and repair bridges, culverts, dams, or other thing necessary for the same."

Section 13 of the same act: "Sec. 13. Be it further enacted, that whenever, in the construction of said railroad, it shall become necessary to cross or intersect a public road or highway, it shall be the duty of said president and directors so to construct said road across such public road or highway as not to impede the progress or transportation of persons or property along the same, or, when it shall be necessary to pass through the lands of any person, it shall also be their duty to provide for such person proper ways, to cross said railroad from one part of his land to another."

Section 2 of an act entitled "An Act to Incorporate the New Orleans & Jackson Railroad Company, and for Other Purposes": "Sec. 2. Be it further enacted, that whenever, in the construction of said road, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the president and directors of said company so to construct said road as not to impede the passage of persons or property along the said highway; and, when it shall become necessary to pass through the lands of any individual, it shall be their duty to provide for such individual a proper wagon way across said road from one part of his land to the other; and, where said road shall run through the enclosures of individuals, it shall be the duty of said company to dig and keep in repair the necessary stock ditches in order to protect such enclosures."

Section 2 of an act entitled "An Act to Incorporate the Holly Springs Railroad Company": "Sec. 2. Be it further enacted, that whenever, in the construction of the said railroad, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the said president and directors so to construct the said railroad across any road already or hereafter to be established by law, as not to impede the pas-

sage or transportation of persons or property thereon; and, when it shall be necessary to pass through the land of any individual, it shall also be their duty to provide for such individual a proper wagon way across said railroad from one part of his land to another."

By these references it becomes evident that the Chicago, St. Louis, & New Orleans Railroad Company was clothed with complete power to do any and all acts which might be necessary to insure the successful maintenance and operation of its line of railroad throughout the state. The object which preceding legislation had in view was the encouragement of various railroad corporations so as to insure the construction of a line of road which should run without break, traversing the entire state, and link together the markets of the north and the fields and factories of the south. This end had already been accomplished at the date of the incorporation of the Chicago, St. Louis, & New Orleans Railroad Company. The continuous line of railroad was already in successful operation throughout the state, and it was only necessary to clothe the company then coming into existence and obtaining possession of the line with all necessary powers to insure its continued and successful operation. This company, in assuming charge and control of the railroad already constructed, was clothed, as successor, with all the powers, privileges, and franchises with which each and every prior corporation had been by legislative authority invested. We think it absolutely indisputable that the acts referred to, recognizing and acquiescing in the enjoyment of a franchise by a railroad corporation through the state of Mississippi, and through each one of the municipalities mentioned in its charters and traversed by its line, considered in connection with the further fact that a right of way "from Jackson to Canton," and "from Canton northward," and "through the state," was in express terms granted to the corporations named, did do what they undertook to do, and that evidently was to grant and delegate to the Chicago, St. Louis, & New Orleans Railroad Company full power to do all acts necessary to the completion of the construction and incidental to the subsequent maintenance of the road, wherever it might. Under the terms of its charter, lawfully be laid. *Hazlehurst v. Freeman*, 52 Ga. 245; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *Morris & E. R. Co. v. Central R. Co.* 31 N. J. L. 205, 212; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 589; *Com. v. Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 475.

Power, as we have seen, was expressly granted to cross any "public road or way;" 65 La. R. A.

and it is now finally and firmly established by the adjudications of our own court and other authorities that these terms refer, unless a contrary intention plainly appears, not only to country highways, but to municipal streets as well. *Hamline v. Southern R. Co.* 76 Miss. 417, 25 So. 295; *Smith, Mun. Corp.* § 1495; *Elliott, Roads & Streets*, § 1, note 3, and cases cited. To hold that a grant of a right of way through a state did not carry with it the power to cross over highways of every description would be to render nugatory every act of incorporation granted to a railroad company. In the very nature of things, it would be impracticable, if not impossible, to specify in each act of incorporation every street and road, to be, or which might be, crossed by the projected railroad; and yet it is a matter of common knowledge that no railroad can possibly traverse a populous state without crossing many thoroughfares, both urban and rural. It was certainly not the intention of the legislature that the great march of progress in which railroads are so often the leaders could be interfered with or impeded by an arbitrary refusal to grant a right of way by any municipal body. To so hold would have the inevitable effect of compelling railroad companies not to run through the municipalities of the state, but to avoid them. That this was not the legislative design, and is not the true view, but is directly violative of the public policy of our state, is plainly shown by all past legislation on this subject, and by reference to § 187 of our present Constitution, where it is made compulsory upon every railroad passing within 3 miles of any county seat, even when not mentioned in its charter, to pass through the same, and to maintain a depot, provided the town or its citizens will grant a right of way and sufficient depot grounds therein; the object clearly being to prevent property values in an established county seat being injured by the locating of a line of railroad a short distance therefrom; and this is an implied recognition on the part of the framers of our Constitution of the great underlying truth that railroads, properly conducted and under reasonable regulations, are a power for good in the upbuilding of the material prosperity of a community.

In this state the power of the legislature over municipal streets is plenary, unless in exceptional cases not here presented. It has the power to divest the municipalities of all control over their streets, and authorize their use by corporations without compensation to the municipality. It is a question of legislative will and intent, not a question of power. *Hodges v. Western U. Teleg. Co.* 72 Miss. 912, 29 L. R. A. 770, 18 So. 84;

Dill. Mun. Corp. §§ 680, 683, 701; Smith, Modern Law of Mun. Corp. § 1309.

With this principle clearly in view, looking now to the facts of this case, and bearing in mind the needs of a railroad for its successful operation, the question next arises as to what rights a railroad acquires in its right of way, and, further, whether there is any difference in the extent of these rights where the right of way is over private property, or where it traverses public streets or highways. It should be borne in mind that both railroad corporations and municipal corporations are created solely by legislative authority, and are clothed, in this connection, at least, only with such powers as are expressly granted in the creative act which vitalizes and brings them into existence. By the grant to a railroad of a right of way, whether that grant be made by legislative act over public lands or across public highways, or by condemnation proceedings, donation, or purchase through private property, certain rights in the use of its right of way are acquired by the railroad. It has the right to do all things with its right of way, within the scope of its charter powers, which may be found essential or incidental to its full and complete use for the purpose for which it was acquired. Thus it has been held that as a railroad cannot be successfully constructed or advantageously operated without establishing proper grades, so that trains may be safely and speedily transported over its tracks, the abutting owner has no claim for compensation for any earth that may be removed from the right of way, or for damages by establishing in a proper manner a grade thereon. *New Orleans, B. R. V. & M. R. Co. v. Brown*, 64 Miss. 482, 1 So. 637; *Cassidy v. Old Colony R. Co.* 141 Mass. 174, 5 N. E. 142. It is also settled that, as railroad companies cannot discharge the duties incumbent upon them as public carriers of freight and passengers, and cannot transport the many trains required by the needs of commerce and travel with safety or security to life or property, without the maintenance of a telegraph system, they have the right to establish a system of wires and posts over their rights of way, and that this is not the imposition of an additional servitude, within the legal meaning of that term, authorizing an abutting owner to claim additional compensation. *American Teleph. & Teleg. Co. v. Pearce*, 71 Md. 541, 7 L. R. A. 200, 18 Atl. 910; *Western U. Teleg. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *Taggart v. Newport Street R. Co.* 16 R. I. 688, 7 L. R. A. 205, 19 Atl. 326; *Randolph, Em. Dom.* § 210. The basic principle here, as in the case of municipal control of highways, is essentially the same. Railroad companies are vested with power to devote

the right of way to any purpose within the scope of the original condemnation or acquisition, and for the consequences flowing from such use the original owner is presumed by law to have been fully compensated. They may devote the right of way which they have acquired to any use indispensable to, or which will facilitate the fulfilment of, the objects of their corporate existence, whether these uses be by grading, constructing of telegraph lines, or other incidental uses requisite for the convenient, safe, and successful conducting of their business and regular running of their trains. Does the use to which the Illinois Central Railroad Company desires to devote its right of way in the instant case fall within the category of incidental uses included within the original condemnation or acquisition, or is it a use foreign to its purpose and outside of its needs? It is hardly necessary to state that, as railroad trains are pulled by locomotive engines, and as steam is the propelling power, fuel and water are both absolutely indispensable to their movement. As the power cannot be generated without heat, so water is required in order to bring into existence the required motive energy. If water, then, is necessary, a railroad company certainly has the right to purchase it, or procure it in any lawful method most convenient, whether by wells dug on its right of way, or by purchase from others. *Hougan v. Milwaukee & St. P. R. Co.* 35 Iowa, 558, 14 Am. Rep. 502. This much being proved, it follows to our mind, irresistibly, that it has the power to lay such conduits as are required to bring the water from the source of supply to the place of use. It can hardly be seriously contended that a railroad company clothed with power to grade its right of way and to remove the earth therefrom, to lower or raise at pleasure the surface of the ground, and to dig wells for the purpose of obtaining water, would not likewise have the power to dig thereon a trench and lay pipes for the purpose of conveniently conveying the water needed to supply the motive power. We think it manifest, therefore, that, if the water main in question was to be laid solely on that portion of the right of way of the railroad obtained by private conveyance or condemnation of private property, the railroad company would be clearly within its rights in so installing it. And we are unable to see that there is any distinction, based upon any sound legal principle, in the power of a railroad company to make such proper use of its right of way as the needs of its business may demand, whether such right of way is acquired through private property by donation, purchase, or condemnation, or granted by legislative enactment over public property,

streets, or highways. If it be necessary for a railroad company to construct a telegraph line, or raise or lower a grade where its right of way runs through private property, the same conditions demand the same treatment when the right of way traverses streets or highways. The broad, fundamental principle is: In the construction or maintenance of its line of road, a railroad company is vested with all such powers as may be requisite for the successful consummation of the object for which it was granted corporate existence. Take the instance of an interurban line of cable railway. Should a charter be granted by the state to such a corporation, which, from the very nature of the power by which the cars are run, requires that a trench shall be dug, and a cable laid over its entire route, could it be successfully contended that the grant of a franchise would not carry with it, even without special provision, the power to perform such work and to dig such trenches as would be indispensable for the construction of its line of road? Clearly not; the reason being that the work is a mere incident to the completion of the purpose for which the charter was granted, and upon which the very existence of the corporation would depend. Just as a cable is indispensable for the running of such a road, so is water required to produce the propelling power used by steam railroads. The one is no more necessary to the successful operation of the first than is the latter indispensable to the other. This being so, and the lessor of the Illinois Central Railroad Company being expressly vested with all requisite powers, privileges, and franchises, and these, in turn, by the broad and general provisions of its lease contract, being transferred to the Illinois Central Railroad Company, and the power of the legislature to grant the franchise being unquestioned, we see no escape from the conclusion that such railroad company is strictly within its rights in laying the proposed water main over its right of way, whether the same traverses private property, or crosses the public streets of a municipality, through which, by legislative enactment, its lessor acquired the right to construct and maintain its line of road. Especially where, as in the instant case, the right to so cross the streets was asserted and exercised by the railroad company long prior to any express legislative grant to the municipality of power to "regulate the crossings of railways," and such use has been acquiesced in and tacitly acknowledged by the municipal authorities and the citizens continuously and uninterruptedly for nearly half a century. See *Smith, Modern Law of Mun. Corp.* § 1309e; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L. R. A. 281, 65 L. R. A.

45 N. E. 430. Under these circumstances, the fact that the Illinois Central Railroad Company is a foreign corporation is of no importance. It is not compelled to resort to the power of eminent domain. It is but exercising a right already acquired by its lessor, and to which it has been expressly subrogated.

We do not here decide whether, under § 17 of our Constitution, the construction across the streets of such water main would or would not entitle the abutting owners on the streets to recover compensation. That is not the case here. The municipality has no such title to the fee of the streets as entitles it to claim compensation from a railroad company or other corporation which by virtue of a legislative franchise occupies a portion of the public streets for crossing. *Hodges v. Western U. Teleg. Co.* 72 Miss. 912, 29 L. R. A. 770, 18 So. 84; *Randolph, Em. Dom.* §§ 297-365; *People v. Kerr*, 27 N. Y. 188.

We recognize the well-established distinction between cases of longitudinal occupancy of streets and cases where the highways are simply crossed in the construction of the line of railroad; but that distinction, as we understand this record, is not brought into question in this case. The only taking of the streets of the city of Canton is by the crossing by the tracks of the railroad, and this power, in our judgment, was expressly granted to the lessor of the Illinois Central Railroad Company, by any just interpretation of the various legislative acts of incorporation hereinbefore referred to.

The remaining question in the case is of easy solution. It is a well-established principle of equity jurisprudence that any unauthorized occupancy of a street constitutes a nuisance, which can by equity be enjoined or prohibited. But here there is no unauthorized occupancy of the public streets of the city of Canton, and no proof that their free use will be permanently interfered with, or that any irreparable damage will be inflicted, and hence there is no ground for the interposition of the restraining hand of a court of equity. *Faust v. Passenger R. Co.* 3 Phila. 186; *Danville, H. & W. R. Co. v. Com.* 73 Pa. 38. Under the facts of this record, all that is sought by the Illinois Central Railroad Company is the temporary and partial obstruction of the streets for the short time required for the laying of the water main. This it has the right to do, and this power is expressly recognized as a general proposition as appertaining to all railroad corporations by § 3555 of the Code of 1892. For all damages proximately resulting from such laying of the water main and the digging of the trench, the railroad company, by express

statutory provision, would be responsible. Elliott, Roads & Streets, §§ 809-882.

For these reasons, we are of the opinion that the bill of complaint herein states no proper cause for injunction, and, upon the facts disclosed, the decree of the chancellor dissolving the injunction was correct, and is *affirmed*.

Whitfield, Ch. J., specially concurring:

The facts in this case necessary to the view I take are these: The Illinois Central Railroad Company, finding a more constant and ready supply of water necessary to the convenient and efficient operation of its railroad as a common carrier, contracted with the Canton Cotton Warehouse Company for such supply. The said railroad company's water station was about 1,700 feet south of the Canton Cotton Warehouse & Ice Factory, and the railroad runs through Canton north and south. The railroad proposed to lay a subsurface water pipe, within the 100 feet constituting its right of way, from the railroad's water station to a point opposite the ice factory, and from that point to lay pipes on the ice factory's grounds. The channel for the pipes was to be 18 inches wide by 2 feet deep. Two of the streets of the city—Peace street and Fulton street—cross the railroad from east to west. Peace street is 60 feet wide, and Fulton street 40 feet wide. The Canton Cotton Warehouse Company and ice factory and water plant is a private corporation. In other words, the waterworks plant does not belong to the city. It was, of course, necessary in laying this water pipe to cross Peace and Fulton streets. The city filed this bill enjoining the laying of this pipe on the following grounds: First. That the Illinois Central Railroad Company acquired the right of way, under its lease, through the charter of the New Orleans, Jackson, & Great Northern Railroad Company to the town of Canton (that is to say, to the southern boundary line of the corporation), and that the right of way north from the Canton corporation line was acquired under the charter of the Mississippi Central Railroad Company, which charter provided for a right of way northward from the city of Canton. The contention of the city on this point was that, as the right of way under one charter was to the city line on the south, and under the other from the city line north, therefore the railroad had no right of way through the city. There are two answers to this: First. The 3d section of the charter of the New Orleans, Jackson, & Great Northern Railroad Company, approved March 11, 1852, provides: "Sec. 3. Said company is hereby invested with all the rights and powers necessary for the construction, repair, and maintenance of a rail-

65 L. R. A.

road through this state, and may purchase such land and material for the same as they may consider necessary." The charter of the Holly Springs Railroad Company, which was made part of the original Mississippi Central Railroad Company charter, which belonged to the consolidated company, the Chicago, St. Louis, & New Orleans Company, provides in its 11th section: "Whenever in the construction of the said railroad it shall be necessary to cross or intersect any established road or way, it shall be the duty of said president and directors so to construct said railroad across any road already or hereafter to be established by law, so as not to impede the passage or transportation of persons or property thereon; and, when it shall be necessary to pass through land of any individual, it shall also be their duty to provide a proper wagon way across said railroad from one part of the land to another." The right of way through the state of Mississippi, of course, conferred the power to acquire the right of way through the streets of any city in the state along the charter route. We all agree that there is nothing in this contention. The second ground for the bill was that the laying of this pipe under the surface of the streets was an additional servitude, which the railroad company could not impose without the consent of the city; but it is obvious, from the authorities cited in the brief of counsel for appellee, that this, if so, could only be complained of by an abutting owner. and this bill is filed by the city alone. The rights of no abutting owner are involved here. The third ground for the bill was that there was a corrupt agreement between the Canton Cotton Warehouse Company and the railroad to use the railroad's right of way for a private purpose; that is, to enable the Canton Warehouse Company to sell its water in disregard, as alleged, of the police power of the city over its streets. And complaint is made about the rate at which the water is sold. But the chief ground presented in the argument here was that the railroad company could not cross with its right of way these two streets without the consent of the city, nor lay said water pipes within the right of way without said consent. So far as the right of way is concerned, we have already pointed out that the lessor of the Illinois Central Railroad Company was granted the right of way through and across these streets by charters given by the legislature. Having obtained legislative grant, it was unnecessary to get consent from the city, since the legislative power in that respect is paramount. And secondly, if there had been no legislative grant, there had been forty years' occupation and use of the right of way across these streets, and

that conferred a valid prescriptive right. *Louisville v. Louisville Water Co.* 105 Ky. 754, 49 S. W. 766, cited in the exhaustive note to *Asher v. Hutchinson Water, Light, & P. Co.* 61 L. R. A. 76.

The only real question in this case for decision is this: Did the grant of the right of way or the acquisition of the right of way by forty years' use, confer upon the railroad the right to lay the water pipes set out in the testimony, under the ground forming part of the right of way, where the pipes would run under the streets in question, of the city of Canton? The injunction is based upon the proposition that to permit the railroad to dig up the surface of these two streets crossed transversely by the railroad right of way, so as to lay these pipes underground beneath the surface of the streets, is an interference with the use of these streets as streets. It is, of course, true that the city of Canton has full power to control its streets and their use by reasonable police regulations. Power of cities in this regard is very large. On the other hand, the railroad company has a right of way over these streets, and the grant of the right of way must carry with it every such use of the incidents of the right of way as will reasonably facilitate the efficient operation of the railroad, which use does not also interfere with the use of the streets by the city as streets for the passage over them by persons riding, driving, or walking, or which does not interfere with their use as streets for other proper purposes, and which use does not also interfere with the property rights of abutting owners. See the authorities collated in note to *Asher v. Hutchinson Water, Light, & P. Co.* 61 L. R. A., at pages 77 and 78.

There are some principles which are, of course, plain: First. That the city has the amplest power to control its streets for the good of all its citizens. Second. That the only party who can recover damages of the railroad for putting an additional servitude on these rights of way is the abutting owner. See authorities in brief of counsel for appellee. The city has no right to damages in such case. Third. That the railroad grant of right of way over the streets of the city does not authorize it to interrupt, or in any manner interfere with, the use of the streets as streets. They may construct any necessary and proper buildings on their right of way. *Gudger v. Richmond & D. R. Co.* 43 Am. & Eng. R. Cas. p. 606, and note (106 N. C. 481, 11 S. E. 515). But whether they can lay pipes underneath the surface of streets is not, of course, determined by their right to erect buildings on their right of way, where their right of way does not cross streets. Fourth. But it is also clear that

whatever use of the ground beneath the surface of the streets, essential to the efficient operation of the railway, may be fairly included within the grant of the right of way itself, as incident thereto, is a use to which the railroad company has a right. Take the concrete case. What the railroad wants is water. Railroad trains cannot be operated without water. The procurement of water in abundant supply is essential, in the highest degree, to the efficient operation of the railroad. The pipes which are to conduct this water from the property of the Canton Cotton Warehouse to the railroad water tanks are proposed to be put deep beneath the surface of the streets, where the railroad right of way crosses them, and the surface of the streets is to be put back in the same condition in which it is now, so that passage over the streets, as streets, will not be in any manner interfered with. It is true that for the little time required to dig up the surface of the two streets and lay the pipes thereunder—shown to be only a few hours—there would be some slight, temporary, interference with travel over the streets; but it is not this sort of casual, necessary interference which the law means, within the principle which we are discussing. Such casual necessary interference, in the prosecution of improvements, may often occur in the adjustment of the relative rights of cities and railroads passing over their streets, and are not to be held by the courts as an insuperable barrier to the development of the manifold needs of the complex civilization of a city, when the relative rights of a city and of common carriers traversing its streets are involved. The city owes a duty to the railroad, and the railroad a duty to the city. Each must so use its rights as not needlessly to interfere with the exercise by the other of its rights. The city may and must keep its streets open for travel; but, in doing so, it is not to stickle at a slight interference for a few hours with that use, when that interference is necessary to enable the railroad to properly exercise its right, incidental to the right of way, to lay subsurface pipes for the conveying of so essential a thing as water.

As said in *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 591: "The right of the public in the use of a highway is the right of transit to every person who has occasion to use it. This right is, however, subject to such incidental and temporary or partial obstructions as manifest necessity may require. Even the use of a highway for mere transit by one part of the public may, at the time of a multitude upon it, oppose a temporary obstruction to the passage of another part of the public. A company of persons stopping and standing on the pavement of a

street, or persons stopping in the street with their wagons or carriages, for mere temporary purposes of business, interpose impediments to the free and uninterrupted transit upon a public highway. The delivery of freight and every variety of goods, fuel, etc., at business and other houses on a street, is a necessary incident to the use of the public highway. And the repair or improvement of streets, and the deposit of the materials for the same, often create obstructions to the uninterrupted transit by the public. So, also, the improvement of building or repair of houses and the construction of sewers and cellar drains on adjacent lots often create necessary temporary impediments upon public highways. These are not invasions of, but simply incidents to, or rather qualifications of, the right of transit; the limitation upon them is that they must not be unnecessarily and unreasonably interposed or prolonged. See also *Kirby v. Citizens' R. Co.* 48 Md. 168, 30 Am. Rep. 455.

The railroad undertaking to lay such subsurface pipes transversely and underneath the surface of streets must exercise great care and skill and great despatch in doing so, so as to make the interference with the use of the surface of the streets as short and as slight as possible. But to hold that, exercising such care, and reducing the interference to the minimum, as shown in this record, it may not use this right at all, which it has as an incident to its right of way, already lawfully acquired, is to place one's self in the city's point of view wholly, and omit to see the correlative right of the railroad. The use of the streets must be preserved, of course, but the preservation of the use of the streets as streets cannot in any reasonable sense be said to be interfered with by the construction of the subsurface pipes in the manner indicated by the testimony in this record. The principle is thus announced in *Elyton Land Co. v. South & North Ala. R. Co.* 95 Ala. 647, 10 So. 274: "The authorities support the conclusion that a railroad company may make any use of the land acquired by it for use as the right of way for its railroad which directly or indirectly contributes to the safe, economical, and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands." And again at page 645, 95 Ala., and at page 273, 10 So., the court says: "It is a matter of common knowledge that the railroad business involves the use, not only of cars and tracks, but of buildings and structures of various kinds. It was contemplated that the strip of land in dispute in this case should be used as a right of way in a city. The place was expected to be the scene for

the transaction of many phases of the business different from, but incident to, the mere act of carrying persons or things. It was to be the place for receiving, delivering, storing, and transshipping freight. In such places it is frequently necessary for the convenient transaction of a railroad business to have platforms, warehouses, lumber yards, elevators, cattle pens, engine houses, car sheds, depots, repair shops, and other like facilities contiguous to the tracks. The space which is commonly called the railroad right of way is, in populous localities, generally found dotted with structures, other than the tracks, which are necessary or convenient for the transaction of the business of a common carrier; and we think that the erection of such structures is to be regarded as within the contemplation of the parties to a contract which stipulates for the use of land in such a locality as a railroad right of way, unless the contrary appears from the terms of the contract. Ordinarily the right of way of a railroad company is its exclusive property, and the company is entitled to its free and unobstructed use. *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 So. 618. The company is entitled to an absolute and exclusive possession so far as to secure fully every purpose for which the railroad is made and used. *Tennessee & C. R. Co. v. East Alabama R. Co.* 75 Ala. 524, 51 Am. Rep. 475. The question is, What are the uses to which the right of way may be devoted? The Western Railroad Corporation was authorized by its charter to lay out its road, not exceeding 5 rods wide, through the whole length, and to acquire such strip by condemnation proceedings. In reference to the rights of the company within this area, Shaw, Ch. J., delivering the opinion of the supreme court of Massachusetts, said: "To the extent of 5 rods, it appears to us, the legislature intended that the franchise of this corporation should extend, for any and all purposes incident to the object of its creation. It was contended in argument that their franchise for public purposes extended only to the use of this strip of land as a way, and that if they had occasion for buildings and storehouses, as incident to their operations as carriers of persons and merchandise, they were to be regarded, in their latter capacity, as carrying on a distinct business for their own profit, and therefore that such buildings were not to come under the same franchise. But no such limitation is contained in the act of incorporation, and none such results from the nature of its provisions. The establishment of the rail track, and the maintenance of engines and cars for the transportation of persons and goods, are all combined together, as one public object to be attained, and the privileges incident

to the one are incident to the other. No doubt, in practice, the main use of the strip of land of 5 rods in width, in the greater part of its extent, will be for sustaining the track for the trains to pass over. But such restriction of its use is not found in the act; and therefore, when the corporation have occasion to use any part of such strip of 5 rods for any of the purposes incident to their creation, it is within their franchise." To the same effect, see note to *Gugder v. Richmond & D. R. Co.* 43 Am. & Eng. R. Cas. p. 608. See specially, also, *Allen v. Boston*, 159 Mass., at page 335, 38 Am. St. Rep. 423, 34 N. E. 519. And see also *Walker v. Pierce*, 38 Vt. 97, and *Abbott v. Butler*, 59 N. H. 317.

There is a marked distinction between the rights to lay pipes for water, gas, and the like in a country highway, and in the streets of a city. The laying of water mains is not an incident of the use of a country highway. *Elliott, Roads & Streets*, § 404. But even there Judge Elliott says (p. 415): "If the light is for the highway, and is necessary to make it safe and convenient for free passage, then it is probable that the highway officers would have a right to dig trenches and lay pipes, for we think it must be the law that where it is necessary to secure gas to light the public way, and thereby make it safe, the highway officers may use the way for a pipe line. To make our meaning plain, suppose, for example, there is a dangerous bridge or other place in a rural highway much traveled after night, and that the best and most convenient mode of lighting and making it safe is by conveying gas to it, from a place near by; would not the highway officers have a right to dig trenches and lay pipes in the road for the purpose of lighting the dangerous place, and thus make it safe for passage? To our minds it seems clear that they would have this right." But the laying of pipes for the water or gas is an incident of the use of the streets in a city. Says Judge Elliott in § 405: "The streets of a city may be used for laying pipe lines, and this is so although there may be no express statutory provision authorizing the municipality to permit such a use. Where a municipal corporation has power to light its streets or to supply itself with water, it has, as an incidental power, the authority to permit the necessary pipe lines to be laid in the public streets. But a gas or water company has no right to dig into the streets of a city without the consent of its officers, except, perhaps, in cases where the charter of the company confers that right. Laying water or gas pipes in a street is not an additional burden entitling the owner of the fee to additional compensation. Reservoirs and cisterns may be dug in city streets. 65 L. R. A.

Sewers and drains may be constructed in public streets when required for corporate purposes." Precisely the same doctrine is laid down by Judge Dillon in 2 Dill. Mun. Corp. § 697.

The best statement we have seen of the extent of the right of easement in a city of a street is contained in § 407 in *Elliott on Roads & Streets*: "Some of the courts make a distinction between cases in which the fee is in the municipality and those in which it is in the adjoining owner, but, in our judgment, there is, so far, at least, as respects the subject under immediate discussion, no valid reason for the distinction thus declared to exist. The easement which the municipal corporation acquires is broad enough to authorize the corporate officers to make any legitimate use of the streets which does not impair its character as a public way or interfere with its free and unobstructed use. The owner who dedicates ground for a street creates an easement extensive enough to permit the city to make any legitimate public use of it which does not impair the right of passage or the right of ingress and egress to and from adjoining property. So, when the land is taken under the right of eminent domain, all is taken that is necessary to make the street a public way in all that the term implies. The easement acquired is by no means confined to the right of passage or travel, for it is a matter of common knowledge, and therefore of law, that land acquired for a public easement is subject to all the burdens incident to that easement." To the same effect is 15 Am. & Eng. Enc. Law, 2d ed. p. 497, § 5: "As stated above, the municipality has generally no right to place obstructions of a permanent character on a highway for municipal purposes, but temporary obstructions may be permitted for such purposes when apparently necessary or desirable; and it has even been held that the municipality may occupy a part of the highway with a water tank or reservoir to hold water for the purpose of sprinkling streets." So much for the extent of the use of the easement of a street. As to the extent to which an abutting owner may use the easement in the street, it is said in the authority just cited, on page 497, § 6: "It is conceded that owners of property abutting on the highway may make certain uses of a part of the highway which are necessary for the proper utilization and enjoyment of the property. These rights of the abutting owner are principally those of leaving building materials and accessories in the highway, and also of leaving therein, for a reasonable time, articles about to be moved from or into a building, and apparatus or vehicles for the purpose of aiding in such removal, and a wagon may

be placed on the sidewalk for this purpose. The obstruction by the abutting owner must, however, be of a reasonably necessary character, and it must not unreasonably interfere with the rights of the public to use the highway." The same authority states in note 5 on the same page: "A railroad company improving land adjoining a highway for railroad purposes has the same right as an abutting owner to utilize a part of the highway for the purpose of construction work." The same authority, on page 500, par. "h," states: "The unauthorized making, in or near the highway, of an excavation which is calculated to interfere with travel constitutes an obstruction and nuisance, subjecting the maker to liability in damages in case any person is injured thereby, unless it is necessarily made in the improvement of abutting property, in which case it must not be unnecessarily extended or continued, and must be properly guarded to prevent accidents." And on page 491, § 14, it states: "While highways are primarily designed for the purpose of travel, and must therefore be kept clear of obstructions, the law justifies obstructions of a partial and temporary character, from the necessity of the case, and for the convenience of mankind, when those obstructions occur in the customary or contemplated use of the highway; they being reasonably necessary and not unduly prolonged. As to what is a proper obstruction, as being based on a reasonable and necessary use, it is impossible to lay down any general rule, each case being determinable by the particular circumstances thereof." To the same effect, see *Allen v. Boston*, 159 Mass. 335, 38 Am. St. Rep. 423, 34 N. E. 519. In 43 Am. & Eng. R. Cas. 576, in a note to *Calcasieu Lumber Co. v. Harris*, the supreme court of Kansas is quoted as saying in *Kansas C. R. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190: "An easement merely gives to a railroad company a right of way in the land; that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purposes of constructing, maintaining, and operating a railroad thereon. Under this right the company has the free and perfect use of the surface of the land as far as necessary for all its purposes, and the right to use as much above and below the surface as may be needed."

Now, what is the principle underlying the right of the city to lay pipes in the streets for water and gas for the public good, and the right of the abutting owner likewise to make excavations under the streets wherein to lay pipes for sewerage or water? Manifestly the principle is that land dedicated for a street is not limited as a highway to the one purpose of passage over its surface

by pedestrians, vehicles, street cars, etc., but that the easement of streets is so extensive as to permit any other use by the city or by the abutting owner which does not interfere with the use of the street as a highway for travel. It may be conceded that the primary use of a street is that it may be used for travel over its surface, but that in no way interferes with the sweep of the principle that it may also be used for any other purpose not foreign to its use as a highway, which does not materially interfere with such use of it as a highway. It is impossible to conjecture at the time of the dedicating of any given street in a city how varied and how numerous may be the other uses referred to, demanded by the complex needs of an advancing civilization in city life. Now, on this same principle, precisely, the railroad in this case is entitled to passage over the surface of the streets, and to any other use—subsurface or supersurface—of the land embraced in its right of way, which contributes essentially to the efficient operation of its road as a carrier of freight and passengers, provided only that such other use does not interfere with the use of the streets as streets.

It is said that the Illinois Central Railroad Company is but the lessee of the railroad which constructs these railroad crossings over the streets of Canton, and authorities are cited announcing the familiar principle that ordinarily in such cases the lessee company cannot exercise the right of eminent domain itself, because it does not belong to it by the lease; but those authorities have no application whatever here, for the very obvious reason that the lessor railroad company acquired the right of way itself in the exercise of the right of eminent domain, and the right of way the lessor railroad acquired, of course, passed, in the full extent it had it when so acquired, to the lessee. The appellee is not claiming the right to exercise the right of eminent domain in laying these pipes. Precisely what it claims—and nothing more—is that the right of way acquired by its lessor, and which passed by the lease to it, embraced, as a necessary incident, the right to lay these pipes. Appellee insists that the lessor railroad company could have laid these pipes, as being necessary to the convenient and efficient operation of its railway, and that by its lease it got that right thus already existing in the lessor. In other words, as said at the outset, the crucial test is, What exactly is embraced, under the facts of this case, in the right of way which the lessor had, and, of course, conveyed to the lessee? Cannot it be fairly said that the laying of these pipes within the right of way originally acquired by the lessor materially facili-

tates and efficiently aids the operation of the railroad company as a freight and passenger carrier? If so, then it was an incident to that right of way. The railroad is interfering in no proper sense with any existing use of these streets. If in time the city should need to put pipes for water or gas or sewage under these same streets at these points, when that time arrives there must be a readjustment to suit the needs of the changed conditions. No such situation is presented by this record.

We have already adverted to the fact that no abutting owner is here complaining upon the ground that a new servitude is being imposed by the railroad company on the right of way. If such abutting owner should complain, and if he should show that the laying of these pipes is the imposition of a new servitude, he, of course, could recover such damages as may be occasioned to him thereby; but that is not our case.

We have paid no attention to the charge of collusion between the railroad and the cotton warehouse, for it must be obvious that, if the railroad had the legal right to lay these pipes, the laying of them could not be rendered illegal because of any collusive agreement between it and the cotton warehouse that the railroad should lay them. What it is legal to do cannot be rendered illegal because of a foolish collusive agreement to do it.

Careful consideration of the case leads us to the conclusion that the action of the learned chancellor is correct, and the decree is affirmed.

Calhoon, J., dissenting:

The railroad tracks through the city of Canton and over its streets have been there more than forty years, and there has never been, and is not now, any trouble about a supply of water, of which there is plenty, nor any effort by the Illinois Central Railroad Company, until now, or by any of its predecessors, to excavate the public streets of the city to lay pipes in order to get water by purchase from another corporation or individual. Its position here is that it has the state's power, which has no need to say to a city, "By your leave," when it proceeds to dig up its streets and throw ditches at right angles across them. This proposition calls for examination to see whether, as a matter of reason or law, this foreign corporation, organized and existing under the laws of the state of Illinois, does not have to say, "By your leave." Every citizen or domestic corporation has to say it before excavating a public street. A request for such specific power would no doubt be hooted out of any legislature in the Union. No corporation, foreign or domestic, it may be as-

sumed, has ever had the hardihood to ask the grant of such specific power under the circumstances shown in this record. Even grants of rights of necessary surface construction over highways are always everywhere most carefully guarded. Code 1892, §§ 2931, 2974, 3555. Here the claim is under power implied, not express. No citizen may defy the municipal government in its full police power over its streets,—a power necessarily inherent in such governments, and always and everywhere recognized by the courts. Then, clearly, before a foreign or domestic corporation can so act, it must be armed with a very plain legislative grant. Without creation by the people, private corporations are nothing. Without it they are more powerless than the humblest inhabitant. Without it a bacillus is a monarch in comparison. The people have said to them, "Your charter from us is your law, and you shall do nothing without our warrant upon a strict construction of the powers we grant." The appellee railroad company must concede all this; must concede that the municipal government, elected by its people, has, subordinately to legislative action, the exclusive police power over its streets; must grant that, for the convenience and safety of citizens, who must go about on foot, on horseback, and in wagons, there can be no more important police power intrusted to the government they elect; must grant that not one of these citizens may lawfully dig up the streets. But they say, "We may, and we will, without saying, 'By your leave,' to the city authorities." And why? "Because," they say, "the power in us to do this is necessarily implied as incidental to express powers given to our remotest predecessor by the state legislature." Curious that a legislature, which is the sovereign people, sitting as lawmakers in a pure democracy, should give you power to dig up streets at your pleasure, without authority from, and in defiance of, the local government which they themselves have armed with exclusive jurisdiction over streets, and without even consulting the authorities. Curious that they should equip you with a suprajurisdictional force which the foremost citizen could not exercise without punishment by fine or imprisonment, or both. Still more curious that they should design this power to be inferred by implication.

Recognizing the necessity of showing credentials for the very unnecessary proceeding they want to put in operation, they produce two certain sections of charters given their remotest predecessors fifty years ago. One is this: "Sec. 3. Said company is hereby invested with all the rights and powers necessary for the construction, repair, and maintenance of a railroad through this state, and

may purchase such land and material for the same as they may consider necessary." This case, in one branch of it, turns on the scope of the word "necessary." How a necessarily incidental power can be deduced from this to dig across two public streets, in defiance of municipal protest, in order to get cheaper water from another corporation, which could not so dig, is beyond my power to take in. No case is produced to support such view. Being doubtful about the sufficiency of this, they produce another section, in these words: "Sec. 2. Whenever in the construction of said railroad it shall be necessary to cross or intersect any established road or way, it shall be the duty of said president and directors so to construct said railroad across any road, already or hereafter to be established by law, so as not to impede the passage or transportation of persons or property thereon; and, when it shall be necessary to pass through the land of any individual, it shall also be their duty to provide a proper wagon way across said railroad from one part of the land to another." If this means anything, it limits and confines the railroad to surface work over roads, and certainly does not squint at the power to excavate to lay water mains in public streets. By no construction of this charter, by any rule known to me, or sanctioned by any known decision, can be deduced an incidental authority to excavate the streets of a city forty years after construction, for gain. Such a conclusion, to my mind, makes it follow, "as the night the day," that they may dig a cistern in the street, and connect with it by subsurface pipes. My associates must agree that it does follow that, if Canton were a Chicago or Washington city, the company may dig into and across a dozen asphalt boulevard streets to get, not merely water, but cheaper water. In my view, the bare statement of the proposition overthrows it. But this § 2 has no bearing whatever on the question here. It relates to construction only, and over roads. Neither section, on any right reasoning, can be construed to refer to any power, after construction, to dig into streets, without the police supervision of the city, for water, after forty years of user of the constructed railroad, when the water is not "necessary." Here it is not pretended to be necessary. Section 3, *supra*, confers only "rights and powers necessary for the construction, repair, and maintenance of a railroad through this state," etc. "Necessary" means what must be; that is, unavoidable, not merely convenient or advantageous. True, the courts give a somewhat liberal interpretation to the word "necessary" in considering grants of powers, even to corporations; but there is no instance known to me, or adduced, which

sustains the claim of the foreign railroad company here. It is not conceivable that the legislature intended to grant by § 3 any such power as is here claimed, which power has not been found "necessary" for nearly fifty years to the "maintenance" of the railroad, and cannot be, and is not now said to be.

Illustrating the settled doctrine of non-extension by implication of the powers of corporations, see *Downing v. Mt. Washington Road Co.* 40 N. H. 230; *Macon v. Macon & W. R. Co.* 7 Ga. 221; *Camden & A. R. & Transp. Co. v. Briggs*, 22 N. J. L. 623; *Perine v. Chesapeake & D. Canal Co.* 9 How. 184, 13 L. ed. 97; *Ford v. Delta & P. Land Co.* 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230; *Rorer, Railroads*, 36; 1 Elliott, *Railroads*, p. 56; *Gulf, C. & S. F. R. Co. v. Morris*, 67 Tex. 700, 4 S. W. 156; *State ex rel. Collings v. Beck*, 81 Ind. 500.

But they say here the work can be done in a few hours,—that it is such a little thing. However, the principle is very large. They say, too, that by this undermining of two public streets they can get water cheaper than from the city, which owns its own water plant. So it seems they want a strained and unnatural construction of their charter, not merely to get water, of which there is a great abundance, but to get it cheaper than private citizens can. They want a lighter burden than the common people have to bear. Was this monstrosity ever contemplated by any legislature of any free people in the world?

The fact disclosed is that the Canton Warehouse Company had contracted itself to do the digging and piping and to furnish water to the Illinois Central Railroad Company. But astute counsel, seeing that the former could not dig streets to sell its water, an immediate arrangement was made in reliance on a forced construction of the railroad charter, and, as a result we have what, in my opinion, is the first instance in the recorded history of railroads where such an outrage as this record discloses was ever attempted on the government of the free people of any city.

The authorities cited for appellee have, in my judgment, no remote bearing on the question, except that by inference they support my position. Of course, the company may dig wells on the right of way, and erect structures and telegraph poles on it, not in streets; but the plain implication is they may not do it to impede or obstruct ways of public passage, and the authorities so differentiate. I regard the case in hand, in the principle it involves, as quite grave, and there can be no difference of opinion that a great corporation presents itself in very

questionable shape in this record, whether right or wrong on the law.

If we are to consider, as we should (and as my associates must agree that we should), the municipal chapter of the Code as of force, or as being a declaration of the public policy of the state, and as a recognition of the common law of all time applicable to the subjects now in hand, then there is another serious feature of this record to be adverted to. In this view, the opinion of the majority of the court, in my judgment, is a judicial repeal of the spirit and letter of important independent clauses of five sections of the Code of 1892, *viz.*, §§ 2931, 2933, 2947, 2948, and 2974. The record shows that these sections were adopted by ordinance of the city long before this litigation arose. Section 2947 gives the municipal boards "full jurisdiction in the matter of streets," etc. Section 2931 empowers them to "regulate the construction and passage of railways and street railroads through the streets," etc. Section 2933 empowers them "to grant to any person or corporation the use of the streets," etc., "to lay gas, water, sewer, or steam pipes, etc., to be used in furnishing . . . any person or corporation with water," etc. Section 2948 empowers them to "prescribe the rates for the sale of water." Section 2974 empowers them "to regulate the crossing of railways . . . and provide precautions and prescribe rules regulating the same," etc. "Full jurisdiction," means "exclusive jurisdiction," as has been repeatedly held by this court, and so held as to § 2947 in the case of *Blocker v. State*, 72 Miss. 723, 18 So. 388. As may be gathered from what has been said, I favor the doctrine of strict construction of charters, and I stand opposed to the exercise of doubtful powers. But on the most liberal construction of powers under the charter of the railroad now sought to be exercised, by a lessee which claims to be a foreign railroad corporation, it seems certain that it cannot exercise them except according to law, and it seems certain that it cannot exercise them in palpable violation of law. Surely it cannot dig through two streets at right angles without calling on the city "to provide precautions" in the work, in the language of § 2974 of the Code of 1892. The city government, with "full jurisdiction" over streets, with exclusive jurisdiction to "regulate the construction and passage of railways through the streets," with exclusive jurisdiction to grant the power to any "person or corporation" to "use the streets to lay water pipes," with the exclusive jurisdiction to "prescribe the rates" for the sale of water (Code 1892, § 2948), with exclusive jurisdiction to "provide precautions" in the crossing of streets

by railways, is entitled to a decree in this cause. The city must be consulted by "any person or corporation," under Code 1892, § 2933, whether claiming the right under charter or not, before laying water pipes in the street. This is reasonable, and none ought to contend that a charter power may be exercised unreasonably and independently of the prescribed law of supervision as set forth in that section. All those provisions are simply enactments of the common law universally recognized by the authorities and text-books relating to the subject. Franchises are granted by legislatures to their immediate creatures, and cannot be leased to either foreign or domestic corporations except by express authority. In the act authorizing the lease of the Illinois Central Railroad Company (Laws 1882, pp. 1023, 1024, chap. 559, § 2) there is absolutely no such authority given as is here claimed. It seems to have been carefully omitted. Under it the "railroad" only may be leased. So well did the great lawyers who represented this foreign corporation understand this, that they provided in the very first clause of the 400-years lease itself that the lease was of specified things, *viz.*, "all and singular the railroad of the party of the first part, extending," etc. (describing it), "and also the lands, gravel pits, rock quarries, rights of way, depot buildings, and depot grounds, station houses and station grounds, water tanks, machine shops, work shops, stationary engines, machinery and fixtures, engine houses, warehouses, offices and all other buildings, structures, and improvements of any nature and kind whatsoever." And so well did those lawyers comprehend that they were on a "shaking prairie," that they provided in the second clause of the lease that the Chicago, St. Louis, & New Orleans Railroad Company, the immediate lessor, should "maintain its corporate organization and existence by the annual election of directors and officers, and the performance of such other acts as may be required by law for that purpose, and that it will at any time during the said term [400 years], when requested by the said party of the second part [the appellee], its successors or assigns, exercise every corporate power, and do every corporate act which the party of the first part [the lessor] can lawfully exercise or do," etc. So there was no authority in law to lease any franchise, and in fact no franchise, but only specified things, appear in the contract of lease; and there can be no warrant for the bald and palpable fraud here attempted by a foreign corporation on our Constitution (§§ 179-190) by the attempted exercise of pretended rights in flagrant violation of law, and never sought to be exercised for fifty years by its

predecessors or by any other railroad company on earth at any time. In the exercise of these asserted rights, it may, under the decision in this case, as my brethren must admit, at any time, rip up the vitrified brick pavement in the capital city of the state, and lay water pipes under it, to do what? Not to get necessary water, but to get water cheaper than any inhabitant of Jackson can get it. I respectfully repudiate this, and more especially, if further emphasis were needed, when the record unmistakably shows that this foreign corporation relies absolutely on an agreement with a private corporation of this state, the Canton Cotton Warehouse Company, to enable it to do what the warehouse company could not do, and for the execution of which the home company might be dealt with by the city. If illegal in the warehouse company to lay the pipes to furnish the water, the agreement is clearly illegal as to both parties to it. There is no question here of the rights of abutting owners, to which appellees attempt to confine this case. It is a question of governmental police power, which cannot be bargained away, and which "shall never be abridged." Const. § 190. If any right exists in any railroad corporation, which I deny, to commit the inexcusable outrage attempted here by the Illinois Central Railroad Company, it could be claimed only by its lessor, the Chicago, St. Louis, & New Orleans Company, which is not even a party to this litigation. This alone is fatal to the claim of the Illinois Central Railroad Company. 19 Am. & Eng. Enc. Law, p. 899, and note; *Englewood Connecting R. Co. v. Chicago & E. I. R. Co.* 117 Ill. 611, 6 N. E. 684; *Deitrichs v. Lincoln & N. W. R. Co.* 13 Neb. 361, 13 N. W. 624; *Gottschalk v. Lincoln & N. W. R. Co.* 14 Neb. 389, 15 N. W. 695; *Kip v. New York & H. R. Co.* 67 N. Y. 227; 1 Elliott, Railroads, § 37; 1 Rorer, Railroads, p. 36. Even "the right to place rails upon a road or street, and use it in the operation of a railroad, can only be granted expressly or by necessary implication, and the use must be reasonable, and such as was clearly contemplated." 3 Elliott, Railroads, § 1076, and the authorities it cites in note 1, p. 1613. In *District of Columbia v. Baltimore & P. R. Co.* 114 U. S. 461, 29 L. ed. 220, 5 Sup. Ct. Rep. 1100, it is said: "It is not known to any member of this court that any railroad company . . . has ever claimed to use the streets of an incorporated city, or any part of them, without express authority from some legislative body." Where is any express authority in this record? Nowhere.

To my mind it is manifest: (1) That the New Orleans, Jackson, & Great Northern Railroad Company, if it were now operating 65 L. R. A.

this road, could not, under its charter of 1852, containing the clause relied on, do the act sought to be done here. Repeating that clause, it reads as follows: "That said company are hereby invested with all rights and powers necessary for the construction, repair, and maintenance of said railroad through this state." Is it reasonable to suppose that the legislature, in the language used, even if it were used now at this date, had any contemplation of conferring power to undermine the streets of a city? Water mains for the sale of water were unknown here in 1852. (2) If the power exists, it can only be exercised when necessary, and it is not necessary under the facts of this case. If not regarded necessary for fifty years, why is it so now? (3) If necessary now, it is still the exercise of a franchise which cannot be availed of by the lessee, and the lessor is not a party. The act of 1882 does not authorize the lease of any franchise. (4) The warehouse company being without power, the railroad company will not be allowed to combine with it to evade the law.

The questions here are very important, and, while railroad corporations are quite useful, and should be fully protected in their charter rights, still, when they begin gross usurpations, they should be promptly restrained by the strong hand of lawful authority. It is settled law that charters must be construed favorably to the rights of the public, and most strongly against the corporations claiming under them. The authorities seem to be uniform that neither states nor municipalities can strip themselves of their police powers by any contract whatever, because such powers are absolutely essential to the well-being of society, if not the actual existence of the social order. I do not think they should be impaired by a liberal, if not loose, interpretation of the word "necessary" in its collocation in the charter in hand, under the facts disclosed by this record. A fair test is this: If accident and injury occurred because of the trench proposed to be dug, could the city shelter itself from liability in damages under the sections of the charter of the railroad company hereinbefore quoted? Would any court originally so hold? I think not. If not, it follows irresistibly that this case should be reversed.

It seems to me unnecessary to refer to that line of authorities, clearly sound, holding that parts of the streets, may, of necessity, be temporarily obstructed by corporations or individuals with building materials, where structures are being erected on private property or the right of way. The differentiation is too manifest to require pointing out.

The direct violation of the sections of the Code referred to is indisputable, in my judg-

ment, and this cannot be argued away, unless on the postulate that a government may contract away its police power, so vital to the people, and that it has in this instance

contracted it away through the enactment of a legislature binding on its successors. This position, in reference to police power, is not supported by any precedent.

VIRGINIA SUPREME COURT OF APPEALS.

William C. HEADRICK, *Appt.*,

v.

Mary J. McDOWELL *et al.*

(.....Va.....)

The execution of releases from part only of the children to whom advances are made, of all further interest in the estate, does not destroy their right to share in intestate property thereafter accumulated by the ancestor, where all his children had shared equally in the advancements.

(December 3, 1903.)

NOTE.—Right of one receiving advancement and executing release of interest in estate to share in after-acquired property.

- I. *Scope of note, 578.*
- II. *In general, 578.*
- III. *Effect of release on descendants of deceased releasor, 582.*
- IV. *Release of interest of married woman or infant, 583.*
- V. *Conclusion, 583.*

I. *Scope of note.*

The inquiry in the present instance will be confined to the consideration of those cases which treat of the effect of a release, executed by one who has received an advancement of his expectancy or interest in the estate or property—thereafter acquired—of the person making the advancement and to whom and in whose favor the release is executed. Cases relating to a general release, or to the assignment and transfer of such an expectancy to another than the one making the advancement, will not be considered other than to say right here that some of the reasons usually given for holding them a bar—or otherwise—are usually the same as those advanced in the cases considered herein. And the same may be said of an agreement between two or more expectants to divide whatever they may secure from the estate.

II. *In general.*

It would seem to be universally conceded that at common law a child could not release his interest in his parent's estate, because, as he might never be the heir of his parent, he had nothing to release. And some courts and judges, as will be seen, have adhered to this rigid rule, and refused to enforce or give effect to such agreements to release. Others invoking the equitable maxim, that what is agreed to be done, is considered as done, hold that it is the duty of courts to compel a child who has received what he and his parent conceive to be his fair share in the estate of the latter, or what he, in

A PPEAL by complainant from a decree of the Circuit Court for Pennsylvania County in favor of defendants in a proceeding to establish title to the intestate property of Jacob Headrick, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. James L. Tredway and Samuel A. Anderson for appellant.

Messrs. P. H. Dillard and H. Dillard for appellees.

Keith, P., delivered the opinion of the court:

Jacob Headrick, wishing to make an ad-

the absence of deceit or fraud, is willing to and does accept as such, and thereupon solemnly releases the estate of the parent from any right of his to a share therein, to live up to such contract of release, and in doing so advance several reasons therefor.

One reason given for holding that a person who had, in consideration of an advancement, released his expectant interest, can claim no interest therein, is that the receipt of a share of a parent's estate in advance may, in many instances, be very advantageous to a child, without being detrimental to the parent. Another reason given is that it must be presumed that the parent relied upon the agreement and release and but for it would have made a will; and that the child should be compelled to abide by its promise and thus prevent the first expectations of the parent from being disappointed. On the other hand, the reason for the contrary doctrine by which the release is denied effect is that this secures equality of division among those who have equality of right.

The first class of cases includes the following:

In *Quarles v. Quarles*, 4 Mass. 680, a father had conveyed to his son certain real estate, by a deed purporting to be for a valuable consideration; and the son on the same day made and executed a deed to his father, in which he acknowledged that, in consideration of his father's conveyance to him, he was fully satisfied and contented therewith as his share of his father's estate, and did thereby acquit and discharge his father's estate forever thereafter from having any demands thereupon as an heir to any part thereof. This was held to be a fair contract understandingly entered into between the parties,—that the father should give to the son a certain portion of his estate, and that it should be received by the son in full satisfaction of any claim he might otherwise afterwards have as an heir to his father; and that this contract was carried into execution, as far as it was in the power of the parties to do it, by their deeds respectively. That the meaning of the parties it was impossible to mistake; that it was fair and honest; that it was right and

vancement to his son John C. Headrick of the whole of that portion of his estate, both real and personal, which he supposed the son would otherwise receive upon the father's death, on the 31st of August, 1883, paid to his son John C. Headrick the sum of \$850, and in consideration thereof John C. Headrick forever relinquished all interest in and claim to any portion of the estate which Jacob Headrick then owned or might thereafter acquire, and as to which he might die intestate. This advancement on the part of the father and relinquishment on the part of the son is evidenced by writing under seal, filed with the record. On the 20th day of June, 1885, the father made advancement of certain real and personal property to his daughter, Mary Jane Mc-

proper that it should be carried into effect; and that it must be so. That it was an advancement, and, an advancement in full, is acknowledged both in the deed of the son and in the record. In answer to the suggestion that the father, after the agreement which is expressed in the deed, might have acquired property, and that it would be equitable that the son should have his proportion of it, the court said that the record before them presented no fact of that kind, and that they had no right to form conjectures about it; but the court did say, further, that the residue of the father's estate, after the conveyance to the son, might have been diminished or wholly lost before the father's death, so as to have deprived the other children of any portion; and again that if the circumstances of the father rendered it reasonable, in his opinion, for the son to have a greater portion than he received by the conveyance, he would probably have made the provision in his will, that all contingencies were the subjects of contemplation and of contract; and after being considered the contract was formed and should be executed.

A son during the lifetime of his parents by his deed, in consideration that his father and mother had at his request, and as and for his advancement in his said father's and mother's estate, advanced and paid him a certain sum, released and quitclaimed his said father and mother, and their heirs and assigns forever, all such right, estate, title, interest, and demand whatsoever, as he had, or ought to have, in or to all the estate, real or personal, of his said father and mother, that then was, or might be thereafter, by any ways or means whatsoever, that would otherwise be his by heirship, the deed being made and the money paid with the knowledge of the family of the father. In a case submitted upon these facts it was held that the heirs of the son were not entitled to recover in any form of action. The record did not show that there was any material difference in the value of the estate that would have passed to the son in case of his father's intestacy and the amount acknowledged in the deed to have been received by him from his father, but it was suggested by the counsel of the demandants that the case was different from that of *Quarles v. Quarles*, 4 Mass. 680, because in that case the advancement was held by the court to be in full, but that here it was apparent that the advancement was not near the proportion that

Dowell, in consideration of which she relinquished her interest in and claim to any portion of the estate then owned by her father, or which he might thereafter acquire, and as to which he might die intestate, which contract is also evidenced by a paper under seal, duly signed by father and daughter.

Jacob Headrick had a third child, William C., the issue of a second marriage, and to him, during his lifetime, he also made advances equal in value to those made to his two children above set out, but he did not exact from William any relinquishment of interest in the residue of his estate.

After these advances had been made, Jacob Headrick accumulated property valued at about \$2,000, and died intestate. There-

would have accrued to the son, and it therefore could operate only as a partial advancement, in answer to which the court said that it was impossible to support any well-founded distinction between *Quarles's Case* and the case at bar. *Kenney v. Tucker*, 8 Mass. 143.

In *Stolenburg v. Diercks*, 117 Iowa, 25, 90 N. W. 525, a married daughter, having received a cash payment from her father, executed a paper in which she acknowledged to have received the sum in advance cash payment, for the reception of which she thereby released in firmest manner the inheritance by her father and her mother perfectly and wholly to her entire satisfaction, so that she had no claim after the possible death of her named parents in any way, whether from her father's or her mother's estate, and this was held to be a perfect bar to her anticipation in the estate of her father. It was contended on the part of the daughter that the instrument should be limited in its operation to the estate of the father in Germany. The court said that there was not a word contained in the release indicating such a purpose, and they could think of no principle justifying such a construction. That a transaction of this kind differed in effect from that of an antenuptial contract, which proceeded on the theory that, in marrying, the parties thereto, by tacit agreement, adopt the laws of the matrimonial domicile relating to property rights the same as though such laws were inserted into the marriage contract; that such an agreement is binding so far as these laws extend, that is, throughout that country, and no further. But that the right to inheritance or succession does not rest on the contract, but is derived from positive law, and in entering into contracts like that in question the heir or distributee inevitably contemplates, not present property rights, but those likely to arise in the future. That in this case the plaintiff, the daughter, had no legal claim to any interest in the estate of her parents when she executed the agreement; and the clear distinction between it and an antenuptial contract is that the latter modifies existing interests, while the former relates merely to a probable right, not present, but solely contingent on the ancestors having property at the time of decease and their inclination not to divert it from the statutory modes of descent.

It is said in *Coffman v. Coffman*, 41 W. Va. 8, 23 S. E. 523, that it is a rule of the common law that no one can be the heir of the living,

to law; that is, in this case, to the heirs in general, subject to the provision for bringing advancements into hotchpot." See also *Coffman v. Coffman*, 85 Va. 459, 2 L. R. A. 848, 17 Am. St. Rep. 69, 8 S. E. 672; *Denson v. Autrey*, 21 Ala. 205.

We have no decision upon the subject in Virginia, and, notwithstanding the formidable array of authorities, we are disinclined to ingraft the principle which they maintain into our jurisprudence. Upon the death of the ancestor the descent is cast by operation of law upon the heirs, and the personality passes in accordance with the statute of distribution. Where advancement has been made in the lifetime of the parent, it must be brought into hotchpot by him who receives it, with the result that perfect equality is attained with respect to estates of intestate decedents.

It did, the judicial mind would have hesitated long before determining that this son should have no share in it, on account of the terms used in the instrument.

Where a testator in his lifetime had made advancements to the husband of each of his four daughters, and taken from each son-in-law an acknowledgment in writing under seal that the advancement was to be in full of all claims the latter could have against the estate of the father-in-law after his death as one of his heirs, and binding himself and his heirs not to set up any further claim; and thereafter made a will containing no residuary clause; and on the settlement of the executors there was found to be a surplus after paying all the debts and specific legacies,—the transaction and releases did not debar the three surviving daughters and the children of one who had predeceased her father, from sharing in the distribution of the surplus. *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85.

As in most instances the decision would appear to have gone upon a construction of the statute of the state relating to advancements, the judge who delivered the opinion saying: "It is fair to presume that, in view of all his previous advancements, he made such a distribution of his property by his will as he deemed just and proper. In such a case, therefore, although the testator had, unexpectedly and beyond his own anticipation, died intestate, as to a residuum of his estate, the statutory provision as to advancements could have no just application."

The court declined to consider what would be the result if a testator should knowingly and designedly make a testamentary disposition of only a part of his property.

The principal question, however, seemed to be whether the husband could under the circumstances bar his wife and her children (see same case *infra*, IV.)

After deciding the case upon other questions the judge who delivered the opinion of the court in *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85, further said: "But for my own part I feel no hesitation in questioning the validity of such a contract," and proceeded further to say that the laws of the state having provided the mode for the disposition of a man's

The question put by Judge Ruffin in *Canon v. Nowell*, 51 N. C. (6 Jones, L.) 437, would be equally pertinent in the case before us: Where would the estate of Jacob Headrick have gone if W. C. Headrick had died without issue in the lifetime of his father? Our laws for the descent and distribution of the estates of intestate decedents are simple, and produce perfect equality, while our statute upon the subject wisely regulates, without unduly restraining, the power of testamentary disposition; and we do not feel that the introduction of the principle for which appellant contends would promote the administration of justice, or be a desirable addition to our jurisprudence.

The decree of the Circuit Court is affirmed.

property after his decease, all dominion of the owner over it ceases with his life; and it must be distributed, according to the bequests of his will, if he has chosen to make a testamentary disposition of it, and, if not, then according to the law of descent and distribution; and that a man cannot provide for the division which shall be made of his property after his death, by executory contracts with his children, instead of a last will and testament; and that to allow him to do so and thus to control the course of descent and distribution would be to allow him to set aside the laws of the state.

III. Effect of release on descendants of deceased releasor.

Children claiming as such, and therefore heirs at law, of a deceased daughter of an intestate, are not debarred by a writing executed to the intestate by their mother and her husband without seal, purporting, in consideration of a deed executed to her and her husband by the intestate, to release her and her heirs' claim to her share in the intestate's estate, from receiving a distributive share of the estate of their grandfather. *Buck v. Kittle*, 49 Vt. 288.

The court stated as reasons for its decision, that it was conceded that the instrument could not operate as a release of the expectancy of the daughter in her father's estate, because a release cannot discharge that which does not exist, and heirship cannot be predicated of a living person. That at the date of the writing she had no right to what in time might prove to be her father's estate, as her expectancy even might prove but a vain hope, as it did in this case by her decease preceding that of her father. Second, that the writing not being under seal left the consideration open for inquiry, and lacked the essential requisites of a technical release; and third, that even if it operated to release her expectancy, it would not touch the rights of her children in the estate, because, while they took as her representatives, they took directly from her father, and not from her; and as she never became an heir to the estate, and so took nothing in it, and therefore could not transfer any part of the estate to her children, nor release anything which the law gave to them directly from the estate.

It would seem that the force of this decision as to the particular question here considered is possibly lessened by the fact that two other reasons were given for it, one as to her right to release her own interest and the other as to the form of the release, especially in view of the other fact that it is opposed in principle to the several cases which immediately follow.

See *Re Lewis*, 29 Ont. Rep. 609, *supra*, II.

And in *Simpson v. Simpson*, 114 Ill. 603, 2 N. E. 258, 4 N. E. 137, 7 N. E. 287, Reversing 16 Ill. App. 170, it was held that a release by a son to his father of all claim and right which he had or might thereafter have or acquire as the heir of his father, in all his estate, real and personal, in favor of the other heirs of the estate, made in consideration of the conveyance on the same day by his father to him of certain lands, will bar his right to share in the distribution of the father's estate, and, in case he should die before his father, will bar his heirs of their inheritance.

And see *Kenney v. Tucker*, 8 Mass. 143; *Coffman v. Coffman*, 41 W. Va. 8, 23 S. E. 523; *Power's Appeal*, 63 Pa. 443; *Re Lewis*, 29 Ont. Rep. 609, *supra*, II.; *Towles v. Roundtree*, 10 Fla. 299, *infra*, IV.

IV. Release of interest of married woman or infant.

Where a decedent in his lifetime made advancements to four of his daughters and took from the husband of each a receipt for the amount advanced, in which the husband acknowledged the same "to be in full of all claims he could have against the estate of said . . . [the decedent], after his death, as one of his heirs," stipulating for himself and his heirs, "not to set up any further claim;" such instruments, if regarded in equity as contracts to be enforced, must be treated as the contract solely of each of the husbands, and as creating no estoppel against the wife. *Needles v. Needles*, 7 Ohio St. 482, 70 Am. Dec. 85.

An acknowledgment in writing by a son-in-law of an amount from the estate of the father of his wife in which he relinquished all his right, title, interest, and claim to any further demands against his father-in-law, his heirs and assigns, executors and administrators, will not bar the children of himself and wife of their interest in the estate of the wife's father where she died previous to her father. *Towles v. Roundtree*, 10 Fla. 299.

The court held that this would be so under the common law, as she having died before her father her husband had no interest, right, or title to the estate of the latter, but the same was extinguished without any aid from the release. That in addition to that the woman's law of 1843 by its provision that "when any female, a citizen of the state, shall marry, or a female shall marry a citizen of the state, the female, being seised and possessed of real or personal property, her title to the same shall continue separate, independent, and beyond the control of her husband, notwithstanding her coverture, and shall not be taken in execution for his debts," etc., effected an important alteration in the law of the state and the common law in this respect, and that obviously if the daughter and her husband had both survived the intestate, no sale or transfer by the husband of the wife's interest in her father's estate would be of any validity, nor a relinquishment made by him. The court held farther that the purchase

by the wife's father of her husband's interest in his estate was no advance to her, but was personal to the husband entirely and barred him from a claim—not his wife's nor her heirs.

In Illinois as late as 1871 a receipt and acknowledgment by a married woman of a sum or property in full payment and satisfaction of her share and portion of the estate of her father is not binding on her. *Bishop v. Davenport*, 58 Ill. 103.

This rule is undoubtedly abrogated in nearly all, if not all, of the states, by reason of the adoption of statutes relating to married women, their rights, and property.

A receipt and acknowledgment by one under age, of a sum or property in full payment and satisfaction of her share and portion of the estate of her father, is not binding on her. *Ibid*.

V. Conclusion.

As was said in the commencement, the only question treated herein is the effect of the release as to property acquired by the person making the advancement and to whom the release is executed, after the same are made and executed. And that is precisely what is decided in *HEADRICK V. McDOWELL*. The opinion in the case, however, indicates that the same result would obtain in that court if a controversy should arise concerning property in existence at the time of the advancement and release, no apparent distinction being developed in the opinion. And *Cannon v. Nowell*, 51 N. C. (6 Jones, L.) 437, a case cited, approved, and chiefly relied upon by the court in *HEADRICK V. McDOWELL*, was one in which it did not appear that the property over which the contest was had was acquired by the father of the parties after the execution of the deed, the acceptance of which—with its conditions—it was claimed barred the son from further participation in the distribution of his father's estate.

The following cases, while not strictly authority on the subject of after-acquired property, yet perhaps reflect a suggestion on the part of the court—or rather of the judge writing the opinion—that the fact that there was no substantial difference in the amount and value of the corpus of the estate at the time of making the advancement and executing the release, and that of the death of the one making the advancement,—cuts some figure in arriving at the result.

For instance in *Daniel v. Lewis*, 13 Ky. L. Rep. 827, it was said that it was alleged and admitted that the estate, at the time of making the advancement and contract, was of as much value as it was at the time of the death of the advancer.

And in *Cushing v. Cushing*, 7 Bush, 259, where a demurrer to an answer alleging an advancement and contract of release was overruled, it is stated that it was averred in the answer that the estate of the decedent was as valuable when the contract (of release) was made, as it was at the time of his death, or as it then was.

So, too, in *Smith v. Smith*, 59 Me. 214, it was stated in the opinion that the sum advanced was the full value of the share the son would have received out of his father's estate, had no advancement been made to him, and was the full share of the son in his father's estate at the time of his father's decease.

And in *Galbraith v. McLain*, 84 Ill. 379, it ap-

peared that the share of the son as represented by the deed executed by his father to him as an equivalent for the expectant share of the whole of his father's estate, which deed was accepted by him as such, and which was held to bar his further claim, was more than twice as much as he would have received under the estate in case of intestacy, and more than double what the other heirs would receive.

Because equality of division as a corollary of equality of right should be sought after, courts have deemed that an important matter in the consideration of the subject.

Finally it must be said that the intention of the person making the advancement—generally to be ascertained by considering all the facts and circumstances surrounding the parties, and with reference to which they will be deemed to have acted—will always control in deciding whether the one receiving the advancement and executing the release shall be barred from further participation in the distribution of that portion of the estate which was acquired after the making of the advancement and release.

P. H. V.

MISSOURI SUPREME COURT.

S. A. WELTMER *et al.*, *Respts.*,
v.

C. M. BISHOP, *Appt.*

(171 Mo. 110.)

1. The business of pretending to heal absent patients by supernatural powers without medicine or surgery is fraudulent, and not protected by the law against libel, although many persons claim to have been benefited by the treatment.
2. Courts are not required to give credence to testimony that would falsify well-known laws of nature.
3. A submission to the jury of the legitimacy of a business, with directions to find it legitimate if it has been substantially beneficial to the public, is error when there is no evidence to support such a finding except testimony which the jurors cannot believe without surrendering their own intelligence.
4. One claiming protection of the law for a business of so-called "magnetic healing" by a mental process transmitted to patients at a distance has the burden of showing the rationale of anything therein, if there be any such thing, not perceptible to the uninstructed, which entitles the business to protection.

(November 26, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for Bates County in favor of plaintiffs in an action brought to recover damages for the publication of a libel. *Reversed.*

The facts are stated in the opinion.

Messrs. W. C. Searritt, W. M. Williams, and M. T. January for appellants.

Messrs. Francisco & Clark and Scott & Bowker, for respondents:

Anything that imputes dishonesty or

NOTE.—As to constitutionality of statute discriminating against magnetic healers in requiring them to procure a license, see *Parks v. State*, 59 L. R. A. 190.

As to liability of magnetic healer for injury caused to patient, see *Longan v. Weltmer*, 64 L. R. A. 969.
65 L. R. A.

fraud or misconduct of one in his business is a libel *per se*, and is actionable without proof of special damages; general damages may be recovered.

Spurlock v. Lombard Invest. Co. 59 Mo. App. 225; *St. James Military Academy v. Gaiser*, 125 Mo. 517, 28 L. R. A. 667, 46 Am. St. Rep. 502, 28 S. W. 851; *Nicholson v. Rogers*, 129 Mo. 136, 31 S. W. 260; *Mitchell v. Bradstreet Co.* 116 Mo. 226, 20 L. R. A. 138, 38 Am. St. Rep. 592, 22 S. W. 358, 724.

Defendant's testimony as to his motives or good faith in publishing a libel or slander is not admissible as to compensatory damages, but is admissible as to punitive damages.

Callahan v. Ingram, 122 Mo. 355, 43 Am. St. Rep. 583, 26 S. W. 1020; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614; *Lewis v. Humphries*, 64 Mo. App. 466; *Jones v. Murray*, 167 Mo. 25, 66 S. W. 981.

Where the language of the libel is ambiguous, and does not call the person libeled by name, it is permissible to show by the persons where the libel circulated that it was directed to a particular individual, and was so understood by the people familiar with all the facts and circumstances surrounding its publication.

Caruth v. Richeson, 96 Mo. 186, 9 S. W. 633; *Crecelius v. Bierman*, 59 Mo. App. 513; *Wagner v. Saline County Progress Printing Co.* 45 Mo. App. 6; *State v. Fitzgerald*, 20 Mo. App. 408; *Lewis v. Humphries*, 64 Mo. App. 466; *State v. Powell*, 66 Mo. App. 598; *Ryckman v. Delavan*, 25 Wend. 186; *Houston Printing Co. v. Moulden*, 15 Tex. Civ. App. 574, 41 S. W. 381; *State v. Mason*, 26 Or. 273, 26 L. R. A. 779, 46 Am. St. Rep. 629, 38 Pac. 130; *Newell, Libel & Slander*, 1st ed. p. 259; *Odgers, Libel & Slander*, 1st ed. pp. 128, 129; 2 *Addison, Torts*, p. 378.

The law does not permit any person to slander another on any occasion or under any circumstances when they are not protected by absolute privilege.

Callahan v. Ingram, 122 Mo. 355, 43 Am. St. Rep. 583, 26 S. W. 1020.

Even in the case of a privileged publication, if the publication is made indiscriminately to everybody,—to others than those who have a special interest in the subject of the publication,—it loses its privilege.

Mitchell v. Bradstreet Co. 116 Mo. 226, 20 L. R. A. 138, 38 Am. St. Rep. 592, 22 S. W. 358, 724.

Even in the case of privileged communication, the language must be such as the occasion warrants. If violent or intemperate language is used, the privilege is lost. If the facts and circumstances do not justify the terms employed, there is no privilege.

Sullivan v. Strathan-Hutton-Evans Commission Co. 152 Mo. 268, 47 L. R. A. 859, 53 S. W. 912; *Odgers, Libel & Slander*, 1st ed. p. 239; *Newell, Libel & Slander*, 1st ed. p. 532; *Arnold v. Sayings Co.* 76 Mo. App. 180; *Callahan v. Ingram*, 122 Mo. 356, 43 Am. St. Rep. 583, 26 S. W. 1020; *Jones v. Murray*, 167 Mo. 25, 66 S. W. 981.

Valliant, J., delivered the opinion of the court:

Plaintiffs sue as partners in trade to recover damages for an alleged libel of their business. They recovered a judgment for \$750, and the defendant appeals. The case comes to this court because a constitutional question is involved.

The petition alleges that the plaintiffs are engaged in the business of magnetic healing, and had been so engaged for more than two years at the city of Nevada, and that large numbers of people had been coming to them from abroad to be treated by the plaintiffs for diseases; that defendant wrote and caused to be published in a newspaper an article in which the plaintiffs were called "miserable charlatans," and in which statements were made concerning their business which were false, libelous, and malicious. The article is set out in full in the petition, but, under the view we have taken of the case, we deem it unnecessary to copy it in this statement, or to say of it more than that if the plaintiffs' business was legitimate, and if the statements were false, and if the article referred to the plaintiffs, it was libelous. The answer admitted the authorship and publication: alleged the truth of the statements; that it was not intended to refer to plaintiffs in particular, but to a large class that were engaged in the business of so-called magnetic healing; that the business was a fraud practised on the public; and that defendant deemed it his duty to expose the fraud, and wrote the article in good faith and without malice. The court, on motion of plaintiffs, struck out all of the answer except that part admitting the publication, and pleading its truth. Upon the trial the evidence both for plaintiffs and le-

fendant showed as follows: The plaintiffs, who were men without the pretense of scientific learning, and who possessed only to a limited degree even the rudiments of education, were engaged in a business at Nevada which they called "magnetic healing." They employed for chief assistants three men who were also unlearned in any science, and of little common education, and in addition to these a large number of female typewriters. They advertised very extensively in the chief cities of the United States and in foreign countries. In their advertisements they professed to possess miraculous power to heal all diseases to which human beings were liable, without medicine and without surgery; that to them had been committed the startling revelation whereby all ailments are dispersed as if by magic; that they had cured patients thousands of miles away, and could cure thousands in an instant; that they exerted the same powers that Jesus Christ exerted to cure diseases 1900 years ago. By far the greater number of their patients were at a distance, and the only communication with them was by letter. These they proposed to cure, no matter what the disease, and though thousands of miles away, by a mysterious influence of the mind of the healer over that of the patient. The chief direction in the letter to the distant patient was that at a certain hour in the day he should dismiss all disturbing thoughts, and bring his mind into a passive condition to receive the influence from the mind of the healer, who at that same hour in Nevada would bring his mind to exert the mysterious influence desired. The business that the plaintiffs built up by these methods was indeed wonderful, in respect to its magnitude. They were making \$1,000 a day. People suffering with sickness and disease came by hundreds to Nevada to receive the magic touch of these men, and many of them went away believing that they had been cured or benefited. But the great bulk of the business was through what they called their "absent treatment;" that is, by letter correspondence. Their patients of this kind numbered many thousands, and they were treated by the typewriters, who alone read the letters coming from the absent patients, and answered them. The answer to each was, in the main, a copy of a circular letter prepared by the plaintiffs, and furnished the typewriters for that purpose. One of the plaintiffs, who was the originator of the scheme, and the chief director of the business, explained that the process of this absent treatment was that, at the hour designated in the letter in which the patient was to make his mind passive to receive the healing influence, he (the healer) would bring the powers of his own mind to bear on that of the distant patient, and the beneficial

result would follow. In this way many hundreds of men, women, and children in different parts of the world were treated at the same instant. When his attention was called to the fact that at a stated hour in Nevada, when the healer was exercising his mind to transmit its influence to the expectant patients in different parts of the world, that time would not correspond with the hour in distant and different localities, he gave no clear explanation of the point. It was also shown that, when he left the business and went to Colorado for a summer vacation, this absent treatment went on as efficiently through the instrumentality of the typewriters as when the healer was present. One of the witnesses for the plaintiffs testified that she was a married woman, living near Chicago; that she had been afflicted with cancer of the breast, and other troubles peculiar to women; that she took this absent treatment from Prof. Weltmer, one of the plaintiffs, from May 1 to July 1, 1899, and was entirely cured. This was one of the cures effected by this absent treatment, when the healer was himself absent, and no one but the typewriter in Nevada to transmit the healing influence. The testimony as to the method of treatment of those who came in person to Nevada showed that it was, in the main, an abuse of their credulity, and in some instances consisted only of disgusting suggestion. Quite a number of witnesses testified for the plaintiffs that they had taken these treatments, and were cured or benefited; and Prof. Weltmer himself testified that, of the many thousands of patients, fully 95 per cent had been cured. There were those who had taken the treatments who testified for defendant that they received no benefit, and there was expert testimony on the feasibility of such treatments. There was a large volume of evidence, and several questions arose during the trial, which, if the plaintiffs were entitled to go to the jury at all, would deserve our attention; but, in the view we have taken of the character of the plaintiffs' business, it is unnecessary to go farther into the case. Defendant asked a peremptory instruction for a verdict in his favor, which the court refused.

The case was given to the jury under several instructions,—among them, the following: "The court instructs the jury that if you find and believe, from all the evidence and the facts and circumstances in evidence, that the business in which plaintiffs were engaged upon August 16, 1899, was and is an imposition and fraud upon the general public, then your finding must be for the defendant. In this connection, however, you are further instructed that, in determining whether or not such business was an imposi-

tion and fraud upon the general public at the time aforesaid, you will consider the general character of the business as disclosed by the facts, as well as the results of their said business methods with the general public, as shown by the evidence and facts and circumstances in evidence, and if you find from all the evidence and the facts and the circumstances in evidence that their said business was and had been substantially beneficial to the general public, and their methods had substantially produced the results claimed for them by plaintiffs, then the same is not a fraud or imposition upon the general public, and you should find for the plaintiffs upon this issue." From this it will be seen that the court submitted to the jury to say if the plaintiffs' business was legitimate, and in weighing that question they were to consider the results as disclosed by the evidence, and, on the whole, if the results had been beneficial, the business was not to be adjudged a fraud. Courts are not such slaves to the forms of procedure as to surrender their own intelligence to an array of witnesses testifying to an impossibility. They are not required to give credence to a statement that would falsify well-known laws of nature, though a cloud of witnesses swear to it. We recognize that in the realm of science much is yet undiscovered, and especially is this so in the science relating to diseases of the human system and their treatment. Different schools of medicine contend with each other on vital questions, and, as long as the contest continues with reason, it cannot be said that the right of either, as above the other, has been demonstrated. But if either school would convince us that it is right, or even that it is entitled to be recognized as a contestant, it must appeal to our intelligence, and discuss the subject on the basis of natural laws. If it cannot be discussed on that basis, there is nothing to discuss. If a man come into court claiming to possess supernatural powers, and bring with him witnesses who swear he has done for them that which we know is impossible, we are not required to believe such evidence. Here was a woman, who perhaps believed what she said, who testified that by a mental process of one of these plaintiffs, transmitted to her through a letter several hundred miles away, she was entirely cured of a cancer of the breast. The fact that the plaintiff who was supposed to have transmitted the influence from Nevada was not there at the time does not add to the absurdity of the statement. And the testimony of other witnesses, perhaps also sincere, to the effect that they were cured of otherwise incurable diseases by such mysterious process, can have absolutely no lodgment in our intelligence. Under the instruc-

tion above quoted, the jury were directed to heed such evidence, and if, on the whole, it showed that good had resulted to the community from the practices of the plaintiffs, the jury were to find that the business was a lawful one. It was an instruction, in effect, directing the jury to surrender their own intelligence to the preponderance of statements of witnesses, irrational though such statements were. Under the conceded facts, there was no evidence to justify the submission of the case to the jury, and the peremptory instruction for a verdict for the defendant should have been given. If there was anything in the plaintiffs' business, which they call "magnetic healing," that entitled it to the protection of the law, and which was not perceptible to the uninstructed, the burden was on them to show the rationale of it; and, failing to do so, the court should close its door against them. *Richards v. Judd*, 15 Abb. Pr. N. S. 184. The law of libel is not designed to shield one in the practice of an illegal business. 18 Am. & Eng. Enc. Law, 2d ed. p. 947; *Johnson v. Simonton*, 43 Cal. 242; *Perry v. Man*, 1 R. I. 263; *Starkie, Slander & Libel*, 5th ed. 522. The business of the plaintiffs, as shown by their own evidence, is of such a character as that it is not entitled to protection under the law of libel.

This case has been conducted on both sides with marked ability, and there yet remain in the briefs of the learned counsel interesting questions, which are tempting to consider; but, in view of what we have already said, the case is disposed of before those questions are reached.

The judgment of the Circuit Court is reversed.

All concur.

A petition for rehearing having been filed, the following response was handed down on December 24, 1902:

On the motion for rehearing, our attention is called to a recent decision of the Supreme Court of the United States in the case of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33, which the learned counsel for respondents are of the opinion announces a different conclusion as to the law from that declared in the opinion of this court in the case at bar. But the case in which the Supreme Court of the United States pronounced its judgment was very different in its facts from the case at bar. That was a suit in equity, in which the complainants, in their bill, made the following averments: "And your orators state that said business is a

legal and legitimate business, conducting according to business methods, and is founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefitting, and remedying thereof; and that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to; and complainants discard and eliminate from their treatment what is commonly known as 'Divine healing' and 'Christian science,' and complainants are confined to practical scientific treatment emanating from the source aforesaid." The bill further averred that the postmaster at Nevada, under orders from the Postmaster General, had refused to deliver to complainants the mail directed to them in that office, and was about to stamp all their letters "fraudulent" and return them to the writers; and the prayer of the bill was for an injunction to restrain the postmaster from doing so. The defendant demurred to the bill. The trial judge sustained the demurrer and refused the injunction. On appeal to the Supreme Court, Mr. Justice Peckham, who rendered the opinion, said: "As the case arises on demurrer, all material facts averred in the bill are, of course, admitted." Then, after quoting the above extracts from the bill, he said: "These allegations are not conclusions of law, but are statements of fact upon which, as averred, the business of the complainants is based." The court held that upon that statement of facts, admitted to be true, the business of complainants was not within the class forbidden to be conducted by use of the mails, and therefore reversed the judgment of the circuit court, and remanded the cause, with directions to overrule the demurrer, with leave to defendant to answer; and, in concluding the opinion, the court said: "In overruling the demurrer, we do not mean to preclude the defendant from showing on the trial, if he can, that the business of complainants, as in fact conducted, amounts to a violation of the statutes, as herein construed." Our decision in the case at bar is not based on a demurrer admitting that the business of plaintiffs is a system of healing conducted on practical and scientific principles, but it is based on the character of the business as shown by the evidence at the trial.

The motion for rehearing is overruled. All concur.

Appeal dismissed by Supreme Court of United States December 21, 1903.

STATE of Missouri, *Respt.*,
v.
MISSOURI TIE & TIMBER COMPANY,
Appt.

(.....Mo.....)

A statute forbidding, under penalty, persons or corporations engaged in private enterprises from paying employees in store orders not redeemable in cash is unconstitutional as interfering with the right to contract.

(May 11, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Ripley County convicting it of violating the statute forbidding the issuing of orders not redeemable in cash. *Reversed.*

The opinion of division No. 2, rendered by BURGESS, J., was as follows:

The defendant is a corporation duly incorporated under the laws of this state, and was at the time of the commission of the alleged offenses of which it was convicted engaged in the tie and timber business in Ripley county. It had, in connection with its timber business, a general supply store for the purpose of furnishing supplies to its employees. The information upon which this prosecution is based contained four counts, which, leaving off the formal parts, are as follows:

"Now comes Thomas F. Lane, prosecuting attorney within and for the county of Ripley, in the state of Missouri, and informs the court under his oath of office and upon his own information and belief: That the Missouri Tie & Timber Company is a corporation duly organized and existing under and by virtue of the laws of the state of Missouri, and was such during all the times mentioned in this information; that said defendant corporation, the Missouri Tie & Timber Company, and J. T. Henderson, its servant, agent, and officer, on the — day of December, 1901, at the said county of Ripley in the state of Missouri, did then and there unlawfully and wrongfully issue, pay out, and circulate, for the payment of wages for certain labor done and performed by one H. A. Sweeney for the Missouri Tie & Timber Company, a certain order, check, memorandum, token, evidence of indebtedness and obligation of the said Missouri Tie & Timber Company, which said order, check, coupon, memorandum, token, evidence of in-

debtedness, and obligation so paid out and circulated for the payment of the wages of labor of the said H. A. Sweeney is described as follows:

"Order for Merchandise, \$5.00.

"To Missouri Tie & Timber Co.

"Acct. Order of H. A. Sweeney.

"O. K. T. W. Beauchamp.

"No. 1761C.

"Merchandise Order.

"Amounting to \$5.00, at the store of Missouri Tie & Timber Co., upon conditions named on back of this book and made a part thereof.

"Missouri Tie & Timber Co., please furnish myself or . . . goods at your store to the amount of \$5.00, and charge same to my account as per coupons contained in this book. These coupons to be detached only by the authorized employees of the Missouri Tie & Timber Co. and if otherwise detached, to be worthless.

"[Signed] H. A. Sweeney.

"Said order book, coupon, token, check, memorandum, evidence of indebtedness, and obligation containing between the covers thereof, 100 five-cent mercantile coupons, each of which is described as follows:

"Mercantile Coupon 5 Cents.

"Mo. Tie & Timber Co.

"No. 1761C.

"That said check, coupon, token, memorandum, evidence of indebtedness, and obligation so paid out for the wages of labor as aforesaid by the said Missouri Tie & Timber Company and J. T. Henderson, as aforesaid, is not redeemable in lawful money of the United States at its face value. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

"Now comes Thomas F. Lane, prosecuting attorney within and for the county of Ripley in the state of Missouri, and informs the court under his oath of office, and upon his own information and belief: That the Missouri Tie & Timber Company is a corporation duly organized and existing under and by virtue of the laws of the state of Missouri, and was such during all the times mentioned in this information. That said defendant corporation, the Missouri Tie & Timber Company, and J. T. Henderson, its servant, agent, and officer, on the — day of December, 1901, at the said county of Ripley, in the state of Missouri, did then and there unlawfully and wrongfully issue, pay out, and circulate, for the payment of wages for certain labor done and performed by

NOTE.—As to validity of statutes requiring wages to be paid in lawful money, see also, in this series, note to *Avent-Beattyville Coal Co. v. C. M. 28 L. R. A. 273*, and the later case of *State v. Hubbard*, 47 L. R. A. 369. 65 L. R. A.

one E. H. Day for the said Missouri Tie & Timber Company, a certain order, check, memorandum, token, evidence of indebtedness, and obligation of the said Missouri Tie & Timber Company, which said order, check, coupon, memorandum, token, evidence of indebtedness, and obligation so paid out and circulated for the payment of the wages of labor of the said E. H. Day is described as follows, to wit:

"Order for Merchandise, \$5.00.
 "To Missouri Tie & Timber Co.
 "Acct. Order of E. H. Day.
 "O. K. T. W. Beauchamp.
 "No. 1810C.

"Merchandise Order.

"Amounting to \$5, at the store of Missouri Tie & Timber Co., upon conditions named on back of this book and made a part hereof.

"Missouri Tie & Timber Co., please furnish myself or . . . goods at your store to the amount of \$5.00 and charge same to my account as per coupons contained in this book. These coupons to be detached only by the authorized employees of the Missouri Tie & Timber Co., and if otherwise detached, to be worthless.

"[Signed] E. H. Day.

"Said order book, coupon, token, check, memorandum, evidence of indebtedness, and obligation containing between the covers thereof 100 five-cent mercantile coupons, each of which is described as follows:

"Mercantile Coupon, 5 cents.
 "Mo. Tie & Timber Co.
 "No. 1801C.

"That said check, coupon, token, memorandum, evidence of indebtedness, and obligation, so paid out and circulated for the wages of labor as aforesaid by the said Missouri Tie & Timber Company, and J. T. Henderson, as aforesaid, is not redeemable in lawful money of the United States at its face value. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

"Now comes Thomas F. Lane, prosecuting attorney within and for the county of Ripley in the state of Missouri, under his oath of office and upon his own information and belief, and informs the court: That the Missouri Tie & Timber Company is a corporation organized and existing under and by virtue of the laws of the state of Missouri, and was such corporation during all the times mentioned in this information. 65 L. R. A.

That said defendants the Missouri Tie & Timber Company and J. T. Henderson, one of its servants, agents, and officers, on or about the 27th day of December, 1901, at the county of Ripley and state of Missouri did then and there unlawfully and wrongfully refuse and fail to redeem in lawful money of the United States a certain memorandum, token, order, check, obligation, and evidence of indebtedness, to wit, an order for merchandise on and to the said Missouri Tie & Timber Company in the form of a merchandise coupon check book to the amount of \$5, which said coupon check book contained 100 coupons, each for the sum of five cents; which merchandise coupon check book had theretofore been issued, paid out, and put into circulation by the said Missouri Tie & Timber Company, indorsed by one T. W. Beauchamp, a servant and agent of said defendant corporation, and delivered to one H. A. Sweeney for the payment to him of wages for labor done and performed by the said H. A. Sweeney for and at the request of the said Missouri Tie & Timber Company. That said merchandise coupon check book was on the — day of December, 1901, by H. A. Sweeney, the owner thereof, for a valuable consideration, sold and delivered to W. A. Leach & Co., a firm composed of W. A. Leach and Jacob Hardcastle; that afterwards, to wit, on or about the 27th day of December, 1901, W. A. Leach on behalf of the firm of W. A. Leach & Co., duly presented said merchandise coupon check book, heretofore described, to J. T. Henderson, servant, agent, and officer of the said Missouri Tie & Timber Company, at the usual place of business and general office of said Missouri Tie & Timber Company, in Ripley county, Missouri, during the business hours of said day, and demanded payment therefor in lawful money of the United States, which was then and there refused by the said J. T. Henderson, servant, agent, and general manager of the defendant Missouri Tie & Timber Company, as aforesaid; which said refusal and failure to redeem said merchandise coupon book in lawful money of the United States, as aforesaid, was contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

"Now comes Thomas F. Lane, prosecuting attorney within and for the county of Ripley in the state of Missouri, under his oath of office and upon his own information and belief, and informs the court: That the Missouri Tie & Timber Company is a corporation duly organized and existing under and by virtue of the laws of the state of Missouri, and was such corporation during all the times mentioned in this information. That said defendants, the Missouri Tie &

Timber Company and J. T. Henderson, one of its servants, agents, and officers, on the 14th day of January, 1902, at the county of Ripley and state of Missouri, did then and there unlawfully and wrongfully refuse and fail to redeem in lawful money of the United States a certain memorandum, token, order, check, obligation, and evidence of indebtedness, to wit, an order for merchandise on and to the said Missouri Tie & Timber Company in the form of a merchandise coupon check book numbered 1801C to the amount of \$5, which said coupon check book contained 100 coupons, each for the sum of five cents; which merchandise coupon check book had theretofore been issued, paid out, and put in circulation by the said Missouri Tie & Timber Company; indorsed by one T. W. Beauchamp, a servant and agent of said defendant corporation, and delivered to one E. H. Day for the payment to him of wages for labor done and performed by the said E. H. Day, for and at the request of the said Missouri Tie & Timber Company. That said merchandise coupon check book was on the — day of December, 1901, by E. H. Day, the owner thereof, for a valuable consideration, sold and delivered to W. A. Leach & Company, a firm composed of W. A. Leach and Jacob Harcastle. That afterwards, to wit, on the 14th day of January, 1902, W. A. Leach, on behalf of the firm of W. A. Leach & Company, duly presented said merchandise coupon check book heretofore described, to J. T. Henderson, servant, agent, and officer of the said Missouri Tie & Timber Company, at the usual place of business and general office of said Missouri Tie & Timber Company, in Ripley county, Missouri, during the business hours of said day, and demanded payment therefor in lawful money of the United States, which was then and there refused by the said J. T. Henderson, servant, agent, and general manager of the defendant Missouri Tie & Timber Company as aforesaid; which said refusal and failure to redeem said merchandise coupon book in lawful money of the United States as aforesaid was contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

The case was dismissed as to J. T. Henderson, and, by consent of the other parties, a jury was waived, the cause tried by the court, the defendant found guilty upon each count in the information, and its punishment fixed at a fine of \$50 upon each count. Defendant appealed to the St. Louis court of appeals, from which it was transferred by that court to the supreme court.

The case was tried upon the following agreed statement of facts:

65 L. R. A.

"Agreed Statement of Facts.

"It is hereby stipulated and agreed by and between the parties hereto that the charges in the information against the defendant filed herein, and each and every count thereof, be submitted to the court, waiving a jury, for its finding and judgment upon the following agreed statement of facts: That defendant is a corporation doing business in Ripley county, Missouri, and on the — day of December, 1901, had in its employ H. A. Sweeney, cutting and hauling ties and putting same on defendant's railroad. That in payment for his wages for such labor defendant issued to said H. A. Sweeney a certain order, check, memorandum, token, obligation, or evidence of indebtedness, which is in words and figures as follows, to wit:

"Order for Merchandise, \$5.

"To Missouri Tie & Timber Co.

"Acct. Order of H. A. Sweeney.

"O. K. T. W. Beauchamp.

"No. 1761C.

"Merchandise Order.

"Amounting to \$5 at the store of Missouri Tie & Timber Co. upon conditions named in the back of this book and made a part hereof.

"That the back of said book is in words and figures as follows, to wit:

"Missouri Tie & Timber Co. please furnish myself or . . . goods at your store to the amount of \$5.00 and charge same to my account as per coupons contained in this book. These coupons to be detached only by the authorized employees of the Missouri Tie & Timber Co., and if otherwise detached to be worthless.

"[Signed] H. A. Sweeney.

"That said order book, token, check, memorandum, obligation, or evidence of indebtedness contained between its covers 100 five-cent mercantile coupons, each of which is described as follows, to wit:

"Mercantile Coupon 5 Cents,

"Mo. Tie & Timber Co.

"No. 1761C.

"It is further stipulated and agreed that said check, order, token, memorandum, obligation, or evidence of indebtedness was not redeemable in lawful money of the United States at its face value, and the same was in truth and in fact issued by defendant to said H. A. Sweeney in payment

to him as wages for his labor. It is further agreed as to third and fourth counts that defendant has an irregular pay day once in every month, and that if an employee on such pay day holds one of the above described checks, tokens, memoranda, obligations, or evidences of indebtedness, or a balance thereof, that the same will be and is paid to such employee in cash on his demand; but that said defendant will not pay such check, memorandum, obligation, or evidence of indebtedness in cash when held or presented by any other person than the one to whom it was issued in the first instance, but will exchange goods therefor. It is further agreed that on the 27th day of December, 1901, W. A. Leach was the legal owner and holder of the above-described check, token, memorandum, obligation, or evidence of indebtedness for value, and that on said day, during the business hours of the day, the said Leach presented the same at the place of business of defendant, and demanded payment thereof in lawful money of the United States, and that defendant then and there refused to pay the same in cash.

"It is further agreed: That defendant keeps in stock hundreds of dollars in amounts of checks, tokens, memoranda, obligations, or evidences of indebtedness of like character and purport as the one above specifically described, and that the same are issued only to employees of defendant in payment of wages for labor, and then only when such employees have amounts due them for labor equal or greater than the amount of such check, token, memorandum, obligation, or evidence of indebtedness issued to them at such times. That, in order to save a large amount of bookkeeping, said company has printed and issues the coupon books in evidence, and that no laborer is compelled, induced, coerced, or required to take any coupon book or books in payment of his wages, or to trade at the store of the company, unless he so desires.

"T. F. Lane, Pros. Atty.

"J. C. Sheppard, Atty. for Deft."

The court, at the instance of the state, declared the law to be as follows:

"(1) The court declares the law to be upon the first count in the information in this case as follows: That if you shall believe and find from the evidence that defendant Missouri Tie & Timber Company, a corporation, doing business in Ripley county, Missouri, and that defendant J. T. Henderson was its servant, agent, and general manager, and that said corporation, by and through its servant, agent, and general manager, J. T. Henderson, did on said — day of December, 1901, at the said county of Ripley and state of Missouri, unlawfully
65 L. R. A.

and wrongfully issue and pay out and circulate for the payment of wages for labor done and performed by H. A. Sweeney for defendant the said Missouri Tie & Timber Company a certain order, check, memorandum, evidence of indebtedness, or obligation of said defendant the said Missouri Tie & Timber Company for the sum of \$5, and that said check, order, token, memorandum, evidence of indebtedness, or obligation so paid out for wages of labor to said H. A. Sweeney by defendant Missouri Tie & Timber Company, as aforesaid, was not at the time of issuing the same redeemable in lawful money of the United States, at its face value, then you will find defendant Missouri Tie & Timber Company guilty as charged in the first count of the information herein, and assess the punishment of defendant Missouri Tie & Timber Company at a fine of not less than \$50 nor more than \$500.

"(2) The court declares the law to be in this case that it makes no difference in law whether H. A. Sweeney agreed to accept the order, check, token, memorandum, evidence of indebtedness, or obligation in payment for wages for labor or not; nor does it make any difference that the said order, token, check, memorandum, obligation, or evidence of indebtedness, purports on its face to be an order issued by the said H. A. Sweeney on defendant said Missouri Tie & Timber Company for merchandise, and accepted by said defendant corporation, if in fact the said token, check, order, memorandum, obligation, or evidence of indebtedness was issued in payment of wages for labor performed by said H. A. Sweeney for defendant, and not redeemable at its face value in lawful money of the United States. And you should not take these facts into consideration in arriving at your verdict in this case.

"(3) The court declares the law to be upon the second count in the information in this case as follows: That if you shall believe and find from the evidence that defendant Missouri Tie & Timber Company, a corporation doing business in Ripley county, Missouri, and that defendant J. T. Henderson, was its servant, agent, and general manager, and that said corporation, by and through its servant, agent, and general manager, J. T. Henderson, did on said — day of December, 1901, at the said county of Ripley, and state of Missouri, unlawfully and wrongfully issue and pay out and circulate for the payment of wages for labor done and performed by E. H. Day for defendant the said Missouri Tie & Timber Company a certain order, check, memorandum, evidence of indebtedness, or obligation of said defendant the said Missouri Tie &

Timber Company for the sum of \$5, and that said check, order, token, memorandum, evidence of indebtedness, or obligation so paid out for wages of labor to said E. H. Day by defendants Missouri Tie & Timber Company and J. T. Henderson, its servant, agent, and general manager, as aforesaid, was not at the time of issuing the same redeemable in lawful money of the United States at its face value, then you will find defendants Missouri Tie & Timber Company and J. T. Henderson, its servant, agent, and general manager, guilty as charged in the second count of the information herein, and assess the punishment of defendant Missouri Tie & Timber Company at a fine of not less than \$50 nor more than \$500.

"(4) The court declares the law to be in this case that it makes no difference in law whether E. H. Day agreed to accept the order, check, token, memorandum, evidence of indebtedness, or obligation in payment for wages for labor or not; nor does it make any difference that the said order, token, check, memorandum, obligation, or evidence of indebtedness purports on its face to be an order issued by the said E. H. Day on defendant said Missouri Tie & Timber Company for merchandise, and accepted by said defendant corporation, if in fact the said token, check, order, memorandum, obligation, or evidence of indebtedness was issued in payment of wages for labor performed by said E. H. Day for defendant, and not redeemable at its face value in lawful money of the United States. And you should not take these facts into consideration in arriving at your verdict in this case.

"(5) The court declares the law to be upon count No. 3 of the information in this case as follows: That if you shall believe and find from the evidence that defendant Missouri Tie & Timber Company, a corporation, was doing business in Ripley county, Missouri, and that said corporation on or about the 27th day of December, 1901, at the county of Ripley and state of Missouri, did then and there unlawfully and wrongfully refuse to redeem in lawful money of the United States a certain memorandum, check, token, order, obligation, or evidence of indebtedness for the sum of \$5, which said memorandum, check, token, order, obligation, or evidence of indebtedness had theretofore been issued, paid out, and put into circulation by defendants and delivered to H. A. Sweeney in payment to him for wages of labor done and performed by him for and at the request of defendant Missouri Tie & Timber Company; and if you shall further find and believe from the evidence that on or about said 27th day of December, 1901, that said token, order, check, memorandum, obligation, or evidence of indebtedness was
65 L. R. A.

presented to defendants at their usual place of business and general office in Ripley county, Missouri, during the business hours of the day, and payment therefor demanded in lawful money of the United States for its face value, and that such payment for its face value, in lawful money of the United States, of said token, order, memorandum, check, obligation, or evidence of indebtedness was then and there refused by defendants,—you will then find defendants guilty as charged in the third count in the information, and you will assess the punishment of the Missouri Tie & Timber Company at a fine of not less than \$50 nor more than \$500.

"(6) The court declares the law to be upon count No. 4 of the information in this case as follows: That if you shall believe and find from the evidence that defendant Missouri Tie & Timber Company, a corporation, was doing business in Ripley county, Missouri, and that said corporation on or about the 27th day of December, 1901, at the county of Ripley and state of Missouri, did then and there unlawfully and wrongfully refuse to redeem in lawful money of the United States a certain memorandum, check, token, order, obligation, or evidence of indebtedness for the sum of \$5 which said memorandum, check, token, order, obligation, or evidence of indebtedness had theretofore been issued, paid out, and put in circulation by defendants, and delivered to E. H. Day in payment to him for wages of labor done and performed by him for and at the request of defendant Missouri Tie & Timber Company; if you shall further find and believe from the evidence that on or about said 27th day of December, 1901, said token, order, check, memorandum, obligation, or evidence of indebtedness was presented to defendants at their usual place of business and general office in Ripley county, Missouri, during the business hours of the day, and payment therefor demanded in lawful money of the United States, for its face value, and that such payment for its face value, in lawful money of the United States, of said token, order, memorandum, check, obligation, or evidence of indebtedness, was then and there refused by defendants,—you will then find defendants guilty as charged in the fourth count in the information, and you will assess the punishment of the Missouri Tie & Timber Company at a fine of not less than \$50 nor more than \$500."

To the giving of said declarations of law, and each of them, counsel for defendant excepted at the time.

The defendant requested the court to declare the law as follows:

"No. 1. The court, sitting as a jury, declares the law to be that under the informa-

tion and the evidence in this cause the defendant cannot be convicted, and the finding must be 'Not guilty.'

"No. 2. The court declares the law to be that, if it finds and believes from the evidence that the defendant company issued the coupon book in evidence for the convenience of the company, and to avoid voluminous bookkeeping, and not for the purpose of compelling its employees to trade at its store, or to take goods for their labor, then the defendant is not guilty, and the court should so find.

"No. 3. The court further declares the law to be that the statute (§§ 8142, 8143, and 8144, Mo. Rev. Stat. 1899), is unconstitutional and void, as being in violation of the constitutional provision 'that no person shall be deprived of life, liberty, or property without due process of law.'"

Which declarations of law the court refused to give, and defendant duly excepted.

It is asserted by defendant in its motion for a new trial that a new trial should be granted, first, because the finding is against the evidence; second, because there is no evidence to support the finding; third, because the court erred in giving instructions Nos. 1, 2, 3, 4, 5, and 6 on behalf of the state; fourth, because the court erred in refusing declarations of law Nos. 1, 2, and 3 asked on behalf of the defendant; fifth, because the statute (Rev. Stat. 1899, chap. 121, art. 3, §§ 8142 and 8143), is unconstitutional, in violation of the Constitution of the United States and the state of Missouri, and void, and will not support the finding.

The information is based upon §§ 8142, 8143, 8144, and 8145 of the Revised Statutes of 1899. The first of these sections reads as follows:

"Sec. 8142. It shall not be lawful for any person, firm, or corporation in this state to issue, pay out, or circulate, for payment of the wages of labor, any order, note, check, memorandum, token, evidence of indebtedness, or other obligation, unless the same is negotiable and redeemable at its face value, in lawful money of the United States, by the person, firm, or corporation issuing the same.

"Sec. 8143. All persons, firms, or corporations, issuing or circulating any such order, note, check, memorandum, token, evidence of indebtedness, or other obligation, shall be at all times during the business hours of the day prepared to redeem, and shall redeem, all such orders, notes, checks, memorandum, tokens, evidence of indebtedness, or other obligation, when presented at their place of business or office, at their face value, in good and lawful money of the 65 L. R. A.

United States, or in goods, at the option of the holder.

"Sec. 8144. Any person, firm, or corporation, or the officer or officers of any corporation, who shall violate this article, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail, or by both such fine and imprisonment.

"Sec. 8145. All fines, exclusive of the expenses of the court, collected under and by virtue of this article, shall be immediately paid into the treasury of the school trustees or board of each county where such fines are collected: Provided, however, that nothing contained herein shall be so construed as to apply to any municipality, township, county, or other subdivision of the state."

It is said for defendant that the statute quoted is violative of § 4 of article 2 of the state Constitution, which says that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry; that to give security for these things is the principal office of government, and that when government does not confer this security it fails of its chief design; that it violates § 30, art. 2, of said Constitution, which says that "no person shall be deprived of life, liberty, or property without due process of law," and that it violates the 14th Amendment of the Constitution of the United States, which provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It was ruled in *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350, that §§ 7058, 7060, Rev. Stat. 1889, making it a misdemeanor for any corporation, person, or firm engaged in manufacturing or mining to issue in payment of the wages of his or its employees any order, check, memorandum, token, or evidence of indebtedness, payable otherwise than in lawful money of the United States, unless the same was negotiable and redeemable at its face value in cash, or in goods or supplies, at the option of the holder, at the store or other place of business of the corporation, person, or firm, is class legislation, and as such is violative of the constitutional guaranty of "due process of law," and void. The decision is placed upon the broad ground that the sections of the statute then under consideration were not "due process of law" within the meaning of the Constitution, and upon the further grounds that they are an interference with the right to make reasonable and proper contracts in conducting a legitimate business which the Constitution

guarantees to everyone when it declares that he has a natural inalienable right of acquiring, possessing, and protecting property. The same rule is announced with respect to similar statutes in *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343. But the state insists that the statute of 1899, upon which this prosecution is bottomed, is to be differentiated from the statute of 1889, under which the *Loomis Case* was decided, in that all questions with respect to class legislation and of a discriminating character are eliminated therefrom as to their constitutionality, and it applies to all persons, companies, and corporations of every kind and description in this state. It is true that one of the principal points upon which the *Loomis Case* turned was that the statute upon which that case was founded applied alone to corporations, persons, or firms engaged in manufacturing or mining in this state, and was not general in its character, was class legislation, and therefore unconstitutional and void, while the statute upon which this prosecution is based applies alike to any person, firm, or corporation in this state who pays for the wages of labor, and is not open to the specific objection of class legislation.

But defendant contends that the statute is invalid because it invades the constitutional right to contract. In *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126, a statute (Stat. 1891, chap. 125, § 1) which provides that no employer shall impose a fine upon an employee engaged at weaving, or withhold his wages in whole or part, "for imperfections that may arise during the process of weaving," is in conflict with the Constitution of that state in forbidding the employer to withhold any part of the contract price from such weaver upon his doing the work improperly, and in requiring such an employer to pay the same price for inferior work as for good work; and particularly with the 1st article of the Declaration of Rights, which secures to all the right of acquiring, possessing, and protecting property. In passing upon an act of 65 L. R. A.

the legislature of the state of Pennsylvania entitled "An Act to Secure to Operatives and Laborers Engaged in and about Coal Mines, Manufactories," etc., of June 29, 1881 (P. L. 147), the supreme court of that state in the case of *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354, said: "The 1st, 2d, 3d, and 4th sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." To the same effect is *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; also *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395.

The state contends, however, that in the circumstances covered by the act in question the employer and employee are not upon an equal footing, but that the laborer, owing, as a rule, to his necessities, is at a disadvantage; and that, as the right to contract is not absolute, the state, in the exercise of its police powers, had the authority to pass the act in question as a police regulation. Under its police power the state has the right to enact and enforce all such laws not in conflict with some provision of the state or Federal Constitution as may properly be deemed necessary for the safety, health, and morals of its people; but it is contended by the state the right of contract between employer and employees is also a legitimate subject for the exercise of this power. This contention finds support in the case of *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 16 Am. St. Rep. 396, 23 N. E. 253, wherein it was held that the legislature of that state has such authority over the right to contract as to prohibit contracts from being made in advance waiving the right to payment in the lawful medium of payment. That case was repudiated, however, by this court in *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350. But in the case of *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 56 L. R. A.

316, 76 Am. St. Rep. 682, 53 S. W. 955, it was held, upon an exhaustive and able review of the authorities, that an act of the legislature of that state (Acts 1899, p. 17, chap. 11) which required employers to pay in money at face value, if presented on a regular pay day, or not less than thirty days after issuance, all orders for merchandise and other like papers issued to employees for wages, is not an unconstitutional abridgement of the employer's right to contract; that the statute does not violate the "due process of law" or the "law of the land" clause of either the Federal or state Constitutions; that it is both "due process of law" and "the law of the land," and likewise a legitimate exercise of the police power. That case was affirmed by the Supreme Court of the United States in 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, in which it was held that the act of the legislature of the state of Tennessee requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employees does not conflict with any provision of the Constitution of the United States relating to contracts. In *Shaffer v. Union Min. Co.* 55 Md. 74, it was assumed that the legislature had the power to enact a law prohibiting a corporation from paying wages to its employees otherwise than in lawful money, or entering into a contract for payment in any other way. So it was held in *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, that an act of the legislature of the state of Arkansas of March 25, 1889, entitled "An Act to Provide for the Protection of Servants and Employees of Railroads" (Acts 1889, p. 76, chap. 61), is not in conflict with the provisions of the Constitution of the United States. But in that case "the act [under consideration] was passed 'for the protection of servants and employees of railroads,' and was upheld as an amendment of railroad charters; such exercise of the power reserved being justified on public considerations; and a duty was specially imposed for the failure to discharge which the penalty was inflicted."

But we are of the opinion that under the great weight of authority the act in question cannot be upheld, in so far as defendant company and its adult employees are concerned, upon the ground of its being a police regulation, for it cannot be said that the defendant, in operating its tie and timber business, is any way pursuing a public business, or devoting its property to a public use; and the law must be held unconstitutional upon the ground that it interferes with or abridges the right of persons com-

petent to contract with each other with respect to the manner in which defendant's employees were to be paid for their services. The right to labor, or employ labor, and make contracts with respect thereto, upon such terms as may be agreed upon, is both a liberty and property right, and is included in the guaranty of the Constitution which provides "that no person shall be deprived of life, liberty, or property without due process of law." § 30, art. 2, Const. Nor can such right to contract be arbitrarily interfered with, but may be subject to limitations growing out of duties which the individual owes to society; but such limitation must be upon some reasonable basis, and not arbitrarily. *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454. In *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75, it is held that, "when the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof." In *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350, it is said: "It is now axiomatic that 'everything which may pass under the form of an enactment is not therefore to be considered the law of the land.'" Speaking of these words, Mr. Justice Johnson said: "They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559. "Law of the land" is said to mean a law binding upon every member of the community under similar circumstances. *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511. The word "liberty," as used in these constitutional declarations, means more than freedom of locomotion. It includes and comprehends, among other things, freedom of speech, the right of self-defense against unlawful violence, and the right to freely buy and sell as others may. 2 Story, Const. 5th ed. § 1950.

From the foregoing descriptions and definitions of "due process of law," or its equivalent, "law of the land," it must be evident that this constitutional safeguard condemns arbitrary, unequal, and partial legislation; and it is equally clear that the right to make contracts and have them enforced, as others may, is one of the rights so secured to every citizen. There is no doubt but many of our legislative enactments operate upon classes of individuals only; and

they are not invalid because they so operate, so long as the classification is reasonable, and not arbitrary. Thus it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like; and the power of the legislature to prescribe police regulations applicable to localities and classes is very great, because such laws are designed to protect property, and the safety, health, and morals of the citizen. But classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves; but no one will claim that competency to contract can be made to depend upon stature or color of hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land. When speaking upon this subject, Judge Cooley says: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character and restricting their rights, privileges, or legal capacity in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and, if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness'; and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negated." Cooley, Const. Lim. 6th ed. 484.

There can be no doubt but the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employees; but that is not the scope of the two sections of the statute now in question. They single out those persons who are engaged in carrying on the pursuits of mining and manufacturing, and say to such persons, "You cannot contract for labor payable alone in goods, wares, and merchandise. The farmer, the merchant, the builder, and the numerous contractors employing thousands of men may make such contracts, but you cannot." They say to the mining and manufacturing employees: "Though of full age, and competent to contract, still you shall not have the power to sell your labor for meat and clothing alone, as others may." It will not do to say these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary everyday contracts,—a right accorded to all other persons. This denial of the right to contract is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract. Now, it may be that instances of oppression have occurred and will occur on the part of some mine owners and manufacturers, but do they not occur quite as frequently in other fields of labor? Conceding that such instances may and do occur, still that furnishes no reasonable basis for depriving all persons engaged in the two lawful and necessary pursuits of the right to make and enforce everyday contracts. Liberty, as we have seen, includes the right to contract as others may; and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the Constitution undertakes to secure to every citizen. Applying the principles of constitutional law before stated, we can come to no other conclusion than this: That these sections of the statute are utterly void. They attempt to strike down one of the fundamental principles of constitutional government. If they can stand, it is difficult to see an end to such legislation, and the government becomes one of special privileges, instead of a compact "to promote the general welfare of the people." We place our conclusion on the broad ground that these sections of the statute are not "due process of law" within the meaning of the Constitution.

Statutes like or analogous to the one in hand have been enacted in several of the states of this Union, and they have been the subject of consideration of several courts

of last resort, and it is well to examine those cases with some detail; for it must be obvious that general constitutional declarations are the better understood when seen in the light of the facts of the particular cases in which they have been applied. The supreme judicial court of Massachusetts had under consideration in *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126, a statute which provides that "no employer shall impose a fine upon or withhold the wages, or any part of the wages, of an employee engaged at weaving, for imperfections that may arise during the process of weaving." It was held, that, if the act went no further than to forbid the imposition of a fine for imperfect work, it might be sustained, but that the attempt to make inferior work answer a contract for good work presented a different question; that the right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. Says the court: "If it [the statute] be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to everyone when it declares that he has a 'natural, essential, and inalienable right of acquiring, possessing, and protecting property.'"

For these considerations the judgment is reversed, and the defendant discharged. All concur.

Messrs. J. C. Sheppard and Dinning & Hamel, for appellant:

Article 3 of chap. 121 is in conflict with the Constitution of this state, in this: It violates that part of § 4 of art. 2, which says "that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry." It also violates § 30 of art. 2 of the Constitution of Missouri, which says "that no person shall be deprived of life, liberty, or property without due process of law."

State v. Loomis, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; 2 Story, Const. 5th ed. §§ 1590, 1943; Cooley, Const. Lim. 6th ed. 430, 434; *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 65 L. R. A.

533, 28 N. E. 1126; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

To say that the laboring portion of this state cannot make a contract to render services for another, and take a check or memorandum in payment therefor, is not required for any public good or welfare, but is an infringement of the rights of the laboring men and women of this state, and of those who seek their employment and services, and is a governmental usurpation, and violates the principles of abstract justice, and places the laborer and those who desire to buy his services at a great disadvantage.

1 Tiedeman, Pol. Power, p. 7; *State v. Layton*, 160 Mo. 474, 62 L. R. A. 163, 83 Am. St. Rep. 487, 61 S. W. 171; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 77 Am. St. Rep. 765, 55 S. W. 627.

To amend this statute by making it apply alone to corporations would leave it class legislation, and therefore void.

23 Am. & Eng. Enc. Law, p. 226; *Dells v. Kennedy*, 49 Wis. 555, 35 Am. Rep. 786, 6 N. W. 246, 381; *State v. Sinks*, 42 Ohio St. 345; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350.

A corporation is a person within the provision of the Constitution against the deprivation of life, liberty, or property without due process of law.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 250, 28 L. R. A. 796, 32 S. W. 5.

A corporation is entitled to the protection guaranteed by both constitutional provisions, the same as a citizen.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Allgeyer v. Louisiana*, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427; *Holden v. Hardy*, 169 U. S. 391, 42 L. ed. 781, 18 Sup. Ct. Rep. 383; *Powell v. Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 312, 25 L. R. A. 161, 24 S. W. 591.

Messrs. Edward C. Crow, Attorney General, and **Sam B. Jeffries**, for respondent:

All questions affecting class legislation

and creating discriminations are eliminated from §§ 8142, 8143, 8144, and 8145, Mo. Rev. Stat. 1899. These sections apply to all persons (natural), all firms (copartnerships), and all corporations (artificial persons) in this state.

The statute does not invade the constitutional right to contract.

People v. Lochner, 73 App. Div. 120, 76 N. Y. Supp. 396; *People v. Orange County Road Constr. Co.* 73 App. Div. 580, 77 N. Y. Supp. 16; *Wenham v. State*, 65 Neb. 394, 58 L. R. A. 825, 91 N. W. 421; *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682, 53 S. W. 955. Affirmed in 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 245, 28 L. R. A. 796, 32 S. W. 5; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Smith v. Mutual Ben. L. Ins. Co.* 173 Mo. 329, 72 S. W. 935; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419.

The natural right of persons to contract is subject to wholesome legislation.

Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *People v. Lochner*, 73 App. Div. 120, 76 N. Y. Supp. 396; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Holden v. Hardy*, 169 U. S. 391, 42 L. ed. 790, 18 Sup. Ct. Rep. 383.

In civilized society there is no such thing as an unrestrained power on the part of the individual to contract. The right of the individual is subject to wise and beneficial police regulations, and, when a certain act harmful to the people is prohibited by a general statute, it will be upheld.

Grimes v. Eddy, 126 Mo. 186, 26 L. R. A. 638, 47 Am. St. Rep. 653, 28 S. W. 756; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595; *Karnes v. American F. Ins. Co.* 144 Mo. 413, 46 S. W. 166.

The police power of the state extends to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state.

Morrison v. Morey, 146 Mo. 543, 48 S. W. 629.

A corporation has no natural right; it is an artificial person, and can enter into only such contracts, and transact only such business, as are expressly granted by its charter, or such as are necessarily implied therefrom.

Huntington v. National Sav. Bank, 96 U. S. 65 L. R. A.

S. 388, 24 L. ed. 777; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; *Head v. Providence Ins. Co.* 2 Cranch, 127, 2 L. ed. 229; *Matthews v. Skinker*, 62 Mo. 329, 21 Am. Rep. 425; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884.

A corporation may, therefore, be prohibited from doing many things which the natural person may, according to natural and civil law, do.

New York Fireman Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Smith v. Alabama L. Ins. & T. Co.* 4 Ala. 558; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143; *Bank of Augusta v. Earle*, 13 Pet. 587, 10 L. ed. 307.

All corporations are subject to the restraints and restrictions of general laws, and at the time of their creation understand and know that the state will always have the right to cast its visitatorial eye over their conduct, and to regulate their business by general laws as will best suit the needs and demands of the people, for whose convenience and benefit they are created.

Mo. Const. § 5, art. 12; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 298, 25 L. R. A. 161, 24 S. W. 591; *Gorman v. Pacific R. Co.* 26 Mo. 441, 72 Am. Dec. 220; *Cooley*, Const. Lim. 6th ed. 707-710; *Pierce v. Worcester & N. R. Co.* 105 Mass. 199; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The act is not violative of the Constitution for the reason that it does not apply to municipal corporations and other subdivisions of the state.

A law may stand so far as it is constitutional, though it has in it certain provisions which are unconstitutional.

State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; *State ex rel. Aull v. Field*, 119 Mo. 593, 24 S. W. 752; *State ex rel. Manning v. Higgins*, 125 Mo. 364, 28 S. W. 638; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317.

Per Curiam:

The judgment herein is reversed and the defendant discharged as directed in the foregoing opinion of **Burgess, J.**, in Division No. 2.

All concur.

INDIANA SUPREME COURT.

INTERNATIONAL TEXT-BOOK COMPANY, *Appt.*,

v.

Horace L. WEISSINGER *et al.*

(160 Ind. 349.)

A statute prohibiting the assignment of future wages by employees is not void as an unreasonable restraint upon the liberty of the citizen, or as depriving him of his property without due process of law.

(November 25, 1902.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Clark County in favor of defendants in an action brought to compel payment of an order out of wages earned by defendant Weissinger. *Affirmed.*

The facts are stated in the opinion.

Mr. James W. Fortune, for appellant:

Assignments of future wages to be earned are held by the weight of authority of the courts of this country to be valid and legal contracts.

Lawson, Rights, Rem. & Pr. p. 4332, note 6; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Greene v. Bartholomew*, 34 Ind. 235; *Augur v. New York Belting & Packing Co.* 39 Conn. 536; *Boylan v. Leonard*, 2 Allen, 408; *Payne v. Mobile*, 4 Ala. 333, 37 Am. Dec. 744; *Wallace v. Walter Heyward Chair Co.* 16 Gray, 209; *Thayer v. Kelley*, 28 Vt. 19, 65 Am. Dec. 220; *Brackett v. Blake*, 7 Met. 335, 41 Am. Dec. 442; *Garland v. Harrington*, 51 N. H. 409; *Hawley v. Bristol*, 39 Conn. 26; *Metcalf v. Kincaid*, 87 Iowa, 443, 43 Am. St. Rep. 391, 54 N. W. 867; *Wade v. Bessey*, 76 Me. 413; *Hartley v. Tapley*, 2 Gray, 565; *Kane v. Clough*, 36 Mich. 436, 24 Am. Rep. 599; *Harrop v. Landers, F. & C. Co.* 45 Conn. 561; *Manly v. Bitzer*, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464; *Emery v. Lawrence*, 8 Cush. 151; *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936.

Sections 1 and 4, chap. 125, Acts 1899, p. 194, are unconstitutional for the reason that they prohibit and limit the right of a citizen of Indiana to make contracts, in violation of art. 1, § 1, of the Bill of Rights of the Constitution of the state of Indiana, and of § 1 of the 14th Amendment to the Constitution of the United States.

Munn v. Illinois, 94 U. S. 113, 24 L. ed.

77; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Jones v. People*, 110 Ill. 590; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 286; *State v. Fire Creek Coal Co.* 33 W. Va. 188, 6 L. R. A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. (Willson) p. 565, 19 S. W. 912; *Re House Bill No. 10*, 15 Colo. 600, 26 Pac. 824; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Ho Ah Kow v. Numan*, 5 Sawy. 552, Fed. Cas. No. 6,546; *Tiedeman*, Pol. Power, ¶¶ 175-179.

Messrs. S. N. Chambers, S. O. Pichens, and C. W. Moores also for appellant.

Mr. M. Z. Stannard, for appellees:

The act of February 28, 1899, was not void for want of constitutionality.

Hancock v. Yaden, 121 Ind. 366, 6 L. R. A. 576, 16 Am. St. Rep. 396, 23 N. E. 253; *State ex rel. Smith v. McClelland*, 138 Ind. 395, 37 N. E. 799; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; *State ex rel. Harrison v. Menaugh*, 161 Ind. 260, 43 L. R. A. 408, 51 N. E. 117, 357.

The written order of June 7, 1899, being an attempted assignment of future, or unearned, wages, was in violation of § 4 of the act of February 28, 1899, and was therefore inoperative and void.

Dowling, J., delivered the opinion of the court:

The appellant (formerly the Colliery Engineer Company, but afterwards, by change of name, the International Text-Book Company) sued the appellees, Horace L. Weissinger and the American Car & Foundry Company, upon an order alleged to have been executed by the said Weissinger,

NOTE.—For a case holding an assignment of future wages to be valid, see the following case of *Mallin v. Wenham*.

For other instances in this series of legislation in regard to wages of employees, see *State v. Brown & S. Mfg. Co.* 17 L. R. A. 856; *Braceville Coal Co. v. People*, 22 L. R. A. 340; *Re* 65 L. R. A.

House Bill No. 1230, 28 L. R. A. 344, and *note*; *Republic Iron & Steel Co. v. State*, 62 L. R. A. 136 (as to statutes requiring wages to be paid weekly); and the preceding case of *State v. Missouri Tie & Timber Co.*, and *footnote* thereto (statutes requiring wages to be paid in lawful money).

and accepted by the said American Car & Foundry Company, of which the following is a copy:

June 7, 1899.

To the American Car & Foundry Company:—

Please pay to the Colliery Engineer Company of Scranton, Pa., proprietors of the International Correspondence Schools, the sum of two dollars per month, from such wages as may be due me, until the total sum of \$61.25 is paid them for a complete architectural course, purchased by me. First payment on this order to be made from money due on next pay-day succeeding date of this order.

Horace L. Weissinger.

Occupation: Carpenter.

Address: New Albany, Indiana.

Shops employed in: . . .

Under whom employed: F. Kahler.

Paymaster: W. C. Ruddell.

Name and title of official to whom this order is to be sent for collection.

A demurrer to the complaint was sustained upon the ground that the instrument which was the foundation of the action was, in legal effect, an assignment of future wages to become due to the appellee Weissinger from his coappellee, the American Car & Foundry Company, and was in violation of §§ 1 and 4 of an act of the legislature of this state approved February 28, 1899 (Acts 1899, p. 193, §§ 7059, 7059c), which are in these words:

"Sec. 1. Be it enacted, etc., that every person, company, corporation, or association, employing any person to labor, or in any other service for hire, shall make weekly payments for the full amount due for such labor or services, in lawful money of the United States, to within six days or less of the time of such payment; but if, at any time of stated payment, any employee as aforesaid shall be absent from his regular place of labor or service, he shall be paid in like manner thereafter on demand: Provided, that this act shall not apply to any employee engaged by a common carrier in interstate commerce. . . ."

"Sec. 4. The assignment of future wages to become due to employees from persons, companies, corporations, or associations affected by this act, is hereby prohibited; nor shall any agreement be valid that relieves said persons, companies, corporations, or associations from the obligation to pay weekly the full amount due, or to become due, to any employee in accordance with the provisions of this act: Provided, that nothing in this act shall be construed to prevent

employers advancing money to their employees."

The appellant refusing to amend its complaint, judgment was rendered for the appellees. The ruling on the demurrer is the error assigned.

For the reversal of the judgment counsel relies upon two propositions, which are thus stated in his brief: "No. 1. Assignments of future wages to be earned are held to be valid and legal contracts by the weight of authority of the courts of this country. No. 2. Sections 1 and 4 of chapter 124 of the Acts of 1899 (Acts 1899, p. 193), are unconstitutional for the reason that they prohibit and limit the right of a citizen of Indiana to make contracts, in violation of article 1, § 1, of the Bill of Rights, of the Constitution of the state of Indiana, and of § 1 of the 14th Amendment to the Constitution of the United States."

The writing referred to in the complaint, although in form of an order for the payment of money, operated as an assignment of the wages mentioned in it. *Gray v. Trafton*, 12 Mart. (La.) 702; *Daves v. Haywood*, 22 N. C. (2 Dev. & B. Eq.) 313. For the purposes of this case it may be admitted that assignments of future wages to be earned are valid contracts, provided they are not prohibited by a statute which the legislature has the constitutional authority to enact. This qualified admission leaves for decision only the question of the constitutional validity of the two sections above set out.

If it can be said that these sections contain unreasonable restraints upon the liberty of the citizen, or that they deprive any person of property without due process of law, then they fall within the express prohibition of § 1, art. 1, of the Constitution of this state, or of § 1 of the 14th Amendment of the Constitution of the United States. These sections do, unquestionably, limit and restrict in a very marked degree the liberty of the citizen to enter into contracts which, in the absence of the statute, he would have the right to make. By § 4 he is absolutely disabled from making an assignment of future wages to be earned by him. Such a prohibition can be sustained only on the ground that some public interest is involved, and that it is of such a character as to render it a legitimate subject of legislative regulation or control. The wages of laborers have been the subject of legislative solicitude and action in this state for many years, and in a great variety of forms. The stockholders of corporations, organized for manufacturing or mining or chemical purposes, were made individually liable for all debts due and owing laborers, servants, and apprentices for services rendered, without limit as to

the amount of such debts. To all other creditors of the corporation such stockholders were liable only to an amount equal to the stock held by them respectively. 1 Rev. Stat. 1852, p. 360, § 11. By the act of August 24, 1875, the stockholders of every company organized to carry on any kind of manufacturing or other business authorized by that act were declared to be individually liable for all debts due and owing to laborers, servants, apprentices, and employees for services rendered such corporations, although not liable for other debts to any amount except to the extent of the stock subscribed by them. Acts 1875, Special Sess. p. 29. Burns's Rev. Stat. 1901, § 5077. Individual liability of the stockholders of railroad companies to laborers for work done in the construction of such roads was created by the general railroad act of 1852, and was afterwards affirmed or extended by later statutes. 1 Rev. Stat. 1852, p. 421, § 38; Id. p. 423, § 10; Acts 1865, Special Sess. p. 120, § 38; Burns's Rev. Stat. 1901, § 5198, 5231. Wages to an amount not exceeding \$50, due to any employee for work and labor performed within two months of the death of a decedent, were made a preferred claim against the estate by the act of 1881. Acts 1881, p. 423; Rev. Stat. 1881, § 2378; Burns's Rev. Stat. 1901, § 2534. So, too, the wages of each employee to an amount not exceeding \$50, earned within the preceding six months, are made a preferred claim where the property of the employer is seized on mesne or final process, or the business is suspended by the action of creditors, or put into the hands of any assignee, receiver, or trustee. Burns's Rev. Stat. 1901, § 7051. In certain cases they are exempted from attachment, garnishment, or proceedings supplementary to execution. Burns's Rev. Stat. 1901, §§ 970-972. The act of March 3, 1885 (Acts 1885, p. 36), made debts for manual or mechanical labor a preferred claim against all persons and corporations when the property of the debtor passed into the hands of an assignee or receiver, and they were required to be paid in full before the payment of any other debts excepting claims for the costs and expenses of the proceedings.

Many other statutes might be mentioned, but those referred to sufficiently indicate the importance of the subject of wages in the estimation of the legislature, and the variety of cases in which attempts have been made to protect the interests of the wage-earner. The reasons for such legislative supervision and control are readily found in the number and situation of ordinary laborers and employees. According to the last census, the number of wage-earners employed in manufacturing and mining industries alone in

this state was 155,956. The amount of wages paid to them annually is stated at \$66,847,317. The census report is but partial and imperfect, as a large number of companies and corporations, engaged in manufacturing and mining, failed to make the returns required from them. No statistics are furnished by the census of the number of wage-earners employed in other occupations besides those of manufacturing and mining. The figures herein stated are sufficient, however, to show how large a portion of the citizens of this state fall within the classification of wage-earners. A large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessities of life, suffering, inability to meet just obligations to others, and, in many cases, may make the wage-earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesmen, and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment, and to sacrifice them for an inadequate consideration, is often very great. Such assignments would, in many cases, leave the laborer or wage-earner without present or future means of support. By removing the strongest incentive to faithful service,—the expectation of pecuniary reward in the near future,—their effect would be alike injurious to the laborer and his employer. It is clear that the object of the act of 1899, *supra*, was the protection of wage-earners from oppression, extortion, or fraud on the part of others, and from the consequences of their own weakness, folly or improvidence. We cannot say that no just ground existed for such legislative interference for so commendable a purpose.

The disability imposed by the act of 1899, *supra*, is similar to that which renders married women incompetent to bind themselves or their property by contract of suretyship. Burns's Rev. Stat. 1901, § 6964. It does not differ in its nature from those humane rules of the law which make void agreements before judgment to waive the benefit of exemption laws, and of laws providing for a stay of execution, or regulating the rights of the parties under mortgages on household goods. *McLane v. Elmer*, 4 Ind. 239; *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 16 Am. St. Rep. 396, 23 N. E. 253, and cases cited on pages 369, 370, 121 Ind., pages 577, 578, 6 L. R. A., pages 398,

399, 16 Am. St. Rep., and pages 253, 254, 23 N. E.; *Zumpfe v. Gentry*, 153 Ind. 219, 54 N. E. 805. In *Cooley*, Const. Lim. 6th ed. 744, in an enumeration of some of the cases in which the police power of the state may be exercised without transcending the limits of constitutional authority, the author says: "So, for the protection of laborers against the oppression of employers, it is held competent to forbid their being paid in anything else than legal-tender funds." A decision to this effect was made by this court in *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 16 Am. St. Rep. 396, 23 N. E. 253.

In a very recent case in the supreme court of the United States an act of the legislature of the state of Tennessee requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employees was held valid. In the course of its opinion the court said: "But it is also true that, inasmuch as the right to contract is not absolute in respect to every matter, but may be subject to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within defined limitations, extend over corporations outside of, and regardless of, the power to amend charters. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609." *Know-*

ville Iron Co. v. Harbison, 183 U. S. 13, 22, 46 L. ed. 55, 61, 22 Sup. Ct. Rep. 1. If the legislature, in the exercise of its general police power, to secure the safety and welfare of the state, may deprive the laborer and his employer of the right to contract for the payment of wages in anything else than legal tender notes or other lawful money, we do not perceive why it may not, also, in the exercise of that power, prohibit the assignment of wages before they are earned. The reason and public necessity are as clear and cogent in the one case as in the other. The purpose of the legislation in each is to protect a large and important class of citizens from imposition, unfair dealing, and the consequences of their own improvidence. The act of February 28, 1899 (Acts 1899, p. 193), applies equally to all citizens, and is not subject to the objection of a partial or improper classification. The sections before us do not extend to wages which have been earned, but merely suspend the right to dispose of wages by assignment until they are earned. They render void an agreement into which no prudent man ordinarily would wish to enter.

The court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Petition for rehearing abandoned.

ILLINOIS SUPREME COURT.

James H. MALLIN, *Appt.*,

v.

Charles F. WENHAM *et al.*

(209 Ill. 252.)

1. An assignment of wages to be earned in the future under an existing contract is valid, and it is immaterial that the term of employment is not of definite duration.
2. Public policy does not invalidate an assignment of future wages to be earned under an existing contract of employment.
3. The court will not construe exemption laws as forbidding laborers from assigning wages yet to be earned.
4. A discharge in bankruptcy of one who has assigned wages to be earned in the future does not affect the right to enforce the assignment.

(April 20, 1904.)

NOTE.—As to validity of statute prohibiting assignment of future wages, see the preceding case of *International Text-Book Co. v. Welsinger*.

For other cases as to validity of assignment 65 L. R. A.

APPEAL by plaintiff from a judgment of the Appellate Court, First District, reversing a decree of the Circuit Court for Cook County in his favor in a suit to nullify an assignment of wages, and enjoin an attempt to enforce it. *Affirmed.*

Statement by *Ricks, J.*:

In this case a bill is filed by appellant, Mallin, against appellee and Armour & Co. Mallin, for several years prior to the commencement of this suit, was employed continuously by Armour & Co. on a salary of \$100 per month. He had no definite contract of employment, but was employed from month to month. Between October, 1897, and June, 1898, he from time to time borrowed money from appellee at usurious rates of interest. He obtained \$342 more from Wenham than he ever paid back. On June 3, 1898, to secure his indebtedness to

of future earnings, see note to *Sandwich Mfg. Co. v. Robinson*, 14 L. R. A. 126, and the later case in this series of *Dolan v. Hughes*, 40 L. R. A. 735.

Wenham, he executed and delivered an assignment of wages, as follows:

For a valuable consideration to me in hand paid by C. F. Wenham, the receipt whereof is hereby acknowledged, I do hereby transfer, assign, and set over to said C. F. Wenham, his heirs, executors, administrators, or assigns, all salary or wages, and claims for salary or wages, due or to become due me from Armour & Co., or from any other person or persons, firm, copartnership, company, corporation, organization, or official by whom I am now or may hereafter become employed, at any time before the expiration of ten years from the date hereof.

I do hereby constitute, irrevocably, the said C. F. Wenham, his heirs, executors, administrators, or assigns, my attorney, in my name to take all legal measures which may be proper or necessary for the complete recovery and employment of the claim hereby assigned, and I hereby authorize, empower, and direct the said Armour & Co., or anyone by whom I may be employed as above, to pay the said demand and claim for wages or salary to the said C. F. Wenham, his executors, administrators, or assigns, and hereby authorize and empower him or them to receipt for the same in my name.

J. H. Mallin.

Chicago, Ill., third day of June, 1898.

On May 3, 1899, Mallin filed his petition in bankruptcy, and his indebtedness to C. F. Wenham was scheduled in his bankruptcy proceedings, and Wenham had notice thereof. On October 23, 1899, he obtained his discharge in bankruptcy. Subsequently Wenham brought suit in the name of Mallin, for the use of Wenham, against Armour & Co., claiming the wages of Mallin by virtue of the above assignment. Mallin thereupon filed his bill without offering to repay the \$342, or any part thereof, and prayed that said assignment be declared null and void, and that Wenham be restrained from prosecuting any suit against Armour & Co., or in any manner interfering with Mallin's salary. It was so decreed by the trial court, which decree, on appeal to the appellate court, was reversed, and judgment entered in behalf of appellee. The appellate court having granted a certificate of importance, the case is now before this court. The appellant urges as error the action of the appellate court in refusing to affirm the decree of the circuit court in reversing said decree and in directing the circuit court to dismiss the bill of complaint. The assignments of error and the argument of appellant raise the following questions: (1) 65 L. R. A.

Whether an assignment transferring wages to be earned in the future under an existing employment is valid; (2) is such an assignment against public policy? (3) the effect of a discharge in bankruptcy of a debtor, upon security or liens created by assignment.

Messrs. A. R. Urion and A. F. Reichmann, with Mr. Herbert H. Reed, for appellant:

The assignment is against the public policy of Illinois, and void.

Ill. Rev. Stat. chap. 79, § 3; Starr & C. Anno. Stat. (Ill.) 2d ed. chap. 52, §§ 1, 13; Hurd's Rev. Stat. 1895, chap. 14, § 13, chap. 10A, § 6; Hurd's Rev. Stat. 1899, chap. 38A, § 1, chap. 52, § 16, chap. 48, § 9; Ill. Const. 1870, art. 4, § 32; Hurd's Rev. Stat. 1899, chap. 38, § 1, p. 644.

The assignment is against public policy generally.

May v. Merchants' & M. Bank, 109 Pa. 145; *Greenhood*, Pub. Pol. pp. 5, 497; *Recht v. Kelly*, 82 Ill. 148, 25 Am. Rep. 301; *Bliss v. Smith*, 78 Ill. 359; *Powell v. Daily*, 61 Ill. App. 552; *Curtiss v. Ellenwood*, 59 Ill. App. 110; *Johnston v. Dunavan*, 17 Ill. App. 59; *Lehigh Valley R. Co. v. Woodring*, 116 Pa. 513, 9 Atl. 58; *Green v. Watson*, 75 Ga. 471, 58 Am. Rep. 479; *Burke v. Finley*, 50 Kan. 424, 34 Am. St. Rep. 132, 31 Pac. 1065; *Collier v. Murphy*, 90 Tenn. 300, 25 Am. St. Rep. 698, 16 S. W. 465; *Mills v. Bennett*, 94 Tenn. 651, 45 Am. St. Rep. 763, 30 S. W. 748; *Wm. Deering & Co. v. Ruffner*, 32 Neb. 845, 29 Am. St. Rep. 473, 49 N. W. 771; *Firmstone v. Mack*, 49 Pa. 387, 88 Am. Dec. 507.

A contract void in part is void in its entirety, unless divisible.

Corcoran v. Lehigh & F. Coal Co. 138 Ill. 390, 28 N. E. 759; *Mechem, Sales*, § 1003; *Henderson v. Palmer*, 71 Ill. 583, 22 Am. Rep. 117; *Tenney v. Foote*, 95 Ill. 109; *Sullivan v. Horgan*, 17 R. I. 109, 9 L. R. A. 110, 20 Atl. 232; *Bisby v. Moor*, 51 N. H. 402.

This contract is entire.

Tripp v. Brounell, 12 Cush. 376.

The assignment covered only wages due on June 3, 1898.

Bishop v. Young, 17 Wis. 47; *Foster v. Singer*, 69 Wis. 392, 2 Am. St. Rep. 745, 34 N. W. 395; *Edwards v. Roepke*, 74 Wis. 571, 43 N. W. 554.

The assignment created no lien upon the wages to be earned after the making thereof.

Hunt v. Bullock, 23 Ill. 320; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706; *Gittings v. Nelson*, 86 Ill. 591; *Ridgeway v. Underwood*, 67 Ill. 428; *Borden v. Croak*, 131 Ill. 74, 19 Am. St. Rep. 23, 22 N. E.

793; *Crum v. Sawyer*, 132 Ill. 460, 24 N. E. 956; Federal Bankruptcy Law 1898, 30 Stat. at L. 564, chap. 541, § 67, U. S. Comp. Stat. 1901, p. 3449; *Botts v. Patton*, 10 B. Mon. 452; *Ocean Nat. Bank v. Olcott*, 40 N. Y. 12; *Hoskins v. Wall*, 77 N. C. 249.

Wenham's claim against Mallin was a provable debt in bankruptcy.

Federal Bankruptcy Law 1898, 30 Stat. at L. 563, chap. 541, § 65a, b, U. S. Comp. Stat. 1901, p. 3448; *Gray v. Bennett*, 3 Met. 526.

All rights Wenham had against Mallin on May 31, 1899, were cut off by discharge in bankruptcy.

Federal Bankruptcy Law, 30 Stat. at L. 550, 562, chap. 541, §§ 17, 63, U. S. Comp. Stat. 1901, pp. 3428, 3447; *Bray v. Cobb*, 100 Fed. 270, 3 Am. Bankr. Rep. 788; *Fowles v. Treadwell*, 24 Me. 377; *Jones, Chat. Mortg.* 3d ed. § 163; *Thompson v. Cohen and Cole v. Kernot*, L. R. 7 Q. B. 527, 41 L. J. Q. B. N. S. 221, 26 L. T. N. S. 693; *Collyer v. Isaacs*, L. R. 19 Ch. Div. 342, 51 L. J. Ch. N. S. 14, 45 L. T. N. S. 567, 30 Week. Rep. 70.

Earnings of a bankrupt after filing of the petition belong to him.

Pease v. Ritchie, 132 Ill. 646, 8 L. R. A. 566, 24 N. E. 433; *Mosby v. Steele*, 7 Ala. 299; *Bond v. Baldwin*, 9 Ga. 9; *McLendon v. Turner*, 65 Ga. 579; *Mays v. Manufacturers' Nat. Bank*, 64 Pa. 74, 3 Am. Rep. 573; *Chippendall v. Tomlinson*, 4 Dougl. 318, 7 East, 57, note; *Williams v. Chambers*, 10 Q. B. 337.

Equity will enjoin the bankrupt's creditor from taking after-acquired property of the bankrupt.

Hays v. Ford, 55 Ind. 52; *Starr v. Heckart*, 32 Md. 267; *Mosby v. Steele*, 7 Ala. 299; *Carrington v. Holabird*, 17 Conn. 530; *Diggs v. Prieur*, 11 Rob. (La.) 54.

Messrs. Morse Ives and George I. Haight, for appellee:

An assignment transferring wages to be earned under an existing employment is valid.

2 Am. & Eng. Enc. Law, 2d ed. p. 1031; *Garland v. Harrington*, 51 N. H. 409; *Tripp v. Brownell*, 12 Cush. 376; *Hartley v. Tapley*, 2 Gray, 585; *Thayer v. Kelley*, 28 Vt. 19, 65 Am. Dec. 220; *Carter v. Nichols*, 58 Vt. 553, 5 Atl. 197; *Hawley v. Bristol*, 39 Conn. 26; *Augur v. New York Belting & Packing Co.* 39 Conn. 536; *McManaman v. Hanover Coal Co.* 6 Kulp, 181; *Kane v. Clough*, 36 Mich. 436, 24 Am. Rep. 599; *Drake*, Attachm. § 612; *Wade v. Bessey*, 76 Me. 413; *Crouch v. Martin*, 2 Vern. 595; *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936; *Brackett v. Blake*, 7 Met. 335, 41 Am. Dec. 442; *Emery v. Lawrence*, 8 Cush. 161; *Taylor v. Lynch*, 5 Gray, 65 L. R. A.

49; *Lannan v. Smith*, 7 Gray, 150; *Boylan v. Leonard*, 2 Allen, 407; *Darling v. Andrews*, 9 Allen, 106; *Metcoalf v. Kincaid*, 87 Iowa, 443, 43 Am. St. Rep. 391, 54 N. W. 867; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Haw v. Aome Cement Plaster Co.* 82 Mo. App. 447; *Greene v. Bartholomew*, 34 Ind. 235; *Payne v. Mobile*, 4 Ala. 333, 37 Am. Dec. 744; *Young v. Jones*, 180 Ill. 216, 54 N. E. 235; *Johnson v. Pace*, 78 Ill. 143; *Buxbaum v. Dunham*, 51 Ill. App. 242; *Weed v. Jewett*, 2 Met. 608, 37 Am. Dec. 115; *Steinbach v. Brant*, 79 Minn. 383, 79 Am. St. Rep. 494, 82 N. W. 651.

This assignment is not against public policy.

Edwards v. Peterson, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936; *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *Greenhood*, Pub. Pol. pp. 116, 117; *Smith v. Atkins*, 18 Vt. 461; *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395.

The discharge in bankruptcy does not impair the security.

Edwards v. Peterson, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936; *Lyde v. Mynn*, 1 Myl. & K. 683, Coop. t. Brougham, 123; *Bush v. Stanley*, 122 Ill. 406, 13 N. E. 249; *Pease v. Ritchie*, 132 Ill. 638, 8 L. R. A. 566, 24 N. E. 433; *Brandenburg*, Bankr. 2d ed. 270, 278; *Re Ellis*, 58 Fed. 567, 3 Am. Bankr. Rep. 564; *Re Mirams*, 60 L. J. Q. B. N. S. 397 [1891] 1 Q. B. 594, 64 L. T. N. S. 117, 39 Week. Rep. 464, 8 Morrell, 59; *Robinson v. Ommanney* L. R. 21 Ch. Div. 780, 51 L. J. Ch. N. S. 894, 47 L. T. N. S. 78, 30 Week. Rep. 939; *Douglas v. Russell*, 4 Sim. 524; *Higden v. Williamson*, 3 P. Wms. 132; *Brett v. Carter*, 2 Low. Dec. 458, 14 Nat. Bankr. Reg. 301, Fed. Cas. No. 1,844; *Mitchell v. Winalow*, 2 Story, 630, Fed. Cas. No. 9,673.

Ricks, J., delivered the opinion of the court:

In respect to the first proposition mentioned, the authorities are ample and conclusive to the effect that an assignment of wages to be earned in the future, under an existing employment, is valid. This precise question has frequently been passed upon by the courts of the different states and of England, and, so far as we are advised, the courts of *dernier ressort* have, without exception, upheld such contracts, where they have been for a valuable consideration and untainted with fraud. The authorities are to the effect that it is not necessary that there be an express hiring for a definite time, but the existence of the employment at the time of the assignment is sufficient. In the case at bar appellant was, and had been for some time previous, in the actual employ of Armour & Co. at a fixed price per month. It

is true, such employment was not of any definite duration, and appellant might abandon the same at any time, or his employer might discharge him. The subject-matter of the contract had but a potential existence, but it was such a property right as might legally be disposed of. The remarks of the court in *Thayer v. Kelley*, 28 Vt. 19, 65 Am. Dec. 220, are very pertinent to the subject in hand, and we here quote them: "When the debtor is in the actual employment of another, and is receiving wages under a subsisting engagement, an assignment by him of his future earnings may be made, not only for the security and payment of a present indebtedness, but for such advances as he may find it necessary to obtain. This principle is fully established by the cases to which we were referred. *Weed v. Jewett*, 2 Met. 608, 37 Am. Dec. 115; *Brackett v. Blake*, 7 Met. 335, 41 Am. Dec. 442; *Field v. New York*, 6 N. Y. 187, 57 Am. Dec. 435; *Emery v. Lawrence*, 8 Cush. 151. The debtor in this case, at the time of his assignment to the claimants, was in the actual employment of the trustees under a subsisting contract, at a given price per day, and had in that manner labored for them for some two or three years previous; and, though he had the right to leave their employment, and they had the right to discharge him, yet, so long as that relation existed between them, we think the authorities are satisfactory in holding that the claimants were entitled to receive, under that assignment, his accruing wages in payment of the advances which they had made." In support of the above doctrine reference is made to the following cases: *Kane v. Clough*, 36 Mich. 436, 24 Am. Rep. 599; *Manly v. Bitzer*, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464; *Metcalf v. Kincaid*, 87 Iowa, 443, 43 Am. St. Rep. 391, 54 N. W. 867.

The second proposition urged by appellant is that the assignment in question is against public policy, and for that reason ought not to be upheld. This question was raised in the case of *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936, and the court there held such an assignment did not contravene public policy, and quoted with approval from the case of *Smith v. Atkins*, 18 Vt. 461, in which case it was said: "It is argued that such contracts are so much against public policy that they ought not to be supported; but we think they are rather beneficial, and enable the poor man to obtain credit . . . when he could not otherwise do it, and that without detriment to the creditors." And, further, in the *Edwards Case*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936, the court says, speaking of an assignment of wages to be earned in the

future: "It cannot be said to contravene public policy. *Smith v. Atkins*, 18 Vt. 461. The consideration was most meritorious, and the assignment was not given to delay creditors." And, further: "The true doctrine seems to be 'that, to make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But courts of equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only,'"—citing numerous cases. Appellant, in this connection, calls attention to the statute and exemption laws of this state, and insists that the liberal provisions made by the legislature for the indigent and poorer classes indicate the adoption of a broad and liberal public policy toward the classes named, and that it is the duty of this court to so construe the law that the class and individuals so favored by the statute shall be compelled to accept of its beneficent provisions. Such is not the province of this court. The citizens of the state have a right to contract, and there is no law forbidding one from selling or assigning any property he may have. A person has the same right to assign his wages that he has to mortgage his homestead, or to mortgage personal property that is exempt from execution. The statute provides liberal exemptions of which a person has the right to avail himself if he so desires, but, if he does not, the courts are powerless to help him. The duty of the courts in instances of this kind is well laid down in the case of *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632 (on p. 579, 67 Ill., p. 640, 16 Am. Rep.): "It is the legislative, and not the judicial, power in the state that must control and give shape to its public policy. That power does not pertain to the courts. They can only observe that policy and apply it to cases as they arise, without changing or obstructing it." Also, in the case of *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395, it was said (p. 185, 141 Ill., p. 496, 16 L. R. A., and p. 399, 31 N. E.): "Other instances of statutory regulations of private rights are in lien laws in favor of homesteaders, mechanics, etc.; limitation laws, the statute of frauds, and other statutes relating to evidence; laws in regard to pleadings, exemption laws, and insolvent laws. But these all relate, not to the power to contract in regard to matters of general right, but to the remedy for the enforcing of contracts, as to which the legislature may make such regulations as the public welfare seems to demand, so long as, under pretense of regulating the remedy, it

does not impair the right itself." We also indorse the doctrine laid down in *Greenhood on Public Policy*, pp. 116, 117, as follows: "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malum in se*, to be void as contravening the policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. He is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the state."

The assignment of appellant's wages was simply a lien on the same so long as he remained in the employ of Armour & Co., and until the indebtedness secured thereby was satisfied. Should appellant quit his employment with Armour & Co., he would, by that act, destroy the assignment as security; or, should he pay his debt to Wenham, he could not be injured in any way by his assignment. Thus it will be seen that there is but little to support appellant's contention that the assignment was a harsh and unconscionable bargain. In the case of *Kane v. Clough*, 36 Mich. 436, 24 Am. Rep. 599, the assignor made an assignment "of all the wages that might thereafter become due to him from the defendants," and the transaction was upheld. In the case of *Weed v. Jewett*, 2 Met. 608, 37 Am. Dec. 115, the assignment was "for all sums of money that may now be due to me from the Chicopee Manufacturing Company," etc., "for labor performed in their service," and the court, in concluding its opinion in that case, says: "This was a proper subject of contract or agreement, and when the labor was performed the company were bound to pay according to their undertaking."

The question of usurious interest is not an element in this case, but, if relief is desired to be had against such, appellant has his proper remedy. The record, however, discloses that appellant has obtained \$342 in actual cash, which he has not repaid.

We cannot see that there is anything intrinsically vicious in an assignment of wages. The assignor in such case simply draws upon his future prospects to supply present needs, which may be of the most urgent and pressing character. There is no law in this state to prevent a poor person from mortgaging or pledging any or every

article of property he possesses as security for his debts, and such a privilege may be of great value. On the whole, we see no reason or right for holding the assignment in question here void as against public policy.

It is next insisted by appellant that because of bankruptcy proceedings had by him the assignment is unenforceable. This position, we think, is wrong. The only effect of a discharge in bankruptcy is to suspend the right of action for a debt against the debtor personally. It does not annul the original debt or liability of the debtor. In *Bush v. Stanley*, 122 Ill. 406, 13 N. E. 249, the court said (p. 416, 122 Ill., and p. 253, 13 N. E.): "The discharge is analogous, in effect, to the statute of limitations, in so far as it does not annul the original debt, but merely suspends the right of action for its recovery." In *Pease v. Ritchie*, 132 Ill. 638, 8 L. R. A. 566, 24 N. E. 433, this court further said (p. 646, 132 Ill., p. 568, 8 L. R. A., and p. 434, 24 N. E.): "It is no doubt true that appellant's discharge in bankruptcy operated as a bar to any action which might be brought to recover any debt or obligation existing at the time he was declared a bankrupt, and after-acquired property was exempted from being taken in satisfaction of any such debts. But if any creditor had a lien or an equitable claim, by mortgage or otherwise, upon any property of the bankrupt, such right or rights would remain unaffected by the proceedings in bankruptcy." In the case of *Eduards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936, an employee had given an assignment of his wages. Subsequently he filed a petition for discharge under the insolvent law of the state, and in its opinion the court there said: "The rule laid down by Judge Story in *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673, seems to have been very generally followed by all chancery courts in this country. He says: 'It seems to me a clear result of all the authorities that whenever the parties, by their contract, intend to create a positive lien or charge either upon real or personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy.'" The language above quoted is also quoted with approval in the case of *Gregg v. Sanford*, 24 Ill. 17, 76 Am. Dec. 719. In the case of *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498, it was held that a creditor who has not proved his debt in bankruptcy is still, after discharge of the debtor, a sub-

sisting creditor against him to the extent of his debt, which he is entitled to have paid out of the proceeds of a policy of insurance on the life of the debtor assigned to him by the debtor and beneficiary to secure subsisting demands in favor of the creditor; and it was said that the discharge did not extinguish the debt or demand, but that the effect of such discharge is analogous to that of the bar of the statute of limitations, which only goes to bar a creditor's remedy, and does not wipe out the debt. In discussing the right of a creditor to maintain an action on a collateral agreement as security after the debt so secured has become barred by the statute of limitations, it was said in *Shaw v. Siloway*, 145 Mass. 503, 14 N. E. 783: "If there is an actual pledge, and the debt becomes barred, this does not give to the debtor a right to reclaim his pledged property. The debt is not extinguished; the statute only takes away the remedy. *Hancock v. Franklin Ins. Co.* 114 Mass. 156. In case of an ordinary mortgage of real or personal estate, the security is not lost though the debt be barred. *Norton v. Palmer*, 142 Mass. 433, 8 N. E. 346. [*Thayer v. Mann*, 19 Pick. 535.] The rule is the same where there is a lien. *Spears v. Hartly*, 3 Esp. 81, 6 Revised Rep. 814; *Higgins v. Scott*, 2 Barn. & Ad. 413, 9 L. J. K. B. 262; *Re*

Broomhead, 16 L. J. Q. B. N. S. 355, 5 Dowl. & L. 52. . . . And there appears to be no good reason why an independent collateral agreement given by way of guaranty or other security should not outlive the remedy upon the debt which it was given to secure, under proper circumstances." Bankruptcy Law July 1, 1898, chap. 541, § 67d, 30 Stat. at L. 564, 565, U. S. Comp. Stat. 1901, p. 3449, provides: "Liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act." In this case there is no question of notice of the assignment, nor was it such a one as required any notice to be given; consequently we think the assignment in question was one "not affected by this act." We think the decided weight of authority is to the effect that a discharge of a debtor in bankruptcy is but a personal release, and does not exonerate the effects of the debtor to which a valid lien has attached, and which is not expressly annulled by the provisions of the bankruptcy act.

The assignments of error, we think, are without merit, and the judgment of the Appellate Court should be and is affirmed.

NEBRASKA SUPREME COURT.

George W. MARSH, Secretary of State, et al., Plffs. in Err.,
v.

Orville M. STONEBRAKER.

(.....Neb.....)

- *1. Chapter 124, p. 630, of the Acts of the Twenty-Eighth General Assembly does not in terms vest title and ownership of the statutes therein mentioned in the officers to whom said statutes are to be delivered by the secretary of state.
2. An act of the legislature will not be declared unconstitutional and void on the presumption that it will be used as a basis to assert an unjust or illegal claim to the property of the state.
3. The legislature is not prohibited by any provision of the Constitution from granting to a person the right to publish the statutes of this state, and making such statute prima facie evidence of the law, nor from purchasing such number of

* Headnotes by DUFFIE, C.

NOTE.—For a case in this series holding, in harmony with the one above, that, under a statute providing for the distribution to county judges of copies of the Supreme Court Reports, the books belong to the office, and not to the incumbent of the office, see *Clifford v. Hall County*, 50 L. R. A. 733.

copies thereof as the legislature may deem necessary for the use of its officers.

(February 17, 1904.)

ERROR to the District Court for Lancaster County to review a judgment enjoining defendants from receiving, distributing, and paying for certain volumes of statutes in accordance with the provisions of an act of the legislature. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. F. N. Front, Attorney General, and Norris Brown, for plaintiffs in error:

The legislature is competent to pass an act authorizing the publication of the statutes, their purchase by the state, and their distribution to all state officers, judicial, executive, and legislative. Such statutes received by such officer during his term of office are not a perquisite of office.

An act authorizing an individual to pub-

lish the laws of the state is not special legislation such as the Constitution prohibits.

McGill v. State, 34 Ohio St. 247; *Edmonds v. Herbrandson*, 2 N. D. 270, 14 L. R. A. 725, 50 N. W. 5; *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *People ex rel. Graves v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *Johnson v. Joliet & O. R. Co.* 23 Ill. 202; *Wilson v. Sanitary District*, 133 Ill. 443, 27 N. E. 203; *State ex rel. Johnson v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *Barber County v. Smith*, 48 Kan. 331, 29 Pac. 565; *Wichita v. Burleigh*, 36 Kan. 34, 12 Pac. 332; *People v. Bowen*, 21 N. Y. 517; *Richman v. Muscatine County*, 77 Iowa, 513, 4 L. R. A. 445, 42 N. W. 422; *State ex rel. Pitman v. Tucker*, 46 Ind. 355; *Vickery v. Chase*, 50 Ind. 461; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *State ex rel. Henderson v. Boone County Ct.* 50 Mo. 317, 11 Am. Rep. 415; *Weston v. Ryan* (Neb.) 97 N. W. 347.

Messrs. Hall & Marlay, for defendant in error:

The bill is void for two reasons: First, it increases the compensation of each member; second, it is an open and flagrant offer of \$9 to each member, in the form of a set of books, for voting for that particular act.

Ex parte Pickett, 24 Ala. 95.

The real purpose of this act was to give Mr. Cobbe a \$4,500 bonus for publishing the statutes; and this is sought to be accomplished by giving to each member of the legislature a set of said statutes.

State ex rel. Squires v. Wallichs, 14 Neb. 439, 16 N. W. 481.

The act is special legislation.

Re House Roll 284, 31 Neb. 513, 48 N. W. 275; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *State ex rel. Dawson County v. Farmers' & M. Irrig. Co.* 59 Neb. 1, 80 N. W. 52.

On petition for rehearing.

This act is unconstitutional because it gives to each member of the legislature a set of the Cobbe statute, which costs the state \$9; this is a perquisite, and is forbidden by § 4, article 3, of the Constitution.

The word "distribute" has a well-defined legal meaning. It does not mean to loan; it has, in this instance, no restrictions and no limitations.

"To distribute" means to divide amongst more than two, to apportion, to deal out, to assign, to allot, to dispense, to administer.

Merrick v. Kennedy, 46 Neb. 265, 64 N. W. 989.

Mr. L. M. Pemberton, *amicus curiae*:

Since 1873 the policy of the state has 65 L. R. A.

been to keep the members of its legislature at all times posted upon the laws and doings of the legislature. The policy and the manner of doing this are purely legislative functions, with which the court has no power to interfere unless a constitutional provision is clearly violated.

State ex rel. Cornell v. Poynter, 59 Neb. 417, 81 N. W. 431; *Interstate Sav. & L. Asso. v. Strine*, 59 Neb. 28, 80 N. W. 45; *Alfalfa Irrig. Dist. v. Collins*, 46 Neb. 411, 64 N. W. 1086; *State ex rel. Churchill v. Bemis*, 45 Neb. 731, 64 N. W. 348; *Granger v. State*, 52 Neb. 362, 72 N. W. 474.

Our legislatures have for thirty years followed this policy.

The construction of a statute by the legislative or executive department, when deliberately made, is entitled to great weight.

State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 89-102, 61 Am. St. Rep. 538, 60 N. W. 373; *State ex rel. Pearson v. Cornell*, 54 Neb. 653, 75 N. W. 25; *State ex rel. Horne v. Holcomb*, 46 Neb. 88, 64 N. W. 437.

The legislature is not amenable to the courts for the wisdom or virtue of its actions.

Kittinger v. Buffalo Traction Co. 160 N. Y. 377, 54 N. E. 1081; *State ex rel. Robinson v. Lindsay*, 103 Tenn. 625, 53 S. W. 950; *State ex rel. Churchill v. Bemis*, 45 Neb. 731, 64 N. W. 348.

The relator in this case, for the purpose of saving himself a penny or two in taxes, is willing to inflict a loss of many thousands of dollars upon a third party who relied upon the law as valid, and pledged his money, credit, and business integrity upon the successful carrying out of the contract, when, had he moved in due time, none of these would have been jeopardized. This is not the good faith required in a court of equity.

Brown v. Merrick County, 18 Neb. 356, 25 N. W. 356; *State ex rel. Miller v. Graham*, 21 Neb. 329, 32 N. W. 142; *Lydick v. Gill* (Neb.) 94 N. W. 109; *Gillespie v. Sawyer*, 15 Neb. 536, 19 N. W. 449; *Forbes v. McCoy*, 24 Neb. 702, 40 N. W. 132; *Nosser v. Seeley*, 10 Neb. 460, 6 N. W. 755; *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 799, 64 N. W. 239.

Duffie, C., filed the following opinion:

At its last session the legislature passed an act (Acts 28th Gen. Assem. p. 630, chap. 124) in the following words:

"Be it enacted by the legislature of the state of Nebraska:

"Sec. 1. That J. E. Cobbe is authorized to prepare a statute of the state of Nebraska to be prepared and published without cost to the state.

"Sec. 2. Said statute shall contain the constitutions of the state and such other preliminary matter as has hitherto been published in the statutes and such matter as is usually published in first class statutes. All the public laws now in force or that shall be passed by this legislature arranged in chapters with proper headings and titles, the whole thoroughly indexed; shall be annotated on the same plan as the 'Annotated Code' of 1901 published by him and published in two volumes.

"Sec. 3. The said statute shall be published as soon after the adjournment of this legislature as is practicable with first-class work and five hundred (500) sets of two volumes each shall be immediately delivered to the secretary of state to be distributed by him to the members of this legislature, and state officers as provided by law. The state shall pay therefor the sum of nine (\$9.00) dollars per set of two volumes each.

"Sec. 4. The said statute shall be received in all the courts of the state as prima facie evidence of the law."

September 28, 1903, the defendant in error commenced this action in the district court of Lancaster county, alleging, among other things, "that under and in pursuance of said act the said J. E. Cobbeey had in preparation said statute: that the same will be completed, printed and published, and ready for delivery in a short time, and that it is the intention of the said J. E. Cobbeey to deliver 500 sets of two volumes each to the secretary of state, and it is the intention of said secretary of state to receive and distribute the same for the state of Nebraska to the members of the legislature of said state and the said officers thereof, in compliance with § 3 of said act, unless restrained by an order of this court from so doing: and that when said statutes are so by the said J. E. Cobbeey delivered to the secretary of state it is the intention of said auditor to draw his warrant upon the treasurer of the state of Nebraska for the payment of the same for the sum of \$4,500 unless restrained by an order of this court from so doing." It is further alleged that "the act is unconstitutional, in that § 4, art. 3, of the Constitution fixes the compensation of members of the legislature at the rate of \$5 per day during their sitting, and 10 cents for every mile they shall travel in coming to and returning from the place of meeting of the legislature: Provided, however, that they shall not receive pay for more than sixty days at any one sitting, nor more than one hundred days during the term, and that neither members of the legislature nor employees shall receive any pay or perquisites other than their salary and mileage: that it further infringes § 15, art. 3, 65 L. R. A.

of the Constitution, which provides that the legislature shall not pass local or special laws granting to any corporation, association, or individual any special or exclusive privilege, immunities, or franchise whatever, and that the act grants to J. E. Cobbeey a special privilege in the matter of publishing the Nebraska statutes." For these reasons an injunction was asked against the plaintiffs in error enjoining them from receiving and distributing or paying for said statutes. A demurrer to this petition was overruled by the district court, and, plaintiffs in error having elected to stand upon their demurrer, a perpetual injunction was granted as prayed in the petition, and the case has been brought here on error.

The theory upon which the defendant in error seeks to sustain this action is that the legislature, in the enactment of this statute, and in the appropriation which was made to pay for the books, contemplated and intended that absolute title to them should pass to the members of the general assembly. The appropriation bill contains the following: "To pay for 500 copies of the statutes for state officers and the present members of the legislature, the members of the next legislature and the counties of the state,—\$4,500." It is urged in the argument that, unless it was intended to give the members of the legislature which passed the act absolute title to the books received by them, it would be unnecessary to provide for the delivery of another copy of the books to the members of the next legislature, and it is insisted that, if title to the books is vested in the members of the legislature by the terms of the act and of the appropriation, it is a perquisite within the meaning of the constitutional provision above referred to. On the other hand, the attorney general insists that title to these statutes does not pass under the act: that it was the purpose and intent of the legislature to provide each of the members with a copy of the statute, to be used during their term of office, the better to qualify themselves for the performance of the duties imposed upon them as members of the legislature. We apprehend that no objection can be taken to furnishing the members of the legislature and other state officers with copies of the General Statutes of this state, to be used during their term of office. The executive, judicial, and legislative officers must each alike have access to the general laws of the state to enable them to perform their official duties in an intelligent manner, and it is as necessary that their offices be supplied with these statutes as with office furniture and other supplies. As we understand from counsel for defendant in error, it is not contended that

there is any constitutional objection against the state furnishing the use of these statutes to the members of the general assembly and other state officers, but it is insisted that the members of the legislature have no right to take these statutes from the capitol to their homes, or to have the use of them at any time except when the legislature is in session. With this contention we cannot agree. No one but the chief executive can know when a special session of the legislature may be called, and until the time when a member's successor is elected and qualified he may be required on any day to resort to the capitol to consider some important interest of the state. During all of his term he is entitled to the use of the statutes of the state as one of the incidents of the office which he holds, and as a means of informing himself in relation to his duty when called upon to act officially as a law-maker for the state. There is nothing in the terms of the act, as we read it, which pretends to vest in the officers furnished with these books an absolute title thereto, or anything more than the use thereof during their term. No party connected with this case is asserting title to these statutes under this act, and until some officer who is to be supplied claims title to the books delivered to him, and neglects and refuses to deliver them to his successor in office, we do not know how the question of title can be tried and determined. We cannot in this case more than in any other determine a question in advance of a controversy. That the state has a right to purchase these statutes is not a question open to discussion. That question was before the court in *State ex rel. Brown v. Wallicks*, 12 Neb. 234, 11 N. W. 321, and it was there said: "Whether this number were reasonable or prodigal, under all the circumstances that should affect it, is not to be here considered. The legislature saw fit to designate the number 'required by the state,' and that designation is not subject to review. That is a matter with which neither the respondent nor this court has anything whatever to do." Until the question of title to these books arises in a proper action and between proper parties, we are not called upon to decide the question, or to give our views in advance of an actual case properly instituted. We cannot declare a statute void upon the assumption that someone at some future time may use it as a basis for asserting an unjust claim to property delivered to him as a state official, and upon the presumption that the officers of this state will not surrender to the state or to their successors in office the property received from the state to enable them to intelligently perform their official duties if the property should, under the law, 65 L. R. A.

be surrendered either to the state or to their successors. The objection that this statute is obnoxious to the provision of our Constitution against the granting of any special or exclusive privilege is not, in our judgment, well taken. Mr. Cobbey is the only party having these books. If the state wishes to purchase, it must purchase from him. It is true that there is another statute published, and which the state could purchase from another party, but we know of no prohibition resting upon the legislature to determine for itself which of these statutes it will buy for the use of the state officers. If this purchase from Mr. Cobbey is granting to him a special or exclusive privilege because he is the only person owning this particular kind of a statute, and the legislature is prohibited from dealing with him on that account, then it must refuse to deal with anyone who is the exclusive possessor of a certain kind of property, however great the need of the state may be for the use of such property. The state having, as we think, an undoubted right to make this purchase, it is not for the courts to interfere or to take any action in the matter. If, at some future time, because of a claim of ownership made to these statutes by any officer to whom they may be delivered, the question of title shall arise, that question will be determined, together with the other question argued as to whether, if title does pass to the recipient, it constitutes a perquisite.

Because the decree of the district court prohibits the secretary and auditor of state from carrying into effect a law which upon its face is valid, we recommend that its judgment be reversed, and the case dismissed.

Kirkpatrick and Letton, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, *the judgment of the District Court is reversed*, and the case dismissed.

Rehearing denied.

Harry L. McCONNELL, *Plff. in Err.*,
v.

P. E. McKILLIP.

(.....Neb.....)

*1. Under the police power of the state, the legislature has power to

*Headnotes by LETTON, C.

NOTE.—As to constitutionality of statute providing for seizure of gaming tables, see the following case of *Woods v. Cottrell*.

As to constitutionality of statute providing

declare property which may be used only for an unlawful purpose to be a public nuisance, and authorize the same to be abated summarily by public officers; but if property of a nature innocent in itself and susceptible of a beneficial use, has been used for an unlawful purpose, a statutory provision subjecting it to summary forfeiture to the state as a penalty or punishment for the wrongful use, without affording the owner thereof opportunity for a hearing, deprives him of his property without due process of law.

2. Neb. Comp. Stat. 1901, § 3, art. 3, chap. 31, in so far as it provides for the seizure, forfeiture, and transfer of title to property without providing for a hearing, held, unconstitutional and void.

(April 21, 1904.)

ERROR to the District Court for Boone County to review a judgment in favor of plaintiff in an action brought to recover possession of certain guns. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Frank N. Prout, Attorney General, Norris Brown, Charles E. Spear, and William B. Rose, for plaintiff in error:

The statute authorizing game wardens to seize and forfeit to the state all guns in actual use by persons hunting in violation of the game law is a valid exercise of the police power of the state.

Lawton v. Steele, 152 U. S. 142, 38 L. ed. 390, 14 Sup. Ct. Rep. 499; *McMahon v. State* (Neb.) 97 N. W. 1035.

Game is the property of the state, held in trust for the people.

Geer v. Connecticut, 161 U. S. 523, 40 L. ed. 794, 16 Sup. Ct. Rep. 600.

The duty of the state to protect the game from the depredations of individuals "is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food."

Lawton v. Steele, 152 U. S. 139, 38 L. ed. 389, 14 Sup. Ct. Rep. 499.

The power of the legislature to authorize the summary seizure of personal property without notice or warrant, where such property is being used in violation of law to the injury of the public, has always been exercised in this country. The right of property is not more sacred than the right of personal liberty, and yet an offender against the law may be arrested by a private individual without complaint or warrant. A man who catches a felon in the act of applying a torch to a neighbor's house is not obliged to file a complaint and get a warrant before making

an arrest, but may imprison the felon and destroy the torch; and a game warden without indictment or process, when authorized by statute, may seize guns unlawfully used in the destruction of game,—property of the state held in trust for the people.

Hancy v. Compton, 36 N. J. L. 507.

Under the police power of the state, ships used for smuggling or to prevent enforcement of the revenue laws, piratical ships, property used for gambling, and also intoxicating liquors kept for unlawful sale, may be seized summarily without complaint or warrant, when authority to do so is given by statute.

Ibid.; *United States v. The Malek Adhel*, 2 How. 210, 11 L. ed. 239; *State v. Intoxicating Liquors*, 68 Me. 187; *Com. v. Certain Intoxicating Liquors*, 107 Mass. 399; *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813, 23 N. E. 878, Affirmed in 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Bittenhaus v. Johnston*, 92 Wis. 588, 32 L. R. A. 380, 66 N. W. 805.

Messrs. H. C. Vail and McKillip & McAllister, for defendant in error:

The state has not the right to use its police power, in addition to putting the offender under arrest, to permit the warden to take his property from him and confiscate it to the state, without a day in court. He has to be heard before he is condemned.

While it is true that plaintiff has invoked the process and powers of the county court to regain his property taken from him, it is equally true that he has no remedy at all, by invoking the powers of the county court, providing the law in question is constitutional.

Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420.

He has been deprived of his property without due process of law.

Hey Sing Teek v. Anderson, 57 Cal. 251, 40 Am. Rep. 115.

Where property is such as to become a nuisance *per se* the legislature has the power to provide for its seizure and destruction without further proceedings; but where it is not a nuisance *per se*, but it is only the use of it that becomes a nuisance, then the legislature has no power, under the police power, to provide for its destruction by the police officer.

Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; *Ely v. Niagara County*, 36 N. Y. 297; *Babcock v. Buffalo*, 56 N. Y. 288; *Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 165; 5 Webster, 12th ed. pp. 487, 488.

for summary seizure and sale of property used in occupation for which license is required, in satisfaction of license fee, see *Chauvin v. Vallon*, 3 L. R. A. 184.

As to validity of statute making criminal the

possession of property capable of criminal use, see *State v. Lewis*, 20 L. R. A. 52, and *note*; *Mon Luck v. Sears*, 32 L. R. A. 738; *Ford v. State*, 41 L. R. A. 551; and *People v. Adams*, 63 L. R. A. 406.

65 L. R. A.

A party cannot, by his misconduct, so forfeit a right that it may be taken from him without judicial proceedings in which the forfeit shall be declared in due form.

Cooley, Const. Lim. p. 362; *Lincoln v. Smith*, 27 Vt. 355; *Jenkins v. Ballantyne*, 8 Utah, 245. 16 L. R. A. 689, 30 Pac. 760.

Letton, C., filed the following opinion:

On the 3d day of August, 1902, P. E. McKillip, D. B. McMahon, and W. E. Harvey were engaged in hunting prairie chickens in Boone county, in violation of the game law of 1901, using three shotguns. The deputy game warden, Harry L. McConnell, seized the three shotguns while they were so engaged in hunting prairie chickens. P. E. McKillip was the owner of the guns, and the guns were valued at the sum of \$75. McKillip brought an action of replevin against the defendant deputy game warden for the possession of the guns. The case was tried to the district court upon an agreed statement of facts, substantially as above stated. The court found for the plaintiff, and rendered judgment accordingly. The defendant brings error to this court.

The game warden claims the right to hold the guns under authority of § 3, art. 3, chap. 31, Comp. Stat. 1901, which is as follows: "All guns, ammunition, dogs, blinds, and decoys, and any and all fishing tackle in actual use by any person or persons while hunting or fishing in this state without license or permit, when such license or permit is required by this act, shall be forfeited to the state; and it is made the duty of the commissioner and every officer charged with the enforcement of this act to seize, sell, or dispose of the same in the manner provided for the sale or disposition of property on execution, and to pay over the proceeds thereof to the county treasury for the use of the school fund." He contends that the statute authorizing game wardens to seize and forfeit to the state all guns in actual use by persons hunting in violation of the game law is a valid exercise of the police power of the state, while the defendant in error contends that the aforesaid statutory provision violates the provisions of the 14th Amendment of the Constitution of the United States, which declares: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and of § 3, art. 1, of the Constitution of the state of Nebraska, which provides that no person shall be deprived of life, liberty, or property without due process of law. The protection of wild animals suited for the purpose of food from indiscriminate slaughter by hunters has been the object of legislation from the most ancient

times. The theory upon which the lawmaking power assumes to act is that all wild game belongs to the state in its sovereign capacity as a trustee for the whole of the public, and that consequently the state may, as a proper exercise of its police power, adopt such rules and regulations with reference to its preservation, and such penalties with reference to a violation of such regulations, as are necessary to accomplish the end desired,—the preservation to the people of the state of the pleasure, sport, and profit derived from the hunting, pursuit, and capture of the wild animals living therein. In this case the defendant in error, McKillip, admits that it is within the power of the state, in the just exercise of its police powers, to prohibit the killing of fish and game at certain seasons of the year, but denies that it has the right to take his property from him and confiscate it to the state without giving him his day in court. He contends that the police power in regard to the confiscation of guns, dogs, blinds, decoys, and fishing tackle is upon exactly the same footing as the police power in regard to the regulation of the sale of intoxicating liquors, and that, since before liquors which have been seized are destroyed there must be a judicial determination by a court as to whether the owner was engaged in unlawfully selling or keeping for sale intoxicating liquors, so there must be as to his property. He further contends that since the statute contains no provisions for determining whether the property was liable to condemnation for the criminal acts of those who had it in their possession, and since it merely authorized the game warden to seize the property without warrant or process, to condemn it without proof, and to sell it as upon execution, it deprives the plaintiff of the property rights which are guaranteed to him by the Constitution.

The laws of the state of New York declare that any net or other means or device for taking fish found in the waters of the state, in violation of the laws for the protection of fish, is a public nuisance, and authorized game constables to destroy such nets. Certain nets were seized and destroyed, and, an action being brought against the officers for their value under these provisions, the court of appeals of the state of New York held that the declaration by the legislature that the nets or other devices found in the waters of the state are a public nuisance is a valid exercise of the legislative power, and that the further provision requiring the destruction of such nets, such destruction being an incident of the power of abatement of the nuisance, and not a forfeiture inflicted as a penalty of the owner, is not in violation of the constitutional prohibition of

taking property without due process of law, but further held that that part of the act authorizing the destruction of nets found upon the shore was unconstitutional, since nets not found in the waters are not a nuisance *per se*. *Larion v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813, 23 N. E. 878. A writ of error being sued out to the Supreme Court of the United States from this judgment, that court affirmed the judgment of the supreme court of New York, and says (Mr. Justice Brown delivering the opinion): "The main, and only real, difficulty connected with the action in question, is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries is to be treated as a public nuisance, 'and may be abated and summarily destroyed by any person; and it shall be the duty of each and every protector aforesaid, and every game constable, to seize, remove, and forthwith destroy the same.' The legislature, however, undoubtedly possessed the power, not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. . . . In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power, in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic, distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle, to pull down houses in the path of conflagrations, the destruction of decayed fruit or fish or unwholesome meats, of infected clothing, obscene books, or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and, if the object to be accomplished is conducive to the public interests, it may exercise a large

65 L. R. A.

liberty of choice in the means employed. *Newark & S. O. Horse Car R. Co. v. Hunt*, 50 N. J. L. 308, 12 Atl. 697; *Blazier v. Miller*, 10 Hun, 435; *Mouse's Case*, 12 Coke, 63; *Stone v. New York*, 25 Wend. 173; *American Print Works v. Lawrence*, 21 N. J. L. 248, 23 N. J. L. 590, 57 Am. Dec. 420." [152 U. S. 139, 38 L. ed. 389, 14 Sup. Ct. Rep. 499.]

The state of Wisconsin has an act, substantially the same as that of New York, providing for the protection of fish, and authorizing the destruction of nets, declaring the same to be public nuisances. In the case of *Bittenhaus v. Johnston*, 92 Wis. 588, 32 L. R. A. 380, 66 N. W. 805, the validity of this provision came before the supreme court of Wisconsin. The court says it has been repeatedly said that neither the 14th Amendment "nor any other provision of the Constitution of the United States 'was designed to interfere with the power of the state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.' *Barbier v. Connolly*, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Re Kemmler*, 136 U. S. 448, 34 L. ed. 519, 10 Sup. Ct. Rep. 930." The court further says: "The plaintiff, having voluntarily put the nets to an unlawful use, which made them public nuisances under the statute, is in no position to recover damages from the defendants for having, as public officials, obeyed the law in abating the nuisance by seizing and destroying the nets. Of course, the plaintiff had his right of action to determine whether the nets were or were not in such unlawful use. We must hold that the plaintiff has not been deprived of his property without due process of law."

No case has been brought to our attention in which a court has construed a statute which provides for the seizure, forfeiture to the state, and sale of property of the kind involved in this case which has been used in violation of the game laws. As a rule, the statutes have declared nets and like devices which can only be used in violation of law to be public nuisances, and provided for their abatement by their destruction by public officers. The distinction between nets, which, under the laws of the states providing for their destruction, can only be used for an unlawful purpose, and firearms, which, under the laws of this and other states, may be used for many other purposes, innocent and lawful in their nature, is clearly apparent, and has been recognized by our legislature in the act under consideration.

In § 1, art. 3, of this act, the legislature of this state has provided: "Every net, seine, trap, explosive, poisonous or stupefying substance or device, used or intended for use in taking or killing game or fish in violation of this act, is hereby declared to be a public nuisance, and may be abated and summarily destroyed by any person; and it shall be the duty of every such officer authorized to enforce this act to seize and summarily destroy the same, and no prosecution or suit shall be maintained for such destruction: Provided, that nothing in this division shall be construed . . . as authorizing the seizure or destruction of fire arms, except as hereinafter provided." The provisions of this section as to nets and like devices are substantially the same as those contained in the game laws of New York and Wisconsin heretofore referred to, and with the conclusions of these courts with reference to laws of like nature we have no fault to find. But there is a broad distinction between this section and § 3, under which the plaintiff in error justifies. The legislature has not declared a gun to be a public nuisance, and has not ordered its destruction as an abatement of the same. The seizure of the property provided for by this section is evidently intended, not only to put it out of the power of the offending person to carry on the destruction of game by depriving him of the implement of destruction, but also to operate as a penalty or punishment for an unlawful act committed by him. It is of the nature of a common-law forfeiture of goods upon conviction of a crime.

In *Hey Sing Leok v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115, it appeared that the plaintiff had rented certain boats and nets to a Chinese fisherman, and that the property was used in violation of a statute of the state which provided that "all nets, seines, fishing tackle, boats, or other implements used in catching or taking fish in violation of the provisions of this chapter" shall be forfeited, or may be seized by a peace officer of the county or his assistant, and may be by him destroyed or sold at public auction, upon notice posted in the county for five days. The court held that so much of the statute as authorized the property to be sold without judicial proceedings was unconstitutional and void. It will be noticed that boats were included which were susceptible of a lawful use.

Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208, was an action in conversion to recover the value of certain hogs. The town ordinance provided that it was the duty of the town marshal to take up the hogs running at large upon the streets, to advertise them

for three days, and to offer them at public sale to the highest bidder, and, after paying the expenses thereof, to pay over to the rightful owner the balance, if any. The court held "the right to forfeit . . . should not be extended beyond impounding the hogs. When that is done, the necessity for summary and precipitate action ceases, and judicial proceedings looking to forfeiture may then properly begin," and that the ordinance was unconstitutional.

Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420, was an action to recover the value of a dining table. The defendant pleaded that he was a member of the board of police commissioners of the city of St. Louis, and that under the statute it was his duty, when he had knowledge that there was a prohibited gaming table kept or used in the city of St. Louis, to issue a warrant directing some officer of the police force to seize and bring before him such gaming table, and made it his duty to cause the same to be publicly destroyed by burning or otherwise. These provisions were held unconstitutional and void.

In *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813, 23 N. E. 878, the supreme court of New York was of the opinion that it was only because the nets found in the water were a public nuisance that they might be destroyed, and that, if the destruction of the nets was intended as a penalty, it was unconstitutional; and also that nets not actually found in the water could not be seized. "But," says the court, "the legislature cannot go further. It cannot decree the destruction or forfeiture of property, used so as to constitute a nuisance, as a punishment of the wrong, nor even, we think, to prevent a future illegal use of the property, it not being a nuisance *per se*, and appoint officers to execute its mandate. The plain reason is that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers; and, under guise of exercising the power of summary abatement of nuisances, the legislature cannot take into its own hands the enforcement of the criminal or quasi criminal law. See opinion of Shaw, Ch. J., in *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381, and in *Brown v. Perkins*, 12 Gray, 89." When the same case reached the Supreme Court of the United States, while the majority of the court held that the law in question was a valid exercise of the police power, Chief Justice Fuller, with whom concurred Mr. Justice Brown and Mr. Justice Field, filed

a dissenting opinion, in which he says: "The police power rests upon necessity and the right of self protection; but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard." [152 U. S. 144, 38 L. ed. 391, 14 Sup. Ct. Rep. 499.]

In *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, it is said by Justice Brown: "But, in determining what is due process of law, we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but, so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction."

In *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302, a later case than *Lawton v. Steele*, a statute providing that every vessel unlawfully used in interfering with oysters planted in the waters of the state may be seized by the game protectors, and upon six days' notice a justice might take evidence, and, if found to be so engaged, the vessel should be ordered sold, and the proceeds paid to the commissioners of fisheries, game, and forestry, was held unconstitutional, the court saying: "It is to be observed, in passing, that the use for which vessels and fixtures may be forfeited under this act does not constitute a nuisance, either at common law or under this or any other statute. Nor is the property itself a nuisance. Hence it is obvious that the validity of this act cannot be maintained upon the ground that either the act or the property is a public nuisance, and, consequently, that the legislature had the power to authorize its abatement."

In *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 41 L. R. A. 481, 53 Am. St. Rep. 557, 66 N. W. 624, this court held: The legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights; but it must appear to the court, when such regulation is called in question, that there is a clear and real connection between the assumed purpose of the law and its actual provisions.

There is a clear and marked distinction between that species of property which can only be used for an illegal purpose, and 65 L. R. A.

which, therefore, may be declared a nuisance and summarily abated, and that which is innocent in its ordinary and proper use, and which only becomes illegal when used for an unlawful purpose. We know of no principle of law which justifies the seizure of property, innocent in itself, its forfeiture, and the transfer of the right of property in the same from one person to another as a punishment for crime, without the right of a hearing upon the guilt or innocence of the person charged before the forfeiture takes effect. If the property seized by a game keeper or warden were a public nuisance, such as provided for in §1, he had the right under the duties of his office at common law to abate the same without judicial process or proceeding; and the great weight of authority is to the effect that such common-law rights have not been abrogated or set aside by the provisions of the Constitution; but if the property is of such a nature that, though innocent in itself and susceptible of a beneficial use, it has been perverted to an unlawful use, and is subject to forfeiture to the state as a penalty, no person has a right to deprive the owner of his property summarily, without affording opportunity for a hearing and without due process of law. The usual course of proceedings in such case has been either, as in admiralty and revenue proceedings, to seize the property, libel the same in a court of competent jurisdiction, and have it condemned by that court, or, as in criminal matters, to arrest the offender, and to provide that upon his conviction the forfeiture of the property to which the offender's guilt has been imputed, and to which the penalty attaches, should take place. These have been the methods of procedure for centuries. No other has been pointed out to us in the brief of the plaintiff in error. We are therefore constrained to the opinion that, in so far as the section under consideration provides for the seizure, forfeiture and transfer of title to property without a hearing upon the guilt or innocence of its owner, it violates the constitutional provisions. Whether or not a forfeiture can be provided for as a punishment for crime under our Constitution is a question not raised or decided in this case.

We recommend that the judgment of the district court be affirmed.

Duffie and Kirkpatrick, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Gibby WOODS, *Plff. in Err.*,
v.

Joel COTTRELL *et al.*

(.....W. Va.)

- *1. A justice who issues a warrant to arrest a party for keeping a slot machine as a gaming table, and to seize the same, and who, on hearing, requires the accused to give recognizance to appear before the criminal or circuit court to answer the charge, and orders the constable to turn over to the clerk of such court the slot machine to abide its order, is acting within his jurisdiction; and a writ of prohibition will not lie against him and the constable to restrain them from executing such order, nor against such clerk to prohibit his retaining the machine until such court act upon it.
2. Code 1899, chap. 151, § 1, in authorizing the seizure of gaming tables or instruments covered by it, is not unconstitutional, as depriving a person of property without due process of law.
3. When gaming tables are seized under a warrant from a justice under Code 1899, chap. 151, § 1, the justice cannot order them to be burned. That can be done only upon conviction of their owner, upon the charge of keeping them, in a criminal or circuit court, and under its order.
4. Public nuisance; power to destroy things constituting it.

(March 29, 1904.)

ERROR to the Circuit Court for Kanawha County to review a judgment in favor of defendants in a proceeding to obtain a writ of prohibition to prevent the execution of an order with respect to the seizing of slot machines. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. W. Kennedy, Cornwell & Cornwell, John H. Holt, John Bassel, and M. G. Sperry for plaintiff in error.

Mr. S. B. Avis, for defendants in error:

The words "gaming table" are used in the statute in the sense of gaming device or gaming implement.

Estes v. State, 10 Tex. 300.

The distinctive feature in the character of the games called A. B. C. and E. O. and faro bank is that the chances of the game are unequal, all other things being equal, and those unequal chances are in favor of the exhibitor of the games or tables. If other games resemble those standard games in that distinctive feature, they come within the terms of the gaming act, being gaming

tables "of the same or like kind," and are liable to the penalties denounced against those standard games, whatever may be the denomination of those other games, and whether played with cards, dice, or in any other manner.

Com. v. Wyatt, 6 Rand. (Va.) 694; *Huff v. Com.* 14 Gratt. 648; *Nuckolls v. Com.* 32 Gratt. 884; *Miller v. State*, 48 Ala. 122; *Mims v. State*, 88 Ga. 458, 14 S. E. 712; *Toney v. State*, 61 Ala. 1; *Wren v. State*, 70 Ala. 1; *Bibb v. State*, 83 Ala. 84, 3 So. 711, 84 Ala. 13, 4 So. 275; *Jeffries v. State*, 61 Ark. 308, 32 S. W. 1080; *Kolshorn v. State*, 97 Ga. 343, 23 S. E. 829.

The "gaming table" is an instrument of crime, so conceived and created, adopted and used only for the purpose of gaming, in violation of the expressed provision of the statute, and, as such, is confiscated and forfeited at the moment of its seizure, without further procedure.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; *Newman v. People*, 23 Colo. 300, 47 Pac. 278.

At common law, and without statute, it would be the official duty of the constable, when he knows or sees that a criminal offense is being committed, without warrant and upon view to arrest the offender, and to seize and take into custody the subject of the crime, or the thing which aids the offender in its commission, and bring before an examining magistrate, there to be proceeded against according to law, not only the person arrested, but also the thing seized.

1 Bishop, Crim. Proc. § 210; 2 Hale, P. C. 90; 1 East, P. C. 307; *Crouther's Case*, Cro. Eliz. pt. 2, p. 654.

Prohibition does not lie to restrain an inferior tribunal after its judgment has been given and fully executed.

Haldeman v. Davis, 28 W. Va. 324.

Where a justice has jurisdiction of the subject-matter in controversy, and does not exceed its legitimate powers, a writ of prohibition should not be granted.

West v. Rawson, 40 W. Va. 480, 21 S. E. 1019.

The writ of prohibition does not lie where an inferior tribunal has jurisdiction, nor where it is not abusing its lawful jurisdiction, and only operates upon a pending suit or proceeding; nor where defendant has other available remedy.

McConiha v. Guthrie, 21 W. Va. 134; *Buskirk v. Circuit Judge*, 7 W. Va. 91; *Eastham v. Holt*, 43 W. Va. 599, 27 S. E.

*Headnotes by BRANNON, J.

NOTE.—As to constitutionality of statute authorizing seizure of property used for unlawful purpose, see the preceding case of *McConnell v. McKillip*.
65 L. R. A.

883, 31 S. E. 259; *Ex parte Ellyson*, 20 Gratt. 24.

To warrant a court in granting a writ of prohibition, it should clearly appear that the inferior tribunal is actually proceeding, or is about to proceed, in some matter over which it possesses no rightful jurisdiction.

Hassinger v. Holt, 47 W. Va. 348, 34 S. E. 728.

Brannon, J., delivered the opinion of the court:

A justice of Kanawha county issued a warrant requiring the arrest of Gibby Woods, charging that he kept and exhibited "a gaming table, called an A. B. C. table, and E. O. table, and faro bank, and keno table, and table of like kind, under the denomination of 'slot machine.'" The warrant required the constable to arrest Woods, and bring him before the justice to answer the charge, and also to seize the slot machine and any money staked and exhibited to allure persons to bet at such table or bank; and under it the constable arrested Woods and seized the slot machine, and upon hearing Woods was required to give bond for his appearance before the criminal court to answer the charge, and the slot machine was by the justice's order turned over to the clerk of the criminal court to await its action as to the machine. Two days after the justice's action Woods obtained from the circuit court a rule against the justice, the constable, and the clerk of the criminal court to appear and show cause why a writ of prohibition should not go to prohibit them from proceeding upon the said order of the justice, "and commanding them no further to hold said slot machine from said petitioner." Upon hearing the court discharged the rule, and Woods sued out a writ of error from this court.

At once the question thrusts itself upon us, Does prohibition lie in this case? No one can question that a justice has jurisdiction to issue a warrant to begin a prosecution for keeping gaming tables under Code 1899, chap. 151, § 1. Say that he erred in deciding that a slot machine is a table, an instrument of gaming, under that statute. It is only an error of judgment within the pale of a lawful jurisdiction. It is not a usurpation of jurisdiction, but mere erroneous decision in a case lawfully before him. The law commanded him to consider and decide whether or not keeping a slot machine was an offense under that statute. He did only what the law required of him,—he decided that question. Prohibition lies only where there is "usurpation and abuse of power, when the inferior court has not jurisdiction of the subject-matter in con-

troversy, or, having such jurisdiction, exceeds its legitimate powers." Code 1899, chap. 110, § 1; *Haldeman v. Davis*, 28 W. Va. 324; *Wood County Court v. Boreman*, 34 W. Va. 362, 12 S. E. 490. It was argued at the bar that the Code just cited says that the writ lies as "matter of right." So it does in those cases where it does lie, but those words do not define the cases where it lies, but were inserted only to say that in cases proper for the writ it should be demandable of right, instead of resting in the discretion of the court as before that enactment. For such error in mere judgment the law provides another remedy. *West v. Rawson*, 40 W. Va. 480, 21 S. E. 1019. If indicted, the criminal court, then the circuit court, then the supreme court,—all in the due course of law; and this is another reason against prohibition. A bold proposition it is to say that, when a justice sends out a warrant for a criminal act for which the law gives him power to issue it, a prohibition lies, even where the act does not constitute an offense. Can the question whether it is an offense be tested by prohibition? It is not a criminal writ. Can the usual criminal procedure be arrested and frustrated by this writ? Surely not. To so hold would palsy the vigor of criminal process. Everybody would be asking a prohibition when a warrant is sued out against him. We decline to set such a precedent, and decide the merits without regard to the question of the propriety of thus using the writ, and thus be understood as holding that prohibition can be so used, even though the parties consent, as we do not think that consent can give the writ a function not given it by law. See dissenting opinion in *State ex rel. Morley v. Godfrey*, 54 W. Va. —, 46 S. E. 185.

Another reason why the writ does not lie, so far as it seeks to restrain the action of the justice, is that he had already acted. When he sent Woods on to the criminal court, he was *functus officio*. The matter was that instant in the criminal court. "Prohibition does not lie to restrain an inferior court after the judgment has been given and fully executed." *Haldeman v. Davis*, 28 W. Va. 324.

Next, as to whether the writ can go to operate upon the constable and clerk. As to the constable: We are to presume that as the justice made his order on December 7th, and the petition for prohibition was not presented until December 9th, the constable had already lost custody of the slot machine. It does not appear to the reverse. Where, after judgment, prohibition is asked to restrain its execution, as may, under some circumstances, be done, it must appear that execution has not been done; but in this

case it does not so appear. *Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152; *Wilkinson v. Hoke*, 39 W. Va. 405, 19 S. E. 520; *Bodley v. Archibald*, 33 W. Va. 229, 10 S. E. 392. And the constable is not a judicial officer, nor is the clerk, and prohibition is only to judicial tribunals. As to clerk: The rule proposes that the writ shall command him "no further to hold said slot machine from petitioner;" that is, that he surrender it to Woods. It can have no other significance. It would be worthless otherwise. This makes the writ an action of detinue,—a function which it cannot perform. If the order of the justice were void (as it is not), or if that feature touching the machine were void, it could be so held in an action of detinue, which would be the proper process. Prohibition does not lie where other plain remedy exists. But, aside from the last consideration, the statute gives authority to seize, under the warrant of the justice, a gaming table or faro bank, and the power to burn it, and within this would be included the power to hold it as evidence in furtherance of the prosecution originating with the warrant, and to answer final judgment of its condemnation. Now, this seizure is thus under color of statute authority and jurisdiction; not without jurisdiction, not an excess or abuse of jurisdiction, but within the very letter of the jurisdiction given by the statute. The arrest, holding the accused to answer in court, and seizure of the instrument, thus preventing its use in gaming until trial and judgment, all these are under color and justification of the authority or jurisdiction given by the statute. To sustain a jurisdiction wide enough to justify, not only the issue of the warrant and hold the accused to answer an indictment, but also the seizure of the slot machine, is not to assert a power in the justice to burn the machine. We do not think he has that power. This warrant was issued under a statute which does not give the justice power to hear and determine final judgment. His only power is to determine whether there is probable cause to hold the party to answer in the trial court. We cannot cut his power into separate pieces, and say that, whilst he cannot try the guilt of the accused, and impose punishment, yet he can pass judgment that the machine be burned. We think that whether the machine shall be burned or released depends on whether the accused is guilty. If not guilty, he is not himself to be punished, neither is the machine to be burned; and, as only the trial court can determine his guilt, so only it can condemn the machine to be burned. If the party is guilty, destruction of the machine follows the ascertainment of his guilt. 65 L. R. A.

If acquitted, judgment of restitution to him of his property follows. Though the thing be plainly an instrument of gaming under the statute, yet, if its owner be acquitted of using it for that purpose, it cannot be destroyed, as it is only instruments actually used and kept for gaming that are thus condemned to destruction.

It is argued that only after trial by a jury and conviction of the accused can the gaming table be seized. This cannot be so. It is designed to take from the accused the gaming instrument, and stop its use until trial. It goes along with the accused to share his fate.

It is argued that there is no authority to turn over to the court as evidence the slot machine, and that that part of the justice's order is an excess and abuse of his powers, and warrants prohibition, as the statute gives only power to burn. We have just said that the statute does not contemplate a burning by order of the justice, and this would justify the commitment of the slot machine to the custody of the criminal court to abide its order, so that it may have possession and execute its judgment of burning. The justice had jurisdiction under the statute to decide whether there was probable cause to charge the accused. Surely that cannot be doubted. It is plain, too, that he had power to retain the machine as evidence, and also to answer judgment of condemnation of it. The general law justifies, not merely seizure of articles admissible as evidence, but even search of the person charged in order to get evidence. State necessity calls for it. 1 Bishop, Crim. Proc. § 210; Hughes, Crim. Proc. § 3132. The above considerations, based on only Code 1899, chap. 151, § 1, besides general law, to show that the justice had jurisdiction to seize and provide for the retention of the article, may be strongly supplemented by Code 1899, chap. 155, allowing warrants to search premises to find gaming implements, as it gives power to the justice to issue search warrants, and allow seizure, and directs that the article be safely kept by direction of the justice to be used as evidence, and then, in some cases, burned. The law thus plainly gave the justice jurisdiction to do all he did in this case. *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, is a valuable case as to limit of right of search where it is illegal, or compels one to furnish evidence against himself. Thus we see clearly that the justice had jurisdiction. It is proposed to make the civil writ of prohibition review and reverse his action for supposed error, as if it were appellate process. Prohibition has no such office. *Wood County Court v. Boreman*, 34 W. Va. 382, 12 S. E. 490. The

case of *State ex rel. Morley v. Godfrey*, 54 W. Va. —, 46 S. E. 185, does not conflict with this case, because the town ordinance under which the warrant issued was void; there was no jurisdiction.

It is said that the statute, in authorizing the seizure and withholding of a gaming table, is a violation of the Constitution, as it takes property without due process. This argument goes upon the theory, in part at least, that it is the justice who commands the burning of the gaming table. It may be that, if such were the construction of the statute, trial before the justice would be due process. *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80. But we hold that it is only the trial court, after conviction, that can order such burning, and it cannot be intimated that this is not due process. It cannot be maintained that the clause of the statute authorizing the seizure and burning of a gaming table is unconstitutional. Mere gaming is not, at common law, an offense, but only by statute; but keeping a gaming house is a public nuisance by common law. 14 Am. & Eng. Enc. Law, 2d ed. p. 666; 1 Wood, Nuisances, § 45. It is law very ancient that upon an indictment for maintaining a public nuisance not only may the offender be punished, but the nuisance may be abated as part of the judgment, and the thing with which the nuisance is done may be destroyed. 1 Am. & Eng. Enc. Law, 2d ed. p. 78; 2 Wood, Nuisances, § 804. This is a governmental power, existing under that vast power called the "police power." It is coeval with government. Under it all criminal law finds its warrant. 1 McClain, Crim. Law, § 23. We cannot believe that it was the design of the state Constitution or of the 14th Amendment to the national Constitution, in declaring that no one shall be deprived of property without due process of law, to enervate and emasculate government of powers so essential and deeply rooted in the social fabric long before the adoption of American Constitutions. They effect no repeal of such inherent common-law powers. *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; *State v. Sponaugle*, 45 W. Va. 415, 43 L. R. A. 727, 32 S. E. 283; 25 Am. & Eng. Enc. Law, 2d ed. p. 146. So the established law of public nuisance and remedy will warrant the seizure and detention and custody of the machine by the criminal court as evidence, and to execute its judgment. In fact, this confiscation of the table is a part of the punishment, just as are the fine and imprisonment. Of course, the Constitutions do not debar the legislature from fixing punishment. Bishop, *Statutory Crimes*, § 993. The old common law confiscated the felon's property. That 45 L. R. A.

general forfeiture of the common law, as a mere sequence of conviction, cannot be enacted in this state because of our Bill of Rights saying, "No conviction shall work corruption of blood or forfeiture of estate." This abolished power to declare a forfeiture as a legal consequence of conviction; but it does not inhibit a provision like that in the gaming act, forfeiting the particular thing working the mischief, the instrument of the nuisance or offense. The legislature may divest property in that particular thing. "Forfeitures of specific articles . . . are a species of fine, resting on the same principles as a sentence to pay a sum of money. We have no general practice of imposing this sort of forfeiture, but it is sometimes done under the direction of a statute." Bishop, *New Crim. Law*, § 944. The legislature may determine when that which is otherwise property shall cease to be such if kept against law. It is subject to police power. *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113; *State v. Lewis*, 134 Ind. 250, 20 L. R. A. 52, 33 N. E. 1024; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 682. In *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, a state act authorizing private individuals and certain officers to destroy fish nets was held lawful exercise of police power, and not to deprive persons of property without due process. In some states are statutes confiscating intoxicating liquors kept for sale contrary to law, and authorizing their seizure. In *Fisher v. Moir*, 1 Gray, 1. 61 Am. Dec. 381, it is held that "the legislature may declare possession of certain property to be unlawful, where such property would be dangerous, injurious, or noxious, and may be due process of law, by proceeding *in rem*, provided for the abatement of the nuisance, and the punishment of the offender, by the seizure and confiscations of the property, by the removal, sale, or destruction of the noxious articles." The Supreme Court has held in *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, that "the destruction, in the exercise of the police power of the state, of property used in violation of law in maintaining a public nuisance, is not a taking of property for public use, and does not deprive the owner of it without due process of law." It held that the state had constitutional power to declare any place kept for illegal manufacture or sale of liquors a public nuisance, and abate it, and at the same time provide for the trial of the offender. An Iowa statute provided that, if the existence of a nuisance is established by trial, it should be abated by the judgment by seizing and destroying the liquor, and that the fix-

tures and furniture used on the premises for manufacture or sale of liquor should be removed and sold. It was argued that the seizure and destruction of the liquor and removal and sale of the fixtures was contrary to the 14th Amendment; that this could not be done by legislative enactment, whereas this legislation forfeited the property; that forfeiture must be by action against the thing; and that in a criminal prosecution the property is not involved, as is contended in this case, and that the defendant was entitled to his day in court upon the forfeiture of the property. The court said—what we say—that property cannot be forfeited by a legislative act, but only by judgment of a court, after notice, that the statute did not forfeit property by legislative enactments, but, as in many other instances, authorizes the courts, in cases where it has been established on judicial investigation that the property is such or has been so used as to be a nuisance, to abate it by destroying and selling the property. It said that in actions wherein the existence of the nuisance is established under the law in question the action is against the thing,—the place,—as well as against the person. In either case the question is whether the place was a nuisance, and, if so, whether the person was engaged in keeping it. The court said that, as the proceeding is against person and thing both, the person has due notice, and his day in

court to defend against forfeiture, as also to defend himself. Just so in this case. *Craig v. Werthmueller*, 78 Iowa, 598, 43 N. W. 606. Where one has his day in court, and regular trial, that is due process. *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80. Such anti-liquor laws forfeiting property have been frequently sustained. *Black, Intoxicating Liquors*, § 54; *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *Bishop, Statutory Crimes*, §§ 993, 994. We conclude that the statute in question is valid both as to the person proceeded against and the implements used for gaming.

The question whether a slot machine is an instrument of gaming within the meaning of Code 1899, chap. 151, § 1, was fully and ably argued orally and in briefs, and this court is as well prepared to decide it now as it likely ever will be, though strictly it is not proper to decide it, as prohibition does not lie. As it was stated in argument that indictments are pending in some counties against persons for keeping slot machines, and that those using them want to know whether they are violating the law or not, some of the members of the court favor expressing our opinion upon it; but, some members objecting, we do not consider the question in this opinion.

We affirm the judgment discharging the rule.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Alexis M. SALLIOTTE, *Plff. in Err.*,
v.

KING BRIDGE COMPANY.

(58 C. C. A. 466, 122 Fed. 378.)

1. **One who contracts to construct bridge abutments according to plans and specifications already prepared for one who has taken the contract for the construction of the bridge is an independent contractor, for whose acts the employer is not responsible, although his agent exercises some**

kind of general supervision for the purpose of seeing that the work is done according to the contract.

2. **One who has constructed a bridge under contract for another is not liable for injuries to adjoining land because of the deflection of currents due to the work, where the injury does not occur until after the bridge has been surrendered to and accepted by the owner.**
3. **A bridge erected under lawful authority cannot be regarded as a nuisance, so as to render those responsible for**

NOTE.—General rule as to absence of liability of employer for torts of independent contractor.

- I. Scope of note, 621.
- II. General doctrine stated, 622.
- III. History of the doctrine.
 - a. *Bush v. Steinman* considered, 624.
 - b. Doctrine that different rules apply to real and to personal property, 626.
 - c. Final rejection of doctrine making distinction between real and personal property, 629.

III.—continued.

- d. Effect of decision in *Randleson v. Murray*, 630.
- e. Subsequent development of the law, 631.
- IV. Rationale of the doctrine, 632.
- V. Extent of employer's duty with respect to the supervision and direction of the work, 635.
- VI. Extent of duty of employer to guard against possible accidents, 639.
- VII. For what torts of contractor the employer is not bound to answer.
 - a. In general, 641.

its construction liable for injuries caused to adjoining land as trespassers or tortfeasors.

4. **One who contracts for the performance of public work, the incidental effect of which is to injure private property,** is entitled to all the exemption to which the public is entitled from liability to private property owners for the consequences of such work.

5. **A taking, or appropriation, of property, within the meaning of a constitutional provision** requiring the payment for property taken for public use, is not effected by the construction of bridge piers in a navigable river and the dredging of the channel so as to change the current and cause it to run directly against the bank, tearing and carrying away portions of the land of the riparian owner.

(April 20, 1903.)

VII.—continued.

b. *Negligence not productive of permanently dangerous conditions.*

1. *Work on railways*, 643.
2. *Work on buildings*, 643.
3. *Work on highways*, 644.
4. *Work involving the handling of heavy articles*, 644.
5. *Management of teams*, 644.
6. *Management of vessels*, 644.
7. *Entertainments at public resorts*, 644.
8. *Loading or unloading of ships*, 644.
9. *Blasting operations*, 644.

c. *Negligence productive of dangerous conditions of a more or less permanent character.*

1. *In general*, 646.
2. *Work on railways*, 646.
3. *Construction of bridges, embankments, and dams*, 647.
4. *Construction of telegraph and telephone lines*, 648.
5. *Laying of pipe lines*, 648.
6. *Construction of buildings*, 648.
7. *Repairing or reconstruction of buildings*, 649.
8. *Demolition of buildings*, 649.
9. *Work performed on streets and highways*, 650.
10. *Work done on premises adjacent to streets and highways, and affecting the safety thereof*, 652.
11. *Scavenging work*, 653.
12. *Work in harbors*, 653.
13. *Excavation work*, 654.
14. *Work involving the use of fire for the destruction of timber*, 654.
15. *Work in mines*, 654.
16. *Hauling of timber*, 654.
17. *Operation of ferries*, 654.
18. *Loading or unloading of ships*, 654.

d. *Acts constituting a trespass*, 655.

1. *Scope of note.*

This note is one of a series dealing with the liability of employers for the acts of independent contractors.

The rule relieving the employer from such

ERROR to the Circuit Court of the United States for the Eastern District of Michigan to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent or wrongful diversion of the currents of a river to the injury of plaintiff's property. *Affirmed.*

Statement by **Lurton**, Circuit Judge:

This is an action of trespass on the case. The plaintiff in error, who was the plaintiff below, is the owner of a tract of land bounded on its northern side by the River Rouge, and on its westerly side by a great public highway, called the "Detroit & Monroe Road," which road crosses the river upon a public bridge at the northwestern corner of the plaintiff's land. The River Rouge is a nav-

acts is, as stated in subd. II., *infra*, limited to collateral or casual torts of the independent contractor, and does not extend to injuries resulting from the unlawfulness of the work itself, or to injuries which are a necessary consequence of executing the work in the manner provided for in the contract or subsequently prescribed by the employer, or to those which are caused by the violation of some absolute, nondelegable duty which the employer is bound to discharge, or to those which are due to some other specific act of negligence on the part of the employer himself. For this reason, the subject will be presented in separate notes, and this one is limited to the presentation of the authorities bearing on the general rule relieving employers from liability for the acts of such independent contractors, including the particular torts or acts which the courts have held to be merely collateral or casual within the meaning of such rule. The authorities holding the employer liable on the ground that one or more of the exceptions to the general rule applies, will be presented in separate notes, each of which will deal with one of such exceptions.

As will appear from an examination of these notes, there is, in not a few instances, a conflict of authority as to whether a particular state of facts and circumstances brings the case within the general rule relieving the employer from liability, or causes it to fall within one of the exceptions which render the employer liable. The authorities are arranged in this note in such a manner as to facilitate comparison and contrast with similar cases, in which the courts have refused to apply the general rule, but have applied one or more of the exceptions to the rule; and which cases will be found in the note discussing the exception applied.

The notes dealing with these exceptions to the general rule are as follows: *Note to Thomas v. Harrington, post*, —, on *Liability of employer for acts of independent contractor where the injury is the direct result of work contracted for*; *note to Jacobs v. Fuller & H. Co. post*, —, on *Liability of employer for injuries caused by the performance of work by independent contractor, which is dangerous unless certain precautions are observed*; *note to Anderson v. Fleming, 66 L. R. A.* —, on *Liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer*; *note to Louisville &*

igable stream emptying into the Detroit river, and wholly within the state of Michigan. The declaration avers that in 1896 the defendant, the King Bridge Company, contracted to construct a new iron bridge, with stone abutments and piers, to take the place of an old bridge; the contract being with the townships of Springwells and Ecorse, and with an electric railway company which was operating an electric road along and upon the said Detroit & Monroe road. It is then averred that it was the duty of the said contractor "so to conduct himself, and so to execute the said work, as not to injure in any manner the premises aforesaid of the said plaintiff; yet the said defendant, in utter disregard of its duty in the premises, and to save the expense of hauling

dirt from a distance, did, by a dredge, dig up a large amount of dirt next to the Ecorse abutment of said bridge, thereby tearing away the natural channel bank of the said River Rouge, and widening the same at that place to a great width, to wit, 30 feet; and by reason of the large amount of dirt taken from the said river at the said place, the cutting away of the channel bank as aforesaid, and of the placing of a turntable in the center of the said river, the said defendant, in utter disregard of the property rights of the said plaintiff, changed the course of current of the said River Rouge, and caused the same to run directly against the aforesaid property of the said plaintiff, thereby tearing and carrying away a large part of the frontage of the said plaintiff's

N. R. Co. v. Low, 66 L. R. A. —, on *Liability of employer for injuries occurring in performance of work by independent contractor where employer's own act is a proximate cause of the injury*.

The authorities as to who are independent contractors are presented in note to *Richmond v. Sitterding*, 65 L. R. A. 445, on *Persons deemed to be independent contractors within meaning of rule relieving employer from liability*.

II. General doctrine stated.

It is here proposed to discuss the effect, and define the limits, of a doctrine which, according to the standpoint from which it is considered, may be stated generally in one or other of these three forms:

(1) Where the injury complained of resulted from the tortious conduct of an independent contractor, the rule which is embodied in the maxim, *Qui facit per alium facit per se*, is not applicable. See *Quarman v. Burnett* (1840) 6 Mees. & W. 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969, per Parke, B; *Wiswall v. Brinson* (1849) 32 N. C. (10 Ired. L.) 554.

Similar statements are also made with regard to the inapplicability, under such circumstances, of the maxim, *Respondet superior*.

(2) A person who employs an independent contractor to perform a specific piece of work is not liable for injuries caused by any merely collateral or casual torts which he may commit while the work is in progress.

(3) An employer is not liable for an injury resulting from the performance of work deputed by him to an independent contractor, unless that work was positively unlawful in itself, or the injury was a necessary consequence of executing the work in the manner provided for in the contract, or subsequently prescribed by the employer, or was caused by the violation of some absolute, nondelegable duty which the employer was bound, at his peril, to discharge, or was due to some other specific act of negligence on the part of the employer himself.

"The only principle upon which one man can be made liable for the wrongful acts of another is, that such a relation exists between them that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant. The maxim of the law is *Respondet superior*. It is 65 L. R. A.

only applicable in cases where the party sought to be charged stands in the relation of superior to the person whose wrongful act is the ground of complaint." *Blackwell v. Wiswall* (1855) 24 Barb. 355. Similar phraseology is found in *Stephens v. Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 542; *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163; *Cincinnati v. Stone* (1855) 5 Ohio St. 38; *Du Pratt v. Lick* (1869) 38 Cal. 691; *Hilsdorf v. St. Louis* (1860) 45 Mo. 94, 100 Am. Dec. 352; *DeFord v. State* (1868) 30 Md. 179.

"The general principle to be extracted from them [i. e., the authorities] is that a person, either natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant or principal and agent exists between them; that when an injury is done by a party exercising an independent employment, the party employing him is not responsible to the person injured." *Painter v. Pittsburgh* (1863) 46 Pa. 213.

"It seems to be settled law that where one person lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular standard when completed, he is not liable for any injury which may occur to others by reason of any negligence of the person to whom the contract is let." *Vincennes Water Supply Co. v. White* (1890) 124 Ind. 376, 24 N. E. 747.

"No one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable." *Pickard v. Smith* (1861) 10 C. B. N. S. 470, 4 L. T. N. S. 470.

For other statements of a similar tenor, see *infra*, VII. a.

The various qualifying elements mentioned in the third form of the statement of the doctrine are not all referred to in any single judicial enunciation of the doctrine, but, as each of them embodies the effect of certain distinct groups of cases which will be reviewed in subsequent notes, they are here collected in the same statement, for the purpose of showing the full extent of the limitations to which the doctrine is subject. The following paragraphs will serve

land upon the said River Rouge, and doing great damage to his property, etc., all to the damage of the said plaintiff \$5,000." The defendant pleaded the general issue, and gave notice of certain defenses which it would make under that issue,—among others, that it would show that it had only been a contractor with the townships named above and the electric railway to construct a bridge according to plans furnished by said townships, and which said plans and specifications had been approved by the proper Federal authority,—the River Rouge being a navigable stream,—and that any dredging done had been by the requirement of said Federal authority for the purpose of maintaining the navigability of said river. At the close of all of the evidence, the court instructed the jury to find for the defendant.

as sufficient illustrations of the language used by courts and text writers.

In a leading case Cockburn, Ch. J., refers to the general rule, "that when a person employs a contractor to do a work, lawful in itself, and involving no injurious consequences to others, and damage arises to another party from the negligence of the contractor or his servants, the contractor, and not the employer, is liable." *Bower v. Peate* (1876) L. R. 1 Q. B. Div. 321.

"It is now settled in that country [i. e., England] that defendants, not personally interfering or giving directions respecting the progress of a work, but contracting with a third person to do it, are not responsible for a wrongful act done, or negligence in the performance of the contract, if the act agreed to be done is legal." *Painter v. Pittsburgh* (1863) 46 Pa. 213; *Edmondson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

The doctrine as to the nonliability of an employer for the acts of an independent contractor "has regard to cases where the contract is entirely lawful, and where the owner of the property upon which the contract is to be executed can lawfully commit its performance to others." *Allen v. Willard* (1868) 57 Pa. 374.

"Where work which does not necessarily create a nuisance, but is in itself harmless and lawful when carefully conducted, is let by an employer who merely prescribes the end, to another who undertakes to accomplish the end prescribed, by means which he is to employ at his discretion, the latter is, in respect to the means employed, the master. If, during the progress of the work, a third person sustains injury by the negligent use of the means employed and controlled by the contractor, the employer is not answerable." *Wabash, St. L. & P. R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296.

"When a contractor takes entire control of a work, the employer having no right of supervision or interference, the employer, if he is not negligent in his selection, is not liable to third parties for the contractor's want of care in the performance of it." *Lancaster Ave. Improv. Co. v. Rhoads* (1887) 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852.

"If damage result from the manner in which a contractor chooses to execute a perfectly valid contract without the proprietors' interference or 65 L. R. A.

Argued before *Lurton, Day, and Severens*, Circuit Judges.

Messrs. Charles C. Stewart and Moore & Moore, with *Mr. George William Moore*, for plaintiff in error:

The rights of the parties herein are to be determined by the laws of Michigan as construed by the supreme court of that state.

Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012.

The state of Michigan has the sole power to authorize a bridge to be built over a navigable stream.

Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; *Chicago v. McGinn*, 51 Ill. 266, 2 Am. Rep. 295; *Webber v. Pere Marquette Boom Co.* 62 Mich. 626, 30 N. W. 469.

direction, the latter [such proprietor] is not responsible." *Davie v. Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 895.

"It is well settled that where the independent contractor and the contractee contract for the performance of work that is lawful in itself, and the work is performed in an unlawful manner, either by the wrongful or negligent execution of the work, and resulting in injury to others, the contractee is not liable in damages to such persons for the injury." *James v. McMinimy* (1892) 93 Ky. 471, 40 Am. St. Rep. 200, 20 S. W. 435.

"The great weight of the modern decisions upon this question establishes the rule that where the relation of independent contractor exists as to the use of real property, and the party employed is skilled in the performance of the duty he undertakes, and the thing directed to be done is not in itself a nuisance, or will not necessarily result in a nuisance, the injury resulting, not from the fact that the work is done, but from the negligent manner of doing it by the contractor or his servants, the owner cannot be made to respond in damages." *Robinson v. Webb* (1875) 11 Bush, 464.

"If the work to be done is committed to a contractor to be done in his own way, and is one from which, if properly done, no injurious consequences to third persons can arise, then the contractor is liable for the negligent performance of the work." *Bailey v. Troy & B. R. Co.* (1883) 57 Vt. 252, 52 Am. Rep. 129.

"The employer is not liable, either for the fault, or for the negligence, of the independent contractor, unless he expressly directed the wrongful or improper act." *Lord Gifford, in Stephens v. Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 535.

Where parties enter into a contract which is in itself lawful, and the contractor, in carrying on his work, does anything injurious to another, he, alone, is responsible. *Woodhill v. Great Western R. Co.* (1855) 4 U. C. C. P. 449.

"The general rule is, that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractors, or his servants.

The power is conferred by the state Constitution and laws upon the board of supervisors of the several counties to authorize, but not to erect, bridges.

Larkin v. Saginaw County, 11 Mich. 88, 82 Am. Dec. 63.

The abutting property owner owns to the center of the river and of the highway.

Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; *Fletcher v. Thunder Bay River Boom Co.* 51 Mich. 277, 16 N. W. 645; *Webber v. Pere Marquette Boom Co.* 62 Mich. 626, 30 N. W. 469; *Butler v. Grand Rapids & I. R. Co.* 85 Mich. 246, 24 Am. St. Rep. 84, 48 N. W. 569, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; *Richardson v. Prentiss*, 48 Mich. 88, 11 N. W. 819; *Turner v. Holland*, 65 Mich. 453, 33 N. W. 283; *Clark v. Dasso*, 34 Mich. 86; *Cole v. Wells*, 49 Mich. 450, 13

N. W. 813; *Maxwell v. Bay City Bridge Co.* 41 Mich. 486, 2 N. W. 639; *Rice v. Ruddiman*, 10 Mich. 125; *People's Ice Co. v. The Excelsior*, 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636; *Hall v. Alford*, 114 Mich. 165, 38 L. R. A. 205, 72 N. W. 137.

As neither of these townships was required to build and maintain the bridge, they did not have the power.

Larkin v. Saginaw County, 11 Mich. 88, 82 Am. Dec. 63.

No authority to build the bridge is shown: therefore under the laws of Michigan it was a public nuisance. Even if it was constructed by lawful authority, still it was a private nuisance, and the builders were liable for the damages caused to the plaintiff.

Pennoyer v. Saginaw, 8 Mich. 534; *Ash-*

committed in the prosecution of such work." 1 Thomp. Neg. 1st ed. § 22, p. 899, 2d ed. § 621, Cited with approval in several cases, *e. g.*, *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 283, 52 Am. Rep. 376.

Under the plea of the general issue alone, there is no error in charging to the effect that, "where one has a lawful work to do, and employs another, who has an independent business of his own including work of that class, to do it, and where the employer does not himself exercise any direction as to how it shall be done, he is not responsible for any wrongs that the employee may commit in the course of the work." *Harrison v. Kiser* (1887) 79 Ga. 588, 4 S. E. 320.

It will be observed that the torts which are covered by the descriptive epithets "collateral" and "casual," as used in the second form of statement, are identical with those which fall outside the scope of the exceptive clauses in the third.

The doctrine thus enunciated is a protection to a principal contractor in any case where the sole cause of the injury complained of was the negligent or otherwise wrongful act of a subcontractor. *Rapson v. Cubitt* (1842) 9 Mees. & W. 710, Car. & M. 64, 11 L. J. Exch. N. S. 271, 6 Jur. 606; *Overton v. Freeman* (1852) 11 C. B. 867, 3 Car. & K. 52, 21 L. J. C. P. N. S. 52, 16 Jur. 65; *Pearson v. Cox* (1877) L. R. 2 C. P. Div. 369, 36 L. T. N. S. 405; *Wray v. Evans* (1876) 80 Pa. 102; *Slater v. Mersereau* (1876) 64 N. Y. 138; *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 391; *Schutte v. United Electric Co.* (1902) 68 N. J. L. 435, 53 Atl. 204.

A fortiori the employer of the principal contractor is not liable for the torts of a subcontractor. *M'Lean v. Russell* (1850) 12 Sc. Sess. Cas. 2d series, 887; *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N. J. L. 17, 10 Am. Rep. 205; *Aldritt v. Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N. W. 741; *St. Louis, A. & T. R. Co. v. Knott* (1891) 54 Ark. 424, 16 S. W. 9; *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209.

In one of the American states the common-law doctrine has been formally adopted in legislative enactments.

"The employer generally is not responsible for torts committed by his employee when the latter exercises an independent business, and in it is 65 L. R. A.

not subject to the immediate direction and control of the employer." Ga. Code 1895, § 3818.

In another the construction placed upon a provision of a less explicit character has been determined by the assumed existence of that doctrine.

Article 2320 of the Revised Code of Louisiana runs as follows: "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed; . . . responsibility only attaches when the masters or employers, teachers, and artisans might have prevented the act which caused the damage, and have not done it." This provision was held not to be applicable to a case in which the injury resulted from the manner in which an independent contractor employed by the defendant had performed work over which the defendant himself had no supervisory control. *Gallagher v. Southwestern Exposition Asso.* (1876) 28 La. Ann. 943.

III. History of the doctrine.

a. *Bush v. Steinman* considered.

The doctrine now under discussion is one of comparatively recent growth. An examination of the language used by the judges, the authorities cited, and the arguments relied upon by the defendant's counsel, in the earliest of the reported cases on the subject, which was decided towards the close of the eighteenth century, will make it apparent that at that date the responsibility of an employer for the torts of a contractor was deemed to be the same in kind and degree as his responsibility for the torts of a servant or an agent.

In *Bush v. Steinman* (1799) 1 Bos. & P. 404, the facts upon which recovery was allowed were these: A, having a house by the roadside, contracted with B to repair it for a stipulated sum; B contracted with C to do the work; and C with D to furnish the materials. The servant of D brought a quantity of lime to the house, and placed it in the road, the result being that the plaintiff's carriage was overturned. The contention of defendant's counsel was that the liability of the principal to answer for his agents is founded on the superintendence which he is supposed to have over them (1 Bl. Com. 431), and that it was not in the power of the

Iley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; *Maxwell v. Bay City Bridge Co.* 46 Mich. 278, 9 N. W. 410; *Defer v. Detroit*, 47 Mich. 346, 34 N. W. 680; *Rice v. Flint*, 47 Mich. 401, 34 N. W. 719; *Seaman v. Marshall*, 116 Mich. 327, 74 N. W. 484; *Ferris v. Board of Education*, 122 Mich. 315, 81 N. W. 98; *Morley v. Buchanan*, 124 Mich. 128, 82 N. W. 802; *Merritt Twp. v. Harp*, 131 Mich. 174, 91 N. W. 156; *St. Louis v. Myers*, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462; *Robinson v. New York & E. R. Co.* 27 Barb. 512; *Brown v. Cayuga & S. R. Co.* 12 N. Y. 486; *Hartshorn v. Chaddock*, 135 N. Y. 116, 17 L. R. A. 426, 31 N. E. 997; *Armendaiz v. Stillman*, 67 Tex. 458, 3 S. W.

678; *Goodrich v. Georgia, R. & Bkg. Co.* 115 Ga. 340, 41 S. E. 659; *Ferris v. Wellborn*, 64 Miss. 29, 8 So. 165; *Weiss v. Oregon Iron & Steel Co.* 13 Or. 496, 11 Pac. 255; *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431; Angell, *Watercourses*, § 388; Lewis, *Em. Dom.* § 61; Cooley, *Const. Lim.* pp. 543, 544; Wood, *Railway Law*, § 215, p. 620.

Messrs. Brennan, Donnelly, & Van De Mark and Henry L. Lyster, for defendant in error:

The Congress has the power to make alterations in navigable rivers for the improvement of navigation.

U. S. Const. art. 1, § 8, ¶ 3; *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *South Carolina v. Georgia*, 93 U. S.

defendant to control the agent by whose act the injury was caused. Eyre, Ch. J., after stating that all the judges were of opinion that the action could be maintained, remarked: "I find great difficulty in stating with accuracy the grounds on which it is to be supported. The relation between master and servant, as commonly exemplified in actions brought against the master, is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large." But he considered that the defendant might be charged with liability on the authority of three cases,—*Stone v. Cartwright*, 6 T. R. 411, 3 Revised Rep. 220, and *Lonsdale v. Littledale* (1793) 2 H. Bl. 267, 269, and one which had not been reported, but which Buller, J., recollected.

With regard to the first of these cases, it is to be observed that the injury was caused by the acts of the defendant's servants, a circumstance which, if the law had been then definitely settled in its present form, would clearly have rendered it inapplicable as a precedent.

In the second case the negligent persons were the immediate servants of the defendant, as they were hired by his steward or foreman. Its effect and rationale were stated by the learned chief justice as follows: "Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference) that an injury was done to the plaintiff's house, and his lordship was held responsible. Why? Because the injury was done in the course of his working the colliery; whether he worked it by agents, by servants, or by contractors, still it was his work; and, though another person might have contracted with him for the management of the whole concern without his interference, yet, the work being carried on for his benefit, and on his property, all the persons employed must have been considered as his agents and servants notwithstanding any such arrangement; and he must have been responsible to all the world, on the principle of *sic utere tuo ut alienum non laedas*. Lord Lonsdale having empowered the contractor to appoint such persons under him as he should think fit, the persons appointed would, in contemplation of law, have been the agents and servants of Lord Lonsdale. . . . The principle of *sic utere tuo ut alienum non laedas* is the principle of this case, therefore, seems to afford a ground which may be satisfactory for the present action, though I do not say that it is exactly in point." Such language would, it is clear, not be used by any modern judge.

defendant to control the agent by whose act the injury was caused. Eyre, Ch. J., after stating that all the judges were of opinion that the action could be maintained, remarked: "I find great difficulty in stating with accuracy the grounds on which it is to be supported. The relation between master and servant, as commonly exemplified in actions brought against the master, is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large." But he considered that the defendant might be charged with liability on the authority of three cases,—*Stone v. Cartwright*, 6 T. R. 411, 3 Revised Rep. 220, and *Lonsdale v. Littledale* (1793) 2 H. Bl. 267, 269, and one which had not been reported, but which Buller, J., recollected.

The ruling in the third case dealt merely with the liability of a master for the acts of a person employed by his servant, and was irrelevant as an authority, if its applicability be tested with reference to the law as it now stands.

The length to which the chief justice was prepared to go is further indicated by a subsequent passage in his opinion, in which it was held that the owner of a house, who was rebuilding or repairing it, would be equally liable for the nuisance created by carrying a boarding so far out as to encroach on the street, whether the work was done by his own servants or by a contractor. The actual position of the court is equally apparent in the remarks made by the other judges. Heath, J., said: "I found my opinion on this single point, viz., that all the subcontracting parties were in the employ of the defendant. It has been strongly argued that the defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant; but no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further. Thus, a factor is not a servant; but, being employed and trusted by the merchant, the latter, according to the case in *Salkeld*, is responsible for his acts." Rooke, J., said: "He who has work going on for his benefit, and on his own premises, must be civilly answered for the acts of those whom he employs. According to the principle of the case in *Michael v. Alestree*, 2 Lev. 172, it shall be intended by the court that he has a control over all those persons who work on his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own. He ought to reserve such control, and, if he deprive himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action. . . . The person from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise."

The influence of this decision is distinctly

4, 23 L. ed. 782; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

This bridge having been built according to plans approved by the Secretary of War in the interest of navigation, there is no liability on account of any damage done to riparian owners by reason of its construction, and any damage suffered on account thereof is *damnum absque injuria*.

Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

Defendant was not a trespasser, and any damage suffered by plaintiff is *damnum absque injuria*.

In the absence of evidence to the contrary, a bridge across a navigable stream will be presumed to have been constructed by lawful authority.

traceable in the following nisi prius rulings made a few years afterwards:

In *Sly v. Edgley* (1806) 6 Esp. 6, the plaintiff was allowed to recover for an injury received through falling into a sewer opened by a bricklayer whom he had employed jointly with others. One of the points taken by defendant's counsel was that the bricklayer was not the servant of the defendant, for whose acts he might be made responsible; that, as he was employed to do a certain work, and the mode of doing it, which had caused the injury, was entirely his own act, he only should be liable. According to the report, Lord Ellenborough disposed of this contention by the remark: "It was the rule of *respondent superior*, what the bricklayer did was by the defendant's direction. He had employed the bricklayer."

In *Matthews v. West London Waterworks Co.* (1813) 3 Campb. 403, where a verdict was obtained against a waterworks company for an injury resulting to the plaintiff from the negligence of men employed by certain pipe layers with whom the company had contracted for the laying down of certain water pipes in a public street, Lord Ellenborough said he had "no doubt" as to the defendant's liability. The precise rationale of this ruling, however, is not very clearly apparent. The report is short and unsatisfactory, and the particular circumstances are not detailed. See the comments of Maule, J., in *Overton v. Freeman* (1852) 11 C. B. 867, 3 Car. & K. 52, 21 L. J. C. P. N. S. 52, 16 Jur. 65.

b. *Doctrine that different rules apply to real and to personal property.*

It was not until 1826 that the points involved in *Bush v. Steinman* (1799) 1 Bos. & P. 404, were again discussed by a court of review. In that year the judges of the King's bench were equally divided as to the propriety of a nonsuit which had been directed by Abbott, Ch. J., in an action brought to recover damages for an injury caused by the negligent driving of a coachman, who had been sent with a pair of horses which the defendant had hired from a job master to draw his carriage. *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L. J. K. B. 309. As the case was one of exceptional importance, and a difference of views developed itself among the judges of the 45 L. R. A.

Nelson v. Cheboygan Slack-Water Nav. Co. 44 Mich. 7, 38 Am. Rep. 222, 5 N. W. 998; *Pratt v. Brown*, 106 Mich. 628, 64 N. W. 583.

The control of navigable rivers within the borders of a state is in the state until Congress chooses to act.

Willson v. Black Bird Creek Marsh Co. 2 Pet. 246, 7 L. ed. 412.

The rule laid down in *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48, must govern the case now before this court.

There is a distinction between injury to property by a direct taking of the property and a consequential injury to the property.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; *Mills v. United States*, 12 L. R. A. 673, 46 Fed. 748.

King's bench when the motion for a new trial was argued, it was ordered that the question submitted should be discussed before the whole body of the judges of the common-law courts. The opinions finally delivered in the King's bench, therefore, represent the results of an unusually exhaustive and searching examination of principles and authorities. It should be observed that two separate and distinct questions were suggested by the evidence, viz.: (1) Whether the effect of a contract of employment was to render the employer liable for the torts of the person employed, irrespective of whether the latter was a servant or a contractor, and (2) whether, supposing that no such general liability could be predicated, the coachman might not be regarded as the special servant *pro tempore* of the defendant, as long as he was driving the carriage. Confining our attention to the former question, with which, alone, we are now concerned, we find that Holroyd and Bayley, J.J., were of opinion that the nonsuit was erroneous, their reliance being placed upon *Bush v. Steinman*, which was considered to have established the general propositions, that "responsibility is not confined to the immediate master of the person who committed the injury, and that the action may be brought against the person from whom the authority flows to do the act, in the negligent execution of which the injury has arisen." It should be noted that, in the case cited, the liability of the hirer of a job carriage for the negligence of the coachman who is sent with it was taken for granted by Heath, J., in his opinion.

The opposite view was supported by Abbott, Ch. J., and Littledale, J. The former judge considered that, if the defendant should be declared responsible simply on the ground of his having had the temporary use and benefit of the horses, it would follow that the hirer of a hackney carriage would be answerable for the negligence of the coachman, and the hirer of a wherry on a river would be answerable for the conduct of a wherryman. A doctrine which led to consequences by which "the common sense of mankind would be shocked" could not be sound. Littledale, J., referring to *Bush v. Steinman* and the decisions based upon it, said: "Supposing the cases to be rightly decided, there is this material distinction, that there the injury was done upon or near and in respect of the property of the defendants, of which they were

If damage has ensued to riparian owners on account of the erection of a swing bridge and the placing of a center pier in the river, the townships and railway company, as well as defendant, have the complete protection of the United States government against any claim for such damage.

Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 9; *Slingerland v. International Contracting Co.* 169 N. Y. 60, 56 L. R. A. 494, 61 N. E. 995.

Defendant cannot be held liable for damage done by an independent contractor.

in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others. . . . It may be said that the defendant in the present case was owner of the carriage, and that, therefore, the principles of these latter cases apply; but, admitting these cases, the same principle does not apply to personal, movable chattels as to the permanent use and enjoyment of land or houses. Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life; the law compels him to take care that no persons come about his premises who occasion injury to others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employments, and the mere possession of that, where the care and direction of it is intrusted to such persons, who exercise public employments, and, in virtue of that, furnish and provide the means of using it, is not sufficient to render the owner liable. Movable property is sent out into the world by the owner to be conducted by other persons; the common intercourse of mankind does not make a man or his own servants always accompany his own property; he must in many cases confide the care of it to others who are not his own servants but whose employment it is to attend to it."

The extract given from the opinion of Littledale, J., shows that even the judges who at this period rejected the broad and unqualified principle enounced in *Bush v. Steinman* were still inclined to accept the decision as binding with respect to injuries resulting from the performance of work on or near the employer's premises. This doctrine, that an employer's liability is measured by different standards, according as the negligence complained of was committed

Casement v. Brown, 148 U. S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Uppington v. New York*, 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Carter v. Berlin Mills Co.* 58 N. H. 52, 42 Am. Rep. 572; *Slingerland v. East Jersey Water Co.* 58 N. J. 411, 33 Atl. 843.

The acceptance of the bridge relieves defendant from any liability to third parties.

1 Thomp. Neg. ¶¶ 686, 687; *First Presby. Congregation v. Smith*, 163 Pa. 561, 26 L. R. A. 504, 43 Am. St. Rep. 808, 30 Atl. 279; *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; *Fitzmaurice v. Fabian*, 147 Pa. 199, 23 Atl. 444; *Albany v. Cunliff*, 2 N. Y. 165; *Blunt v. Aikin*, 15 Wend. 522, 30 Am. Dec. 72; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec.

ted in reference to real or personal property, was applied or recognized in several later cases, English as well as American.

In *Quarman v. Burnett* (1840) 6 Mees. & W. 499, 9 L. J. Exch. N. S. 308, 4 Jur. 969, in which the defendant was held not liable upon evidence which was virtually identical with that presented in *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L. J. K. B. 309, Parke, B., incorporated in the judgment which he delivered for the whole court the essential portion of the extract quoted, *supra*, from the opinion of Littledale, J., and declared that the reasons given by him for making a distinction between the two classes of cases were satisfactory.

Two years afterwards, in *Rapson v. Cubitt* (1842) 9 Mees. & W. 709, Car. & M. 64, 11 L. J. Exch. N. S. 271, 6 Jur. 606, the same judge again expressed his approval of the same doctrine, saying: "If a man has anything to be done on his own premises, he must take care to injure no man in the mode of conducting the work." In view of the later English cases, it is somewhat curious that this *dictum* should have recently been referred to without any expression of disapproval by Smith, L. J., in *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196.

In *Dutton v. Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N. E. 405, Lathrop, J., made the following remark: "Until the case of *Hilliard v. Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743, was decided, our decisions were in a somewhat anomalous state. Compare *Sproul v. Hemmingway* (1833) 14 Pick. 1, 5, 25 Am. Dec. 350, with *Stone v. Codman* (1834) 15 Pick. 297."

In the former of these cases the owner of a vessel which was being towed was held not to be liable for a collision caused by the negligence of the crew of a tugboat. Such a decision is in harmony with the modern rule, but the court cites *Bush v. Steinman* with approval, remarking that "It was decided principally on the ground that the owner of real estate must be taken to be the employer of all those who are engaged in making repairs for him; and that, having the power to control and regulate the use of his own estate, he is bound to do it in such a manner that others may not be injured by the mode in which it is used." It is to be observed,

345; *Hyams v. Webster*, L. R. 4 Q. B. 138, 38 L. J. Q. B. N. S. 21, 17 Week. Rep. 232; *Winterbottom v. Wright*, 10 Mees. & W. 109, 11 L. J. Exch. N. S. 415.

No action will lie against the townships for an injury resulting from the lawful exercise of their legislative authority.

Corning v. Saginaw, 116 Mich. 74, 40 L. R. A. 526, 74 N. W. 307; 2 Dill. Mun. Corp. 4th ed. ¶ 963; *Nicholson v. Detroit*, 129 Mich. 246, 56 L. R. A. 601, 88 N. W. 695; *Leoni Twp. v. Taylor*, 20 Mich. 148; *Highway Comrs. v. Martin*, 4 Mich. 557, 69 Am. Dec. 333; *Larkin v. Saginaw County*, 11 Mich. 88, 82 Am. Dec. 63; *Gibson v. United States*, 166 U. S. 270, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Smith v. Washington*, 20 How. 135, 15 L. ed. 858.

moreover, that the court did not regard the contract for the towing as one of employment. but one which created relations similar to those which exist between a freighter and the crew of a general ship, or between a passenger and the crew of a packet. The defendants therefore were not regarded as "independent contractors" in the restricted sense in which that phrase is ordinarily used.

In *Stone v. Codman* the plaintiff was allowed to recover damages for an injury to his goods caused by water which escaped from a drain which was being dug from the defendant's house to a common sewer by a mason who procured the materials and hired the laborers, charging a compensation for his services and disbursements. The decision was expressly upon the ground that the relation of master and servant existed between the defendant and the mason, — a conclusion which, according to the opinion in *Hilliard v. Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743, was deduced in a great measure from the fact that there was no contract, written or oral, by which the work was to be done for a specific price, or as a job. Compare cases cited in subd. XI. b, of note to *Richmond v. Sitterding*, ante, 445, on *Persons deemed to be independent contractors within meaning of rule relieving employer from liability*.

In *Lowell v. Boston & L. R. Corp.* (1839) 23 Pick. 24, 34 Am. Dec. 33, the defendant was held liable for the damages which the plaintiff municipality had been compelled to pay to a traveler who, as a result of the negligence of a contractor's workmen in omitting to replace the barriers which the plaintiff's agents had set up on each side of a cutting which had been opened through a highway, in the course of grading the defendant's roadbed, had driven into the excavation and suffered serious injuries. The court again expressed its approval of the decision in *Bush v. Steinman*, and took the broad ground that, as the work was done for the benefit of the company, under its authority, and by its direction, it was to be regarded as the principal, and that it was immaterial whether the work was done under contract for a stipulated sum or by workmen employed directly by the company at daily wages. This case was explained in *Hilliard v. Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743, as being sustainable on the following grounds: That the corporation, being intrusted by the legislature with the execution of a public work such as the building of the rail-

Lurton, Circuit Judge, delivered the opinion of the court:

1. The present structure took the place of an old bridge. It is not averred that the bridge was constructed without authority or unlawfully, and there was no evidence offered tending to show that the two townships were without authority in replacing the old by the new bridge, or exceeded their authority in contracting for the construction of the particular bridge here in question. Under the law of Michigan, the county board of supervisors had the power to determine when and where navigable streams may be crossed by bridges; and, in the absence of any averment or evidence to the contrary, we must assume that this bridge was lawfully constructed, the townships

way in question, was bound, when the work was in progress, to protect the public against danger; that it could not escape this responsibility by a delegation of its power to others; that the work was done on land appropriated to the purpose of the railway, and under the authority of the corporation, vested in them by law for the purpose; that the barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders; that that servant had the care and supervision of them; and that the accident occurred through the negligence of a servant of the railroad corporation, acting under its express orders. The fact that *Bush v. Steinman* was expressly approved is disposed of with the passing remark that the decision of the case before the court did not involve the correctness of the rule in the case cited. The explanation thus given of the rationale of *Lowell v. Boston & L. R. Corp.* may be adequate to afford a justification for the actual decision on the special grounds enumerated. But it will be apparent to everyone who peruses p. 31 of the report in 23 Pick., p. 36 of the report in 34 Am. Dec., that the court did not rely upon those special grounds, but upon the broad rule embodied in the English case.

From a consideration of the language used in these earlier Massachusetts decisions, it is apparent that the labored attempt which was made in *Hilliard v. Richardson* to defend them merely adds one more to the long list of instances in which the courts have taken pains to demonstrate that the actual rulings in cases based upon discarded doctrines were, upon the evidence, reconcilable with the doctrines afterwards adopted.

In *Stone v. Cheshire R. Corp.* (1849) 19 N. H. 427, 51 Am. Dec. 192, a person injured by a rock which was thrown out by a blast set off by a contractor who was building a portion of a railroad was held entitled to recover on the ground that, where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants or by contractors or their servants. This case is virtually overruled in *Wright v. Holbrook* (1872) 52 N. H. 120, 13 Am. Rep. 12, where, however, it was suggested that it might stand upon the same principle as *Lowell v. Boston &*

having obtained the consent of the proper authority. *Nelson v. Cheboygan Slack-Water Nav. Co.* 44 Mich. 7, 38 Am. Rep. 222, 5 N. W. 908; *Pratt v. Brown*, 106 Mich. 628, 633, 64 N. W. 583. So far as the consent and approval of the United States were essential, they were obtained; the plans and specifications of the bridge having been submitted to, and approved by, the Secretary of War. 26 Stat. at L. 454, chap. 907 (Act September 19, 1890, § 7).

2. So far as the plaintiff's declaration proceeded upon the ground of either unskillfulness or negligence in the construction of the bridge, or its abutments and pier, there was no substantial evidence upon which a verdict might have been returned against the King Bridge Company. The plans for the

bridge, including its abutments and piers, were prepared, under the direction and supervision of the authorities contracting for the erection of the bridge, and approved by the Secretary of War; and when so adopted the work of construction was let out, as a whole, to the King Bridge Company. That company contracted with a third person to construct the bridge abutments and piers, and this substructure was located and constructed under the constant supervision of the civil engineer representing the owners of the bridge. The only charge of negligence is "that, to save the expense of hauling dirt from a distance, [the defendant] did, by a dredge, dig up a large amount of dirt next to the Ecourse abutment of said bridge: thereby tearing away the natural channel

L. R. Corp. (1839) 23 Pick. 24, 34 Am. Dec. 33, as that decision is explained in *Hilliard v. Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743. It is to be observed that in this later New Hampshire case the court did not go to the length of categorically rejecting the doctrine that the owner of land is liable for acts which a contractor does upon that land for his benefit.

In *Wiswall v. Brinson* (1849) 32 N. C. (10 Ired. L.) 554, where the injury was caused by a hole in the street which a contractor employed to move a house had left uncovered, the plaintiff was held entitled to recover. The decision was put upon the ground that the stipulated work was to be done, "In respect to the defendant's property." Considering the date of this case, it is rather surprising to find in the opinion of the majority some language which indicated a more unqualified approval of *Bush v. Steinman* than is observable in any other case decided since *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 3 Dowl. & R. 550, 4 L. J. K. B. 309. *Ruffin. Ch. J.*, dissented. So far as his conclusion was determined by the doctrine as to a distinction between real and personal property, it was based upon the theory that the liability which is predicated with reference to that distinction takes effect only when the nuisance created by the contractor is actually on the premises of his employer. In other respects his opinion embodies what is now the generally received doctrine.

It will be noticed that, on the facts, both the New Hampshire and the North Carolina decisions might possibly be sustained on the ground that the employer was bound, at his peril, to see that appropriate precautions were taken to safeguard the public. See note to *Jacobs v. Fuller & H. Co. post*, —, on *Liability of employer for injuries caused by performance of work by independent contractor which is dangerous unless certain precautions are observed*.

In *Memphis v. Lasser* (1849) 9 Humph. 757, the case of *Bush v. Steinman* was mentioned without any expression of disapproval, but the decision was really put upon the ground of a breach of a nondelegable duty.

Other American cases in which the distinction between the liabilities incident to the ownership or possession of real and of personal property is recognized more or less definitely are *Blattenberger v. Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 300; *Moore v. Sanborne* 65 L. R. A.

(1853) 2 Mich. 519, 59 Am. Dec. 209. The allusion to the doctrine in the latter case is somewhat remarkable, as it has been expressly condemned in *De Forrest v. Wright* (1852) 2 Mich. 368.

c. Final rejection of doctrine making distinction between real and personal property.

That doubts as to the correctness of the doctrine reviewed in the preceding subsection had been felt by some judges, even at the time when its ascendancy seemed to be most assured, may be inferred from the fact that in 1840 Lord Denman intimated that he found great difficulty in accepting it. *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L. J. Q. B. N. S. 19. The remarks of Parke, B., in *Quarman v. Burnett*, which had been decided earlier in the same year, were here explicitly referred to.

At length, in 1849, it was definitely repudiated by a unanimous judgment of the court of exchequer. In the course of his opinion Rolfe, B., intimated that, under some circumstances, the owner of real property may be responsible for nuisances occasioned by the mode in which his property is used by persons not standing in the relation of servants to him. But it was declared that, if any liability could be imputed on this ground, it must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. It was suggested that the decision in *Bush v. Steinman* might possibly be supported on some such principle as this. But, even conceding this to be so, the doctrine could not be applied to the case before the court, as the wrongful act complained of could not in any possible sense be treated as a nuisance. *Reedie v. London & N. W. R. Co.* (1849) 4 Exch. 254, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N. S. 65, where the defendant was held not to be liable for the negligence of the servants of a contractor in letting fall a stone from a bridge which was under construction.

A few years later it was observed by Parke, B., in *Gayford v. Nicholls* (1854) 9 Exch. 702, 2 C. L. Rep. 1086, 23 L. J. Exch. N. S. 205, 2 Week. Rep. 453, that the principle of *Bush v. Steinman* "cannot now be considered law."

Within the next few years similar views were established by carefully considered cases in several of the United States.

In *Blake v. Ferris* (1851) 5 N. Y. 48, 55 Am.

bank of the said River Rouge, and widening the same at that place," etc. Now, if it was either unskilful or negligent to so dredge the river next the abutment on plaintiff's side of the river, it was the negligence of an independent contractor, and not that of the defendant. The firm which built the abutments, and did the excavation for their foundation and the dredging in front when built, contracted to do that particular work in accordance with the plans and specifications already prepared. They did not become the general servants of the King Bridge Company, but only contracted to do for that company a specific work. That the bridge company, through its engineer or other agent, exercised some kind of general supervision, does not affect the question,

where that is only for the purpose of seeing that the specific work is done in accordance with the contract. In such circumstances, those who contract to produce a finished structure according to plans furnished are independent contractors, responsible for their own acts of negligence. *Powell v. Virginia Constr. Co.* 88 Tenn. 697, 17 Am. St. Rep. 925, 13 S. W. 691; *Casement v. Brown*, 148 U. S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672; *Alabama Midland R. Co. v. Martin*, 100 Ala. 511, 14 So. 401. A general contractor is not liable to third persons for the negligent acts of an independent subcontractor unless the thing contracted to be done is necessarily a public nuisance, or the injury is a direct result from the act or thing which the independent contractor is

Dec. 304, it was held error to give an instruction by which the jury were, in effect, told that the person who undertakes the erection of a building, or other work for his own benefit, is responsible for injuries to third persons, occasioned by the negligence of the servants of the builder or the person who is actually engaged in executing the whole work, under an independent employment, or a general contract for that purpose.

In *Barry v. St. Louis*, 17 Mo. 121, and *De Forrest v. Wright*, 2 Mich. 368, both decided in 1852, the doctrine of *Bush v. Steinman* was expressly disapproved.

In *Pack v. New York* (1853) 8 N. Y. 222, where the plaintiff's house was injured by a rock thrown up by a blast set off in the course of grading operations in a street, a charge to the effect that, if the jury believed that the contractor employed by the defendant to do the work had been guilty of negligence in blasting, and that the injury to the plaintiff was caused by such negligence, the plaintiff was entitled to recover compensation for certain injuries specified by the court, was held erroneous, inasmuch as it conflicted with the doctrine, "that a person who undertakes the erection of a building, or other work for his own benefit, is not responsible for injuries to third persons occasioned by the negligence of a person, or his servant, who is actually engaged in executing the whole work, under an independent employment or a general contract for that purpose."

In *Hilliard v. Richardson* (1855) 3 Gray. 349, 63 Am. Dec. 743, the authorities were exhaustively examined and collated, and the doctrine of *Reedie v. London & N. W. R. Co.* (1849) 4 Exch. 254, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N. S. 65, was fully approved.

In *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345, the court, referring to this English decision, said: "The doctrine laid down in this last case appears to us to be founded in good sense; and it follows from it that the distinction as to the liability of a party when he engaged a contractor to erect structures on his own premises, and when he engaged such contractor to erect them on the premises of another, does not rest on any just principle. If the enterprise undertaken be a lawful one, and be intrusted to competent and skilful architects, there is no just reason why liability should attach to the proprietor for injuries occurring in its progress, 65 L. R. A.

any more if such enterprise be executed on his own land, than if executed elsewhere."

In the more recent American cases the ruling in *Bush v. Steinman*, whether viewed as one which embodies the broad principle that tortious acts committed in the course of his employment, by a person who is doing work for the benefit of another, are imputable to the latter, or as one which may be sustained on the ground that such a principle is applicable where the stipulated work is done on, near, or in respect to, real property, has never been mentioned except with disapproval. See *Myer v. Hobbs* (1876) 57 Ala. 175, 29 Am. Rep. 719; *Lawrence v. Shipman* (1873) 30 Conn. 586; *Kellogg v. Payne* (1866) 21 Iowa, 575; *Robinson v. Webb* (1875) 11 Bush, 464; *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430; *Clark v. Hannibal & St. J. R. Co.* (1865) 36 Mo. 203; *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352; *Independence v. Slack* (1895) 134 Mo. 66, 34 S. W. 1094; *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N. J. L. 17, 10 Am. Rep. 205; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267; *Gourder v. Cormack* (1853) 2 E. D. Smith, 254; *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461; *Painter v. Pittsborough* (1863) 46 Pa. 213; *Cunningham v. International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632.

d. Effect of decision in *Randleeson v. Murray*.

During the period which saw the courts still hesitating as to whether a recognition should be accorded to the doctrine which draws a distinction between fixed and movable property a case was decided which might seem to indicate a reversion to the much broader principle applied in *Bush v. Steinman*. *Randleeson v. Murray* (1838) 8 Ad. & El. 109, 3 Nev. & P. 239, 1 W. W. & H. 149, 7 L. J. Q. B. N. S. 132, 2 Jur. 324. There the defendant was held liable upon the following evidence. The defendants, for the purpose of removing some barrels of flour from their warehouse, had employed one Wharton, who was a master porter in Liverpool, and who used his own tackle, and brought and paid his own men. Taylor, a master carter, was employed by Wharton to carry the barrels away; Taylor also sent his own carts, etc., and his own men, one of whom was the plaintiff. The injury to the plaintiff was occasioned by a barrel falling on him in consequence of part of

required to do. 16 Am. & Eng. Enc. Law, pp. 192, 196; *Quarman v. Burnett*, 6 Mees. & W. 499, 9 L. J. Exch. N. S. 308, 4 Jur. 969; *Laugher v. Pointer*, 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L. J. K. B. 309; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Casement v. Brown*, 148 U. S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672. This principle of nonliability for the negligence of an independent contractor applies to and exempts the general contractor. *Powell v. Virginia Constr. Co.* 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; *Rapson v. Cuthitt*, 9 Mees. & W. 710, Car. & M. 64, 11 L. J. Exch. N. S. 271, 6 Jur. 606; *Slater v. Mersereau*, 64 N. Y. 138.

3. But, aside from this, the evidence

Wharton's tackle failing while it was being used by Wharton's men. The defendant's counsel unsuccessfully contended that Wharton was a bailee for a special purpose, and contended that the remedy of the plaintiff was against him, not against the defendants. The subjoined extracts from the opinions will show the grounds upon which the decision was based:

Lord Denman, Ch. J.: "Had the jury in this case been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendants, there can be no doubt they would have found in the affirmative."

Littledale, J.: "It seems to me to make no difference whether the persons whose negligence occasions the injury be servants of the defendant, paid by daily wages, or be brought to the warehouse by the person employed by the defendant. The latter frequently occurs in a large place like Liverpool, where many persons exercise the occupation of a master porter. But the law is the same in each case."

Patteson, J.: "The case of a carrier is quite distinct. He has goods in his custody as bailee."

From the language used by the judges, however, it is quite apparent that recovery was allowed for the reason that the person engaged to do the work, and his servants, were deemed to have been in the service of the defendant while the work was in progress.

That this was the standpoint of the court is also shown by the following comment which was made upon the decision by Lord Denman in *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L. J. Q. B. N. S. 19: "The work was, in effect, done by the defendant himself, at his own warehouse: if he chose, instead of keeping a porter, to hire one by the day, he did not thereby cease to be liable for injury done by the porter *while under his control*." (The italics are ours.) This explanation, which, it should be observed, proceeded from a member of the court which decided the case, shows that Parke, B., misapprehended the rationale of the case, when, in *Quarman v. Burnett* (1840) 6 Mees. & W. 499, 9 L. J. Exch. N. S. 308, 4 Jur. 969, he intimated that it might be classed with those in which the occupiers of land or buildings have been held responsible for acts of "others than their servants," done upon, or near, or in respect of, their property.

That such a conclusion would not be drawn by any court at the present day from similar 65 L. R. A.

clearly established that the dirt excavated at the edge of the river bank, where the road touches the river for the purpose of making a pit for the foundation of the abutment, was thrown on the river side and into the river to make an embankment to keep the water out. When the abutment was finished, the dirt thus thrown into the edge of the river was dredged out and used to fill in behind the abutment. There was no substantial evidence that the dirt dredged and used to form the bridge approach exceeded that thrown into the river, or that the river bank was cut away either to save hauling, or for any other unlawful purpose, or in a negligent or unskilful manner.

4. So far as the plaintiff's case is rested upon damages due to any defective con-

evidence would seem to be a reasonable inference from many of the decisions cited in subd. VI., note to *Richmond v. Sitterding*, 65 L. R. A. 445, on *When person employed is deemed to be an independent contractor*; though it must be admitted that the authorities are not entirely uniform. See, also subd. XI., c, of same note. But whether this surmise is correct or not, it is at all events manifest that the case is not one which exemplifies any theory respecting the limits of an employer's liability for a person who is determined to be an independent contractor.

It is not easy to determine what was the precise point of view from which Pollock, C. B., was speaking when he remarked, in *Murphy v. Caralli* (1864) 3 Hurlst. & C. 462, 34 L. J. Exch. N. S. 14, 10 Jur. N. S. 1206, 13 Week. Rep. 165, that "the case of *Randleston v. Murray* seems at variance with current of authority." He may have intended to express his disapproval of the decision as being an apparent recurrence to the doctrine of *Bush v. Steinman*, or he may merely have stated his opinion that, on the facts, the relation of master and servant was improperly inferred.

e. Subsequent development of the law.

From the foregoing review it will be apparent that, about the middle of the nineteenth century, almost every court which had had an opportunity of expressing its views had definitely discarded, not merely the broad principle embodied in *Bush v. Steinman*, viz., that a person must answer for the torts of all those who are in his employ, whether they are servants or contractors, but also the qualified doctrine upon which it had been for some time supposed that that decision could be supported, viz., that a responsibility of this extent is imputable wherever the injury resulted from the execution of work on, near, or in respect to, real property belonging to the employer. What may be regarded as the characteristic, as it is certainly the most important, feature of the doctrinal developments during the subsequent period is the gradual delimitation of the domain within which the general rule as to the nonliability of an employer for the torts of an independent contractor is controlled and overridden, by the principle that a person who is subject to an absolute duty cannot, by delegating it to another party, relieve himself from liability for injuries caused by its nonfulfilment. An examination of the

struction for which the defendant might be liable upon its contract to the owners of the bridge, it is not maintainable, because there is not the slightest evidence that any damage occurred until after the completion of the bridge and its acceptance by the townships. There is no rule under which a third person may recover damages against a builder or contractor for an injury sustained by reason of defective construction, if the thing constructed is not inherently and necessarily dangerous, when the injury did not occur until after the builder or contractor had parted with the possession and title. The liability of the builder or contractor for defective construction is to the person with whom he was under contractual relations, and a stranger can hold him liable after he

cases cited in note to *Jacobs v. Fuller & H. Co., post*, —, on *Liability of employer for injuries caused by the performance by independent contractor of work which is dangerous unless certain precautions are observed*, and in note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer*, will show that the result of working out this principle in its application to certain situations has been the formation of several groups of precedents which, in any case involving similar facts, put a plaintiff, so far as his actual right of recovery is concerned, in a position which is very nearly, if not quite, as favorable as he would have occupied if the doctrine enounced in *Bush v. Steinman* had found a permanent place in Anglo-American jurisprudence. It seems certain, however, that a plaintiff now suing for injury received under the same circumstances as those involved in that case could not recover under any of the more recent doctrinal developments. The work was not intrinsically dangerous, nor was there a violation of any absolute duty which the employer was bound, at his peril, to see performed. How far these encroachments upon the older doctrine of nonliability will be carried remains to be seen. In this respect the law is at present in a transition state. But in view of the trend of judicial opinion, as indicated by the most recent decisions, it seems perfectly safe to predict that, in some directions at least, the immunity of the employer will continue to be more and more abridged.

IV. Rationale of the doctrine.

The doctrine enunciated in subd. II., *supra*, is frequently put upon the ground that the characteristic incident of the relation created by an independent contract is, that the employer has not the power of controlling the person employed in respect to the details of the stipulated work, and that it is a necessary juridical consequence of this situation that the former should not be answerable for an injury resulting from the manner in which those details may be carried out by the latter.

The employer is not liable "because he has employed an independent person, and has not retained any control over processes or details, nor even interfered in any way with the work at any stage." *Wills, J., in Holliday v. National Tel-* 65 L. R. A.

has parted with the possession only under exceptional circumstances. *Marquardt v. Ball Engine Co.* 58 C. C. A. 462, 122 Fed. 374. This rule has been applied to suits by strangers for injury arising from defective construction of bridges and houses, when it was sought to hold the contractor liable after completion of his work (*Albany v. Cunliff*, 2 N. Y. 165; *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322, 23 Am. St. Rep. 220, 21 Atl. 244), and to an action against a contractor for an injury from a burst in the sewer. *First Presby. Congregation v. Smith*, 163 Pa. 561, 26 L. R. A. 504, 43 Am. St. Rep. 808, 30 Atl. 279. In *Blunt v. Aikin*, 15 Wend. 522, 30 Am. Dec. 72, it was held that an action on the case for flowing lands will not lie against a former own-

eph. Co. [1899] 1 Q. B. 221, 227, 68 L. J. Q. B. N. S. 302.

"The rule that prescribes the responsibility of principals, whether private persons or corporations, for the acts of others, is based upon their power of control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not master, for the relation implied by that term is one of power, of command; and if a principal cannot control his agent, he is not an agent, but holds some other or additional relation." *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352.

"The liability of one person for the negligent acts and omissions of another rests upon the relation of superior and subordinate as master and servant, and the consequent control which the superior has over the acts of the subordinate in the performance of his duties. There can be no liability, therefore, unless such relation and such right of control exist, either by force of the contract between the parties, or the duty to assume control is imposed, as a matter of law, by reason of some peculiar relation the person for whom the work is being performed bears to third persons with respect to the time, place, and manner of performance." *Aldritt v. Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N. W. 741.

"The liability of one person for damages arising from the negligence or misfeasance of another on the principle of *respondent superior* is confined in its application to the relation of master and servant, or principal and agent, and does not extend to cases of independent contracts not creating the relation of principal and agent, and where the employer does not retain the control over the mode and manner of the performance of the work under the contract." *Cincinnati v. Stone* (1855) 5 Ohio St. 38.

"It seems to us that the doctrine would be productive of great wrong, to hold that when owners of real estate, who contract with reliable, competent, and skilful builders, and deliver the premises into the actual, exclusive possession of the contractors for a definite period, and when neither the contractors nor their servants are under the control of the owners, that they must be liable for all of the negligent acts of the contractors and their servants." *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334.

The doctrine has also been said to rest upon "the ground that a contractor, as between him

er of the dam, who erected the dam and built the wall by means of which the injury was done, when it appears that other persons are in possession of the premises, occupying them as their own, not being tenants of such former owner.

5. The River Rouge between the stone abutments of the bridge is 198 feet wide. The pier upon which the bridge swings is in the center of the river, and is 32 feet wide. This pier obstructs what had been the deep, navigable channel of the river, and rendered necessary the deepening of the river on one or the other side of the pier so as to continue the navigability of the river. The act of 1890 (Act September 19; 26 Stat. at L. 426, 453, chap. 907) provides that no bridge shall be built across a navigable stream, ex-

cept upon plans approved by the Secretary of War; and also provides that, if any bridge shall prove an obstruction to any water way, it shall be the duty of the Secretary of War to cause the parties constructing or controlling such bridge to make such changes as to obviate the difficulty. *Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357. Now, it is shown that, this pier proving an obstruction to the deep channel, the township authorities were required to deepen by dredging a channel of sufficient depth between the pier and plaintiff's side of the river. The King Bridge Company neither did this dredging, nor procured it to be done. It was done by the township authorities, the Electric Railway Company probably joining

and his employer, is responsible only for the fulfilment of his agreement, and, pending the performance of the work, is, to a certain extent, substituted for the party for whom the work is to be performed." *Reynolds v. Braithwaite* (1889) 131 Pa. 416, 18 Atl. 1110.

In this point of view any mischief which may have resulted from the performance of the work may be regarded as having been "done in the course, not of the employer's, but of the contractor's, business." See the remarks of Lord Denman in *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L. J. Q. B. N. S. 19.

The doctrine has also been referred to as an application of the general principle, that, where an independent, responsible cause is interposed between an alleged cause and the injury, the juridical connection between that alleged cause and the injury is broken. *Wharton, Neg. § 482*.

None of these explanations, however, is adequate for the purposes of a fundamental inquiry, since they presuppose that an affirmative answer should be given to what is really the ultimate question to be decided, *viz.*, the permissibility of allowing one person to depute to another a particular piece of work, on terms which will have the effect of relieving the former from the obligation of seeing that that work is executed with reasonable care and skill. It seems clear from the not very numerous authorities which bear directly upon this question that the real, and in fact only, available basis for the doctrine which declares such a delegation of functions to be, under certain circumstances, allowable is public policy.

In the opinion delivered by Parke, B., for the whole court in *Quarman v. Burnett* (1840) 6 Mees. & W. 409, 9 L. J. Exch. N. S. 308, 4 Jur. 969, we find this passage: "The liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable on the simple ground that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and, to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable, not only for the acts of his own servant, but for any injury

which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice Eyre says in the case of *Bush v. Steinman* (1709) 1 Bos. & P. 404, and cannot be maintained to its full extent without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, 'shock the common sense of all men.' not merely would the hirer of a post chaise, hackney coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles if they had the management of them, or their servants if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness whilst passing along the street." The remark of Lord Tenterden here referred to was made in his judgment in *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L. J. K. B. 309.

In *Daniel v. Metropolitan R. Co.* (1871) L. R. 5 H. L. 45, 61, 40 L. J. C. P. N. S. 121, 24 L. T. N. S. 815, 20 Week. Rep. 37, Lord Westbury made the following remarks: "It would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected, with all prudence, proper persons to perform the work, but that he is still under an obligation . . . to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons."

In *Wiswall v. Brinson* (1849) 32 N. C. (10 Ired. L.) 554, the nonliability of an employer for the torts of an independent contractor was said to constitute "an exception to the generality of the rule [*i. e.*, *Qui facit per alium facit per se*], made necessary by public convenience and general usage, and when the reason of the rule does not so fully apply." The opinion then proceeds as follows: "When one enters a railroad car, the engineer and hands serve him,—do work for him; carry him and his goods. But he is not liable for their negligence or want of skill. So far from it, the company is liable to him. This is an exception to the rule, for two reasons: He did not make

in the matter. Now, plaintiff must at last stake his case upon the contention that the evidence showed that the injury to his property is due to the obstruction of the current caused by this pier, and its diversion against his land by thus deepening the channel on his side of the river. We do not understand that the plaintiff claims that this bridge was constructed unlawfully; that is, that there was no authority from a competent source to justify its erection. Yet his contention, in legal effect, is not very different, for he claims that the particular structure which was erected was, as to him, a wrongful and tortious act, because, to quote from the brief, "it was so placed and constructed that of necessity it diverted the water out of its ordinary channel and

against the plaintiff's land," and that all who participated in the tortious act are liable for all resulting damage. Now, it may be conceded that, if one had unlawfully erected a pier, bridge, or other structure, which diverted the current so as to flood or otherwise injure the land of a riparian proprietor below, an action on the case for the resulting damages would lie against the wrongdoer. To this extent are the authorities cited by the plaintiff in error. *Harts-horn v. Chaddock*, 135 N. Y. 116, 17 L. R. A. 426, 31 N. E. 997; *Armendaign v. Stillman*, 67 Tex. 458, 3 S. W. 678; Angell, *Water-courses*, § 388; *Marwell v. Bay City Bridge Co.* 46 Mich. 278, 9 N. W. 410. But, however reluctant plaintiff may be to concede that this structure was a lawful structure

the selection, and although in a large sense they are his servants, yet they are the servants of the company. It carries on a distinct, independent business, and is liable for their negligence or want of skill. The reason of the rule fails; and public convenience demands that the party injured should be content with his remedy against the company or the individual whose fault caused the injury. If passengers were liable, no one would travel upon railroads. This is the principle upon which the exception is based. It extends to an infinite variety of cases. The one given is *ex grege*.—It includes all who carry on independent trades or callings recognized as such by law or by common usage."

"To hold that a person is liable for all the damages resulting from the carelessness or negligence of all the servants or employees engaged in working for his benefit, although employed by contractors, without his knowledge or consent, and without any right or ability on his part to control or discharge them, might ruin any man in the world." *Kellogg v. Payne* (1866) 21 Iowa, 575.

In *Palnter v. Pittsburgh* (1863) 46 Pa. 213, the court reasoned thus: "The verdict determines that the fault was all that of the contractors. Over them the defendants had no more control than the plaintiff's husband had. They were not in a subordinate relation to the defendants, neither servants nor agents. They were in an independent employment. And sound policy demands that in such a case the contractor alone should be held liable. In making a sewer he has, necessarily, the temporary occupancy of the street in which the work is done, and it must be exclusive. His servants and agents are upon the ground, and he can more conveniently and certainly protect the public against injury from the work than can the officers of the municipal corporation. The public will be better protected if it be held that the contractor alone is responsible for his negligence, and that the city does not stand between him and any person injured. Thus he will be taught caution, while a sufferer by the negligence of his servants will not be compelled to resort for compensation to the insolvent servants." It must be admitted, however, that the presumption entertained in this passage, that the protection of that part of the public which will be exposed to danger by the progress of a given piece of work will be more

effectively secured by casting the responsibility on the contractor, is far from being axiomatic in its nature. If the maximum of protection is the object to be considered, it is, to say the least, probable that this end will be better attained by imposing liability both upon the employer and the contractor. It seems clear, however, that the rule as to the nonliability of employers has been formulated rather with reference to their interests than with reference to those of possible sufferers from the torts of the contractors.

The juridical situation, therefore, would seem to be simply this,—that the considerations of expediency which, according to the most generally accepted theory, constitute the only rational foundation of the rule which declares a master to be liable for the torts of his servant, are deemed to be inoperative, or to be superseded and overridden by other and antagonistic considerations of expediency, in some classes of cases where the person employed is exercising an independent business. See *Gregory v. Hill* (1869) 8 Sc. Sess. Cas. 3d series, 282; *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 55, 38 Am. Dec. 339; *Chicago & N. W. R. Co. v. Moranda* (1879) 93 Ill. 314, 34 Am. Rep. 168; *Camp v. Church of St. Louis* (1852) 7 La. Ann. 321; *Coon v. Syracuse & U. R. Co.* (1849) 6 Barb. 231; *Carman v. Steubenville & I. R. Co.* (1854) 4 Ohio St. 399; *Pollock's Essays on Jurisprudence*, p. 116.

There would seem to be plausible grounds for arguing that the exemption of an employer for the torts of a contractor should not be conceded without some restrictions in a case where the contractor himself is domiciled in a foreign jurisdiction. The inconvenience which is sometimes caused by compelling injured persons to obtain redress by following the contractor into another state is a serious evil. But the matter is one which can be dealt with only by the legislature. See the remarks of the court in *Sanford v. Pawtucket Street R. Co.* (1896) 19 R. I. 537, 33 L. R. A. 564, 35 Atl. 67.

It has been strongly intimated in a recent New York case that, if a person is not competent to plan or carry out a piece of work, and yet attempts to do one of these things, he should be held responsible for an injury resulting from his having undertaken the charge of the work; and that it is his duty to devolve the planning and execution of the work

erected by lawful authority, there can be, in the absence of any evidence to the contrary, and of any averment in the pleadings based upon such a contention, no doubt but that such is the case. Being a lawful structure, it is not a nuisance; and those who constructed it are not, for that reason, to be regarded as trespassers or tortfeasors. If the bridge was a lawful structure, and the injury done to the riparian lands of the plaintiff below does not constitute an appropriation of his land, or a "taking" thereof, within the meaning of the constitutional requirement as to compensation, and the injury is merely incident to the exercise of public authority acting within its jurisdiction, in good faith and without negligence, the injury is *damnum absque injuria*. As

upon persons possessing sufficient knowledge and skill to accomplish what is contemplated without endangering the workmen and the public. *Burke v. Ireland* (1901) 166 N. Y. 305, 59 N. E. 914.

Such a doctrine is doubtless in harmony with the general conception of legal negligence, as being "the absence of care according to the circumstances." *Vaughan v. Taff Vale R. Co.* (1890) 5 Hurlst. & N. 679, 688, 29 L. J. Exch. N. S. 247, 6 Jur. N. S. 899, 2 L. T. N. S. 394, 8 Week. Rep. 549, per Willes, J.

But it cannot be said to supply an adequate reason for exempting the employer from liability for the torts of the person whom he engages to perform the work. The existence of an obligation to appoint a substitute under the supposed circumstances is by no means incompatible with the existence of an obligation to answer for the acts and omissions of that substitute.

V. Extent of employer's duty with respect to the supervision and direction of the work.

That an employer is not bound to supervise the progress of contract work, for the purpose of preventing the commission of collateral torts by the contractor, is well settled.

In *Braldwood v. Bonnington Sugar Ref. Co.* (1866; Ct. of Sess.) 2 Scot. L. R. 152, it was argued, as a ground for imputing liability to the defenders, that "they did not so far separate themselves from those whom they employed, and that they had an inspector looking after their interests." The reply made to this contention was as follows: "That makes no difference. The inspector failed in no duty which he was bound, as the defenders' representative, to discharge to the deceased. He was not there to attend to the interests of the deceased, or to any duty of the defenders to the deceased. The company was not bound to have an inspector there, and it did not send one there to protect his interests. Anything he failed to do he was answerable for to the company, and to no one else. He might be personally, no doubt, for his own delinquency, but he could not bind the defenders."

Where the owner of a building contracts with a stair builder for the reconstruction of his stairway therein, and such stair builder has entire control of the stairway for the purpose of the work, it is not the duty of the owner to see that cleats placed on the stairs, to protect

a riparian proprietor, the plaintiff was subject to all the injury, not amounting to a taking of his land, which might result from the lawful improvement of the navigation of the stream, or the construction of piers, abutments, or bridges, in the exercise of the public rights in and over the stream in respect of such matters. *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48. Affirming 6 C. C. A. 585, 16 U. S. App. 152. 57 Fed. 803; *Slingerland v. International Contracting Co.* 169 N. Y. 60, 56 L. R. A. 494, 61 N. E. 995; *High Bridge Lumber Co. v. United States*, 16 C. C. A. 460, 464, 466, 37 U. S. App. 234, 69 Fed. 320; *Fitchburg R. Co. v. Boston & M. R. Co.* 3 Cush.

them from injury before being painted, are properly placed there by the contractor's servant. *Louthan v. Hewes* (1902) 138 Cal. 116, 70 Pac. 1065.

A church society engaging a contractor to repair its church tower is not under the positive duty to see that such contractor leaves a shutter in the tower in an apparently safe condition, where he has loosened and rendered it insecure in the erection or removal of a scaffold erected for such repairs. *Woods v. Trinity Parish* (1893) 21 D. C. 540.

A railway company which contracts for the erection of a train shed is not under a duty to see that the workmen in the employ of the contractor and subcontractors handle their tools with reasonable care. *Fitzpatrick v. Chicago & W. I. R. Co.* (1888) 31 Ill. App. 649 (tool fell on trainman).

A person for whom a building is being erected by a contractor is not under any duty or obligation to see that a subcontractor does not deposit materials in the public street. *Aldritt v. Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N. W. 741.

In a case where water flowed into plaintiff's cellar in consequence of the manner in which a subcontractor constructed a vault and sidewalk in front of a building, the court concurred with the finding of a referee that the principal contractor was not liable for the resulting damage, as he was under no obligation by his contract to give any direction as to this portion of the work, and had no control or authority over the mode or manner of its performance, but only a right to insist generally that the work be done according to the terms of the contract. *Slater v. Mersereau* (1876) 64 N. Y. 138.

In *Hawke v. Brown* (1898) 28 App. Div. 37, 50 N. Y. Supp. 1032, the court said: "There is no authority for the proposition that the employment of an architect to make plans and specifications for work of this character, and to supervise the work in its progress to completion, is a legal duty owing by the employer either to the contractor or to third persons. We are not aware of any such rule of law. An architect is usually retained for the protection of the proprietor. If there was no negligence imputable to the proprietor in the employment of the contractor, or negligence in other respects, the failure to employ an architect does not constitute a breach of duty owing to the

58; *Mills v. United States*, 12 L. R. A. 673, 46 Fed. 738; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336. The same principle applies in reference to public streets and roads. If the property of the abutter is not appropriated or taken, he is not suffered to recover damages for any mere change of grade. *Smith v. Washington*, 20 How. 135, 15 L. ed. 858; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 4 L. R. A. 622, 11 S. W. 705; *Pontiac v. Carter*, 32 Mich. 164.

In *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, access by river to the riparian lands of the plaintiff was cut off during ordinary water by a dike constructed just above. The court, speaking by Chief Justice Fuller, said:

public, and is no evidence of negligence in the execution of the work." The following passage from 2 Thomp. Neg. § 41, was quoted with approval: "The proprietor usually retains control by a skilled architect, not for the purpose of controlling the contractor in his methods, but for the purpose of assuring himself that the results enumerated in the specifications of the contract are reached by the contractor, step by step, as the work progresses."

In *Burke v. Ireland* (1901) 166 N. Y. 305, 39 N. E. 914, Reversing (1900) 47 App. Div. 428, 62 N. Y. Supp. 453, it was shown that the defendant employed a competent architect to draw the plans and specifications for a building, which were approved by that department of the city government which had charge of the matter, and there was no ground for affirming that he interfered with the plans, or reserved or exercised any right to change them. The work of constructing the building, including the foundations, he also committed to a competent contractor. But the foreman made the mistake of placing the central column, which supported the upper part of the building, upon an insecure foundation, not constructed in accordance with the specifications, the result being that the building collapsed and the plaintiff's intestate lost his life. The court explained as follows its reasons for denying the liability of the defendant: "If it be true that the owner was bound at his peril to see to it that the foundation of the iron column was laid upon solid ground, then it would be difficult to avoid the conclusion that the result of the accident could be attributed to the omission of the defendant in that respect. But we think that this was an obligation which the owner could devolve upon an independent contractor, and it requires only a fair construction of the contract to show that it was placed upon the builder, for whose omissions or mistakes the defendant is not responsible. There is no proof in the case from which the jury could find that the accident resulted from any defect in the plan. The death of the plaintiff's intestate was caused by a detective execution of the plan which the contractor agreed to carry out. The central column, which was intended to support the building, was placed upon an unsafe foundation, and this was the direct or proximate cause of the calamity. If the architect, who had general supervision, had insisted upon a careful inspection of every detail of the work, and 65 L. R. A.

"Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. . . . In short, the damage resulting from the prosecution of this improvement of a navigable highway for the public good was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject."

The King Bridge Company was but an agent of the townships in the construction of this bridge, and is entitled to any exemption from liability which exists in favor of the supervisors or of the state itself.

In *Larkin v. Saginaw County*, 11 Mich.

had been present when the concrete was about to be laid upon the disturbed ground outside the old cistern wall, he might have discovered the departure from the terms of the contract in that respect, and prevented it. But the architect was not the agent or servant of the owner. He was in the exercise of an independent calling, and held the same legal relations to the defendant that the builder did: and, for the omissions of either in the execution of the plans, personal negligence cannot be imputed to the defendant."

The view thus taken of the evidence was radically different from that which was adopted by the supreme court, which proceeded upon the theory that the architect was the defendant's agent, and that, as one of the two contracts which it was necessary to consider in relation to the incidence of the liability did not require anything further than not to lay the concrete in the trenches until they had been inspected by the architect, while the other contract made no provision with respect to the depth of any excavation required to produce a good bottom, if further excavation was necessary beyond that for which the plans called, the duty of determining the depth to which the excavation should extend devolved upon the defendant or his agents. First appeal (1898) 26 App. Div. 487, 50 N. Y. Supp. 369; second appeal (1900) 47 App. Div. 428, 62 N. Y. Supp. 453.

The following passage contains the gist of the opinion delivered on the second appeal: "Behrens [the architect] not only prepared the plans, but he superintended the construction. When a point was reached where it became necessary to determine what should be the proper depth of the excavation for a secure foundation, such question must be held to have been work within the owner's control, for the performance of which, by the agent selected by him, he was responsible. *Vogel v. New York* (1883) 92 N. Y. 10, 44 Am. Rep. 340. The primary duty resting upon the defendant Ireland was to secure a sure foundation for his building, and he ought to have known,—at least he is chargeable with the knowledge essential for him to perform the duty properly. As he did not contract with any contractor for a specific depth to which the foundation should be carried, and as the architect had no power or authority to change or modify his plans, the duty of determining what should be done on account

88, 82 Am. Dec. 63, an action was brought for the improper and defective construction of a bridge, which thereby constituted an obstruction to navigation. Special damages to the plaintiff were averred. The court held that the action of the board of supervisors in providing for the construction of the bridge was legislative, and that no action would lie. Said the court: "What would be a nuisance if erected by an individual is not such when erected by authority of law and by the public, so as to confer a right of private action against the public therefor; and the same principle, I think, controls in this case that would, had the bridge been built by authority of the legislature."

The plaintiff in error has cited and relied

of the infirmity of the soil was one which devolved directly upon the defendant Ireland, and the architect in this respect occupied the relation to Ireland of an ordinary agent. For his failure to properly perform his duty in that regard, the defendant Ireland is chargeable."

On the first appeal the supreme court had also laid it down that one who contracts with an independent contractor for the construction of a building upon his property does not guarantee to third persons that the contractor will comply with the building laws, as such laws merely limit the existing rights of the owner to improve his property, and do not confer any new rights. *Burke v. Ireland* (1898) 26 App. Div. 487, 50 N. Y. Supp. 369. This point was not referred to by the court of appeals.

A complaint which shows by its averments that the tortious act which was the immediate cause of the injury was collateral in its nature, and was committed by a person who bore to the defendant the relation of an independent contractor, cannot be made proof against a demurrer by inserting an allegation that it was the legal duty of the defendant to examine from time to time the condition of the place where the work was being done, and to provide suitable material for making that examination. *Boardman v. Creighton* (1901) 95 Me. 154, 40 Atl. 663, *Affirming* (1899) 93 Me. 17, 44 Atl. 121.

See also *City & Suburban R. Co. v. Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643.

This doctrine relieving the employer from the necessity of supervising the work may be regarded as one which is deducible directly from the legal conception of an independent contractor, as being essentially a person who, *ex hypothesi*, is entitled to exercise his own discretion with regard to the manner in which the results which he has undertaken to produce shall be achieved. Or it may be put upon the ground that the employer is entitled to act upon the presumption that a contractor who has been carefully selected will exercise reasonable skill and prudence in executing the stipulated work. The justifiability of this presumption is adverted to by Lord Westbury in the passage quoted in IV., *supra*, from his judgment in *Daniel v. Metropolitan R. Co.* (1871) L. R. 5 H. L. 45, 61, 40 L. J. C. P. N. S. 121, 24 L. T. N. S. 815, 20 Week. Rep. 37.

In *Butler v. Hunter* (1892) 7 Hurlst. & N. 465 L. R. A.

upon *Maxwell v. Bay City Bridge Co.* 46 Mich. 278, 289, 9 N. W. 410, as authority for the contention that any injury to the property of a riparian owner below by the construction even of a lawful bridge is recoverable. The point does not seem to have been considered, though there is a clause in the opinion which seems to support plaintiff's claim. The principle is, however, in conflict with both earlier and later Michigan cases in respect of incidental damages not amounting to either an appropriation or "an invasion" of the plaintiff's premises, but incident to a lawful public improvement. *Pontiac v. Carter*, 32 Mich. 164, 172; *Seranton v. Wheeler*, 113 Mich. 565, 67 Am. St. Rep. 484, 71 N. W. 1091. In respect of damages incident to a lawful change of

825, 31 L. J. Exch. N. S. 214, 10 Week. Rep. 214, plaintiff's counsel argued, in substance, that where a person employs a tradesman to do work which may be dangerous to another (here the making of an excavation on land adjacent to a house), he is bound to show that he directed all care to be taken, and specifically pointed out what was the danger to be guarded against, or, at all events, to show that he did enough to exempt himself from responsibility. But Pollock, C. B., rejected this contention, saying: "It must be assumed that directions were given to do the work in the ordinary way, and to take all the proper precautions not to cause any mischief." Wilde, B., also observed: "It is said that the defendant ought to have given orders to do the work in a tradesman-like way, or ought to have pointed out what was requisite, but it seems to me that it would be unreasonable to require an unskilled person to point out to a skilled person in what way the work should be done. I think that, as a matter of fact, if a man gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesman-like way." This case is referred to as an illustration of the general principle embodied in the above quotation. The decision itself has been virtually overruled. See subd. VII. b, of note to *Jacobs v. Fuller & H. Co.*, *post*, —, on *Liability of employer for injuries caused by the performance of work by independent contractor which is dangerous unless certain precautions are observed*.

"When the contract is to do an act in itself lawful, it is presumed that it is to be done in a lawful manner." *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430; *Carter v. Berlin Mills Co.* (1876) 58 N. H. 52, 42 Am. Rep. 572.

In *Independence v. Slack* (1895) 134 Mo. 66, 34 S. W. 1094, where it was held that landowners who make a contract with another person to provide the materials and construct a sidewalk in front of their premises are not liable for an injury caused by stones and other obstructions negligently left in the street by the contractor, the court reasoned thus: "We know of no principle of law that imposes a legal obligation upon the owner of property adjacent to a public street to see that no obstructions to travel are placed or suffered to remain thereon; nor is there evidence of a contract with, or license from, the city which placed defendants under any peculiar obligation to keep the

grade, Cooley, Ch. J., in *Pontiac v. Carter*, said: "The injury in all these cases is incidental to an exercise of public authority, which in itself must be assumed to be proper, because it is had by a public body acting within its jurisdiction, and not charged with malice or want of good faith. It must, therefore, be regarded as an injury that every citizen must contemplate as one that, with more or less likelihood, might happen."

6. The act of the King Bridge Company cannot be regarded as its personal act, but as that of the supervisors authorizing this bridge. *United States v. Lynah*, 188 U. S.

445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349. If there has been any appropriation, it has been by the public, for the benefit of the public, and the action should have been against the townships and railway company. Certain it is that there was no appropriation of plaintiff's property in any view of the case, prior to the completion of the work and the acceptance of the bridge by the public. The evidence was conclusive that no injury had been done up to the time defendants turned the bridge over to the owner. How, then, can it be said that there has been any "appropriation" of plaintiff's land by the defendant in error? But has

street secure while they were improving their property. Defendants were, of course, responsible for what they did themselves or directed others to do, but the contract in question did not necessarily, or probably, involve the commission of a nuisance, and cannot, therefore, be construed as a direction by defendants to commit the negligent acts of which complaint is made. They had the right to make the contract, and to believe that the work would be done carefully in all respects; and, after they had committed it to Stewart, duty did not require them to interpose, and see that the methods adopted were careful and proper."

On the other hand, it is clear that, in cases of the types discussed in *note* to *Jacobs v. Fuller & H. Co. post*, —, on *Liability of employer for injuries caused by performance of work by independent contractor which is dangerous unless certain precautions are observed*, and to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties*, what the law virtually declares is that the employer must at his peril, see that the work is executed with reasonable care; and his liability is sometime discussed under this aspect.

In *Hole v. Sittingbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 30 L. J. Exch. N. S. 81, 3 L. T. N. S. 750, 9 Week. Rep. 274, which was decided on the grounds explained in subd. V. of *note* to *Thomas v. Harrington, post*, —, Pollock, C. B., in the following passage noticed an alternative conception to which the liability of the defendant might be referred: "I suggested, in the course of the argument, that where a man employs a contractor to build a house, who builds it so as to darken another person's windows, the remedy is not against the builder, but the owner of the house. It may be that the same principle applies to cases where a man is employed by another to do an act which it is the duty of the latter to do. In such cases it is the duty of the owner of the soil to inquire what is in the course of being done,—to know what is the plan,—to see that the materials are good, and to take care that no mischief ensues. So here it was the duty of the company to see how the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do,—what materials he would use,—and to have seen that the specification and the materials were such as would insure the construction of a proper and efficient bridge."

In *Dalton v. Angus* (1881) L. R. App. Cas. 829, 50 L. J. Q. B. N. S. 689, 44 L. T. N. S. 65 L. R. A.

844, 30 Week. Rep. 196, Lord Blackburn said in the course of his opinion: "A person causing something to be done the doing of which casts on him a duty cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor."

According to Lindley, L. J., in *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 342, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196, the effect of what was said by Lords Blackburn and Watson in *Hughes v. Percival* (1883) L. R. 8 App. Cas. 443, 446, 449, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772, was that where the work is of an intrinsically dangerous character the employer's duty is to see that the contractor does his work properly.

For other cases in which the duty of exercising supervision is predicated specifically with respect to work which involved the performance of absolute duties which were incumbent on the employer, see *O'Brien v. Board of Land & Works* (1880) 6 Vict. L. Rep. (L.) 204, 2 Australian Law Times, 22; *Williams v. Tripp* (1878) 11 R. L. 447; *Logansport v. Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166.

The existence of the duty of supervision is occasionally inferred from the terms of some statutory provision which regulates the performance of the work in question.

Where the charter of a city requires the board of public works to take charge of the erection of public buildings it is their duty to see, through their architect or otherwise, that the work on every building of that description is performed according to the plans and specifications adopted by the common council. *Chicago v. Dermody* (1871) 61 Ill. 431. The court said: "If those having charge of the construction or repair of streets, bridges, etc., permit obstructions, pits, or other dangerous places, to be made in the streets by the contractor without being properly guarded, the city is liable for injury that may ensue, because the work is in the charge of the proper city officer, and is being done by authority of the city. Nor is it an answer in such a case to say the contractor departed from his contract or violated the city ordinances in performing the work, as it is the duty of the officer having charge of the improvement to see that the plans are pursued and the proper precautions taken to secure the safety of the public; and it is negligence on the part of such officers in failing to see that they are adopted. And the same rule must prevail where the city or its officers have

there been any appropriation of plaintiff's land by anyone? There has been no such permanent flooding as was held to be an appropriation in *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557, and *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349. The injury done has not been by flooding or any sort of possession, but simply by the natural effect of the flow of the current upon a bank against which it has always flowed. Its volume and force have been increased, but the force is exerted between the river banks, and has not involved the surface of plaintiff's land. The incidental injury was

one which might have been guarded against by a protecting line of piles or by a sea wall, and the question at last is as to whose duty it was to properly protect a river bank, exposed to waste by the increased volume and force of the current to which it is exposed? That such a consequential injury is a taking or appropriation, we cannot agree.

There was no error in directing a verdict for the defendant, and the judgment is affirmed.

Petition for certiorari denied by Supreme Court of United States October 19, 1903.

charge of the erection of a public building for the use of the city."

Compare also the case cited in subd. XI. of note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from non-performance of absolute duties of employer.*

It should be noted that, under such circumstances as these the work is assumed to be under the employer's control while it is in progress, and the liability which he incurs by reason of a failure to perform the duty of supervision might equally well be referred to the conception that the contractor is, in point of law, his servant (see subds. X. *et seq.* of note to *Richmond v. Sitterding*, 65 L. R. A. 445, on *Persons deemed to be independent contractors within meaning of rule relieving employer from liability*), or to the conception that he is constructively, if not actually, directing the operations, or from some explicit stipulation in the contract? *Slater v. Mersereau* (1876) 64 N. Y. 138. A referee had found that the waters which flowed into the cellar of the building and injured the plaintiffs came from the roof by reason of the failure of the defendant to direct the subcontractors to make the necessary cuttings in the wall for the waste pipe, which was intended to connect with the sewer, and without which it could not be connected, so that he failed to provide means to carry off the rain water. Discussing the effect of this finding in connection with a clause in the contract with the subcontractors which provided that they should do all the cutting away for repairing after plumbing, etc., as "they should be directed," the court said: "It necessarily follows from the terms of the contract that the defendant was bound to give such directions as were required to prepare the same, and, upon a failure to do so, that he should be held responsible for the damages which ensued by reason of his neglect in this respect. According to this condition, the defendant exercised a supervisory control over the progress of the work, and it was a part of his duty to see that it was conducted properly and with the exercise of ordinary care and skill, so as to prevent injuries to other parties."

On the ground that it was provided in the contract for the erection of a building that partitions, etc., were to be taken down or filled up as may be required, and anchored where directed, it was held that the directions were to be given by the owners. *Lancaster v. Connecticut Mut. L. Ins. Co.* (1887) 92 Mo. 460, 1 Am. St. Rep. 739, 3 S. W. 23. 65 L. R. A.

VI. *Extent of duty of employer to guard against possible accidents.*

It is sufficiently manifest that the virtual abrogation of the doctrine now under discussion would result if the law were to predicate, in respect to all kinds of work indifferently, the existence of an absolute duty on the employer's part to guard against accidents, probable as well as improbable, that may happen to the damage of third persons while that work is being performed by an independent contractor.

In *City & Suburban R. Co. v. Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643, where a horse was frightened by the whistle of a steam engine used for the purpose of hauling along the defendant's track cars belonging to a contractor and loaded with materials which were to be used by him for the repair of a turnpike road, the court reasoned as follows: "It would be carrying the obligation of the turnpike company beyond that required or authorized by the authorities to hold that its duty to the public required it to see that the servants of White [the contractor] were not thus negligent, although the use of the steam engine was not a nuisance *per se*, and could be operated so as not likely to do any injury to anyone using the road. It would be requiring too much of it to make it take such precautions against accidents when letting out lawful work to an independent contractor. It must be admitted that the work to be done was lawful, and the company had the right to assume that there would not be such negligence as that complained of, which was entirely collateral to, and not a probable consequence of, the work contracted for. To hold the company to such a strict liability would practically forbid it from having such work done by contractors, as it would have to keep its own agents on engines to see that there was no negligence on the part of the contractors or their servants."

If, therefore, recovery is sought on the ground that the employer ought to have adopted certain precautionary measures for the purpose of preventing the injury complained of, the action will fail, unless the plaintiff can at least show that, in view of the nature of the work and the conditions under which it was to be executed, the defendant should have foreseen that the actual catastrophe which occurred was likely to happen if those precautionary measures were omitted. Whether the production of evidence to this effect will entitle him to go to the jury upon the question whether the employer ought to have provided for the protection of the public was a point which elicited different opinions.

in the case cited below. But it seems to be a reasonable inference from the more recent decisions cited in the *note* to *Jacobs v. Fuller & H. Co., post*, —, on *Liability of employer for performance of work by independent contractor, which is dangerous unless certain precautions are observed*, that this point should be decided in the plaintiff's favor.

In *Pearson v. Cox* (1877) L. R. 2 C. P. Div. 369, 36 L. T. N. S. 495, the defendants were builders and contractors, who, after the outside of a house was finished, had removed the outer boarding and had employed a subcontractor to do the internal plastering. One of the men employed by the subcontractor, in walking, shook a plank, which caused a tool to fall out of a window of the house, and the tool, in falling, injured the plaintiff, who was passing along the highway. The jury found that the boarding had been properly removed, but that the injury was caused by the negligence of the defendants in not providing some other protection for the public. Upon this finding it was held that the defendants were entitled to judgment. Commenting upon the doctrine propounded by the plaintiff's counsel, that there was a general duty imposed upon the defendants to guard against accident, Coleridge, Ch. J., said: "That must mean accidents which could reasonably be foreseen, and there was no evidence that this was such an accident. No doubt the accident has happened, and may happen again, but the falling of a tool in this manner is not such a probable incident in the plastering of the interior of a house as that it could reasonably have been foreseen. If it was so, that would be a ground for holding someone liable; but if anyone is liable for not providing some protection, it would be the subcontractor." Bramwell, L. J., said: "I am of the same opinion, and for the same reasons. The only ground on which the action could be maintained against the defendants would be that the carrying on of the work in the course of which the accident happened was a nuisance to the highway, unless the passers by were guarded against the results. It may be that when a house is being built there is a probability that tools or other things will fall; and the jury might be justified, either upon the evidence of experts, or from knowledge of common life, and without experts being called, in finding that some protection to the public must be afforded. . . . But, however that may be, if there was any such duty, it was the duty of the person whose conduct was a nuisance to the highway. I agree that the general builder would be the person who is to guard against general damages in the course of the building, but this, according to the opinion of the jury, is not such an accident. But, even if I assume danger to the public from plastering, I cannot understand upon what ground the defendants are to be made liable. The plasterer, if any person, ought to be made liable; it is he who knows when he is going to begin, and when he is going to leave off, and how the work will be done; and he is the person who ought to provide against the accident. Going, therefore, as far as I can, and assuming that someone ought to have provided against the danger, the last link in the chain falls: it is the plasterer who ought to have provided against it, and not these defendants." Brett, L. J., said: "The negligence alleged was that the boarding ought to have been kept up, or that there ought to

have been some protection at the window; but there was no evidence that the tool fell by the negligence of anyone,—no such question was left to the jury. It seems to have been assumed that the falling of this tool was the result of accident. If there had been any evidence that such an accident might probably happen whilst such work was going on in the interior of a house, then there might have been a question for the jury whether someone ought not to have guarded the public against such an accident. If there had been such evidence, then, with all deference to what has been said, I should have thought it a question whether the builders were not the persons who ought to have put up that protection to the public, as they had control over the whole building. But there was no evidence that any such accident was probable, and no one said it was probable that such things would fall from the window; nor is it a thing the probability of which must be known to all the world, so that the jury must be taken to know it without any evidence. The accident was highly improbable, and a man need not guard against highly improbable accidents."

An employer cannot be charged with liability on the theory that it is his duty to insert in a contract an affirmative provision to the effect that the contractor shall not be guilty of negligence. "The law always implies that every person who is authorized to do any act which, if it is done improperly, may injure his neighbor, will do that act without negligence; and such an implication is a necessary part of every contract." *White v. New York* (1897) 15 App. Div. 440, 44 N. Y. Supp. 454, holding a complaint to be demurrable which was based upon the theory that the failure of a city to include in a contract with an independent contractor for the improvement and grading of a street a provision that the contractor should care for and remove all surface water, sewage, and drainage which would be interfered with by such grading rendered it liable for the negligence of such contractor in failing to provide for the removal of surface water and sewage.

In *Aston v. Nolan* (1883) 63 Cal. 269, it was urged that it was the duty of defendant to insert in the contract an express term, to the effect that the work should be so conducted and finished as not to disturb the soil of the adjacent lot, and that, in default of such express provision, the defendant was liable, because the work was done in accordance with the contract. The court, however, said: "When a contract provides for doing a thing which may be, and generally is, done in a lawful manner, and is silent as to the mode of doing it, the contract is to be construed as requiring it to be done in a lawful manner. As the injury was caused by the contractor while doing work which, it must be assumed, could have been done without causing it, and the contractor had agreed so to do it, the injury was done in violation of his contract."

Still less can an employer be held responsible on the ground that the injury was a natural and probable result of his contract, where that instrument expressly provides that the stipulated work shall be carefully done, and the injury complained of would not have occurred had that provision been observed. *Samuelson v. Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499.

VII. *For what torts of contractor the employer is not bound to answer.*

a. *In general.*

In the following subdivisions the cases in which various kinds of collateral negligence are involved, have been arranged in such a manner as to facilitate comparison and contrast with those in which recovery has been allowed on one or other of the various grounds discussed in the notes dealing with the grounds on which employers are held liable notwithstanding the employment of an independent contractor (notes to *Thomas v. Harrington*, post, —, on *Liability of employer for acts of independent contractor where injury is direct result of work contracted for*; to *Jacobs v. Fuller & H. Co.* post, —, on *Liability of employer for injuries caused by the performance of work by an independent contractor which is dangerous unless certain precautions are observed*; to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer*). It is deserving of notice that, in not a few instances, the result of determining the rights of the parties with reference to different principles has been the rendition of conflicting decisions with regard to virtually identical facts.

If it is conceded or established that the tortfeasor was an independent contractor, the nonliability of the employer becomes an inference in point of law, if the only reasonable deduction from the circumstances as shown is, that the injury in question resulted proximately and solely from the negligent manner in which the stipulated work was performed, or from a wrongful act which was neither a necessary nor a probable incident of that work.

"Where the act is in itself a nuisance, the party who employs another to do it is responsible for all the consequences, for there the maxim, *Qui facit per alium facit per se*, applies; but, where the mischief arises, not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible, unless the relation of master and servant exists." *Butler v. Hunter* (1862) 7 Hurlst. & N. 826, 31 L. J. Exch. N. S. 214, 10 Week. Rep. 214, per Pollock, C. B.

"The true distinction between cases of master and servant and cases of employer and independent contractor seems to be this, that, when the person actually doing the work does something for which he would himself be liable, the master is, whilst the employer is not, liable for what is conveniently called 'collateral negligence,' meaning thereby negligence other than the imperfect or improper performance of the work which the contractor is employed to do." *Rigby, L. J.*, in *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 352, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196.

"When the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an unskilful or improper person as the contractor." *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N. J. L. 17, 10 Am. Rep. 205.

"For negligences of the contractor, not done under the contract, but in violation of it, the 65 L. R. A.

employer is, in general, not liable." *Lawrence v. Shipman* (1873) 39 Conn. 586.

In a case where a contractor had omitted to close an opening over an area, the court said: "We are, for these reasons, of the opinion that the true rule in cases of this character is, if the nuisance necessarily occurs, in the ordinary mode of doing the work, the occupant or owner is liable; but if it is from the negligence of the contractor, or his servants, that he should alone be responsible." *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334.

The employer is not liable where the injury was caused by "the manner in which the contractor managed the details of the work." *Hausser v. Metropolitan Street R. Co.* (1890) 27 Misc. 538, 58 N. Y. Supp. 286.

The conception of an injury which was the result of the manner in which the contract was performed is also explicitly adverted to in *Shute v. Princeton Twp.* (1894) 58 Minn. 387, 59 N. W. 1050.

Other forms of words which may be used to express the same general conception are suggested by the following phrases:

"A wrongful act of commission by a contractor beyond the scope of his employment." *Gray v. Pullen* (1864) 5 Best & S. 970, 984, 34 L. J. Q. B. N. S. 265, 11 L. T. N. S. 569, 13 Week. Rep. 57, per Erle, Ch. J.

A "wrongful act unnecessarily done" by the contractor in the performance of his work. *Upton v. Townend* (1855) 17 C. B. 30, 71, 25 L. J. C. P. N. S. 44, 1 Jur. N. S. 1089, 4 Week. Rep. 56, per Willes, J.

Acts which were "unnecessary to the accomplishment of the work, and in no way connected with its proper performance" (*Scammon v. Chicago* [1861] 25 Ill. 424, 79 Am. Dec. 334); or which "did not necessarily occur as an incident to the prosecution of the work" (*Ibid.*); or which did "not necessarily arise" out of the work contracted for (*Chicago City R. Co. v. Hennessy* [1884] 16 Ill. App. 153).

An accident "caused by the act of the contractor in doing what it was not necessary for him to do,—what he was not expected to do." *Boomer v. Wilbur* (1900) 176 Mass. 482, 53 L. R. A. 172, 57 N. E. 1004.

In a case where the evidence is susceptible of the construction that the person employed was exercising an independent employment under the contract, it is error to refuse a charge to the effect that, if the accident was the result of the negligence of that person or of his servants, the employer is not liable. *Potter v. Seymour* (1859) 4 Bosw. 140.

The term commonly used for the purpose of describing tortious conduct for which the employer is not liable is "collateral."

"Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default." *Mersey Docks & Harbour Board v. Gibbs* (1864) L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872, per Blackburn, J.

In the later case the same Judge (then a member of the House of Lords) observed: "Ever since *Quarman v. Burnett* (1840) 6 Mees. & W. 499, 9 L. J. Exch. N. S. 308, 4 Jur. 969, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a per-

son employing a contractor to do work is not liable for the negligence of that contractor or his servants." *Dalton v. Angus* (1881) 1 L. R. 6 App. Cas. 740, 50 L. J. Q. B. N. S. 689, 44 L. T. N. S. 844, 30 Week. Rep. 196.

The same word is also used in the following cases: *Hole v. Sittlingbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 30 L. J. Exch. N. S. 81, 3 L. T. N. S. 750, 9 Week. Rep. 274; *Butler v. Hunter* (1862) 7 Hurlst. & N. 826, 31 L. J. Exch. N. S. 214, 10 Week. Rep. 214; *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 352, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 106; *Birmingham v. McCary* (1887) 84 Ala. 469, 4 So. 630; *Frassl v. McDonald* (1898) 122 Cal. 400, 55 Pac. 139, 772; *Davie v. Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395; *Sanford v. Pawtucket Street R. Co.* (1896) 19 R. I. 537, 33 L. R. A. 564, 35 Atl. 67.

Another word which conveys a similar meaning, but which is found less frequently in the reports, is "casual." *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 106; *Smith v. Benick* (1898) 87 Md. 610, 42 L. R. A. 277, 41 Atl. 56; *Wilson v. White* (1883) 71 Ga. 506, 51 Am. Rep. 269.

Occasionally those two epithets are combined in the same statement. See, for example, *Holliday v. National Teleph. Co.* [1899] 2 Q. B. 392, 400, 68 L. J. Q. B. N. S. 1016.

In some instances the language used is indicative of the conception that no causal connection between the letting of the contract and the injury can be said to exist where that injury resulted solely from the tortious act of the contractor.

Thus we find it laid down that the employer is not liable where the execution of the work did not entail the injury in question as a "natural or necessary" consequence (*O'Rourke v. Hart* [1860] 7 B. & W. 511 [1862] 9 Bosw. 301); as a "natural result" (*Knowlton v. Holt* [1891] 67 N. H. 155, 30 Atl. 346; *Carter v. Berlin Mills Co.* [1876] 58 N. H. 52, 42 Am. Rep. 572; *Fuller v. Grand Rapids* [1895] 105 Mich. 529, 63 N. W. 530); or as a "probable" consequence (*Smith v. Benick* [1898] 87 Md. 610, 42 L. R. A. 277, 41 Atl. 56); or as a "necessary consequence" (*Moore v. Sanborn* [1853] 2 Mich. 519, 59 Am. Dec. 209).

To establish such a connection it is not enough to show that the employer supplied one or more of the instrumentalities which were necessary for the execution of the stipulated work.

It does not follow that, because those instrumentalities were capable of being so used as to constitute a nuisance, or of being used in an improper, negligent, or mischievous manner, an injury of which it is an efficient cause must therefore be regarded as a natural consequence of the permission to use it. The extent of the authority conferred by the employer is, to execute the contract by a proper and reasonable use of any means and appliances which he furnishes.

The fact that the materials for paving a highway were brought to the required spot by the principal contractor for the work will not render him liable for the negligence of a subcontractor in leaving a portion of those materials in such a position as to obstruct the highway. *Overton v. Freeman* (1852) 11 C. & D. 110, 18 L. R. A.

B. 867, 3 Car. & K. 52, 21 L. J. C. P. N. S. 52, 16 Jur. 65, *Citing Knight v. Fox* (1850) 5 Exch. 721, 20 L. J. Exch. N. S. 9, 14 Jur. 963.

In *Leavitt v. Bangor & A. R. Co.* (1897) 89 Me. 509, 36 L. R. A. 382, 36 Atl. 998, where the plaintiff's mill was burnt by fire communicated from the stove of a cooking car occupied by a man who had contracted to supply cordwood to a railway company, it was sought to charge the company with liability on the ground that, inasmuch as it had, for the purpose of enabling the contractor to do his work conveniently, placed this and other cars on a siding close to the mill, the mischief complained of was not the negligent act of the contractor or his servants, but the direct result from using an appliance located by defendant; that the *proxima causa* was the location of the car, the use of which naturally would and did cause the damage. This contention was rejected by the court, which said: "The act of locating the car, and of using it with fire, must be distinguished. The former was the act of the defendant. The latter, of the contractor. The car itself was harmless, and its location, when unused, threatened no injury to plaintiff. The use might create mischief. The thing unused was harmless. . . . True, there might be cases where the landowner would be liable if the use was contrived by him for the purpose of mischief, with intent of avoiding liability; but there is no element of that sort here. The car was located without intent to injure. The liability for its imprudent use then rested upon its owner, who was tenant. There is no principle of law that can be invoked to charge the defendant. It did not create or maintain a nuisance, nor a condition that directly caused the mischief. That was perhaps caused from the misuse, by another, of the conditions created by defendant, for whose acts defendant is in no way responsible. . . . The act complained of in the case at bar was locating a car upon the employer's land,—an act not dangerous to anyone. Its use might, or might not, be. A dangerous use was not contracted for."

To the same general effect, see *Carter v. Berlin Mills Co.* (1876) 58 N. H. 52, 42 Am. Rep. 572 (plaintiff's land was flooded owing to the improper use of defendant's dam by a logging contractor).

The fact that certain appliances or materials were furnished by the employer is treated as immaterial in the following cases, among others: *Murray v. Currie* (1870) L. R. 6 C. P. 24, 40 L. J. C. P. N. S. 26, 23 L. T. N. S. 557, 19 Week. Rep. 104; *Corbin v. American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63; *Miller v. Minnesota & N. W. R. Co.* (1888) 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N. W. 188; *Mayhew v. Sullivan Mtn. Co.* (1884) 76 Me. 100; *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103; *Deford v. State* (1868) 30 Md. 179; *Benedict v. Martin* (1862) 36 Barb. 288; *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113; *Emmerson v. Fay* (1896) 84 Va. 60, 26 S. E. 380.

Nor can the liability of an employer for the careless management of an appliance be inferred from the mere fact that there was an understanding between him and the contractor that such an appliance was to be used.

In *Bailey v. Troy & B. R. Co.* (1884) 57 Vt. 232, 52 Am. Rep. 129, where the plaintiff's horse was frightened by a steam shovel, and ran

away, the court disapproved of an instruction contravening the principle stated in the text, saying: "If the shovel became a nuisance merely because it was negligently operated, and such operation was controlled by Munson [the contractor], he is the author of the nuisance, and answerable for the consequences; and the understanding between the parties that the shovel should be used in the work does not change the liability to the defendant. This understanding calls for the proper, not negligent, use of the shovel."

A complaint is demurrable if the facts declared upon show that the injury for which damages are sought was caused by the negligent manner in which the contractor executed the work in question, unless some allegation also discloses that there was a misfeasance or malfeasance on the part of the employer, which caused the contractor to do the work negligently, and that the origin of the injury complained of can, therefore, be traced to the action of the former in setting in motion the immediately efficient cause of the wrong. *White v. New York* (1897) 15 App. Div. 440, 44 N. Y. Supp. 454, where one of the allegations of the complaint set up that the cause of the injuries complained of was the neglect of a contractor for the grading of a street to see that the surface water, sewage, and drainage, whenever it should accumulate through being impeded by reason of the grading of Ninth avenue, should have a sufficient outlet and be discharged and carried off.

A demurrer should be sustained to a declaration which alleges substantially that the plaintiff's intestate, B., was employed as workman by one W., who had contracted with the defendant to dig lime rock for him by the cask in a certain quarry; that it then and there became the legal duty of the defendant, while B. was at work for the said W., to see that the walls of said quarry were examined from time to time in order to ascertain if any loose rock was likely to fall upon the said B.; that the defendant negligently permitted the said W. to excavate rock in the walls of the quarry in such a manner as to render the walls on one side thereof unsafe for the said B. to work therein; and that the death of the said B. was caused by the negligence of the defendant in not providing suitable appliances for the purpose of ascertaining the condition of the quarry, as aforesaid, and in permitting the dangerous condition of the quarry to exist while the said B. was lawfully at work therein. *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663.

b. Negligence not productive of permanently dangerous conditions.

1. Work on railways.

The liability of the defendant company has been denied under the following circumstances:

Where the injury resulted from the negligent management of a train, used and controlled by contractors on a portion of the road not yet turned over to the company. *Scarborough v. Alabama Midland R. Co.* (1891) 94 Ala. 497, 10 So. 316 (contractors injured by a collision); *Rome & D. R. Co. v. Chasteen* (1889) 88 Ala. 501, 17 So. 94 (brakeman injured in attempting to couple cars); *Miller v. Minnesota & N. W. R. Co.* (1888) 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N. W. 188 (contractor's servant injured as a result of maintaining too high a speed on an unsafe track); *St. Louis, Ft. S. & W. R. Co.* 65 L. R. A.

v. Willis (1888) 38 Kan. 330, 16 Pac. 728 (brakeman on a train operated by a construction company on a line, injured by defects in the rolling stock); *Hitte v. Republican Valley R. Co.* (1886) 19 Neb. 620, 28 N. W. 284 (stranger was run over); *Houston & G. N. R. Co. v. Van Bayless* (1876) 1 Tex. Civ. App. Cas. (White & W.) 248 (mule run over); *Houston & G. N. R. Co. v. Meador* (1878) 50 Tex. 77; *Meyer v. Midland Pacific R. Co.* (1873) 2 Neb. 319 (similar accident); *Cunningham v. International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632 (injury to passenger, his reception on the train being a violation of the express prohibition of the railway company); *Union P. R. Co. v. Hause* (1871) 1 Wyo. 27 (in this case the plaintiff was conveyed in the caboose on a regular ticket issued by the contractor's employees).

In cases of this class it is error to give a charge to the jury, which bases the responsibility of the defendant upon the isolated fact that the contractor was transporting freight and passengers for reward on a finished portion of the line. This fact would be insufficient to warrant the inference thus drawn from it, if it should be shown, either (1) that the contractor was operating that particular section of the road, as a means of furthering the construction of the unfinished portion, or (2) that, although the contractor might have been transporting freight and passengers under an arrangement which did not avail to exempt the company from liability for his negligence, while he was rendering that service, yet he exercised at the same time, in respect to the work of construction, an independent occupation, and was not the agent of the company while discharging the functions incident to that position. *Rome & D. R. Co. v. Chasteen* (1889) 88 Ala. 501, 7 So. 94.

Recovery has also been denied under the following circumstances:

Where an iron awning rail which was being moved for the purpose of obtaining more space for a street railway was let fall on a passer-by. *O'Rourke v. Hart* (1860) 7 Bosw. 511, (1862) 9 Bosw. 301.

Where workmen dropped a chain from the structure of an elevated railway onto the street below. *Burmester v. New York Elev. R. Co.* (1881) 15 Jones & S. 264.

Where a horse was frightened by the operation of a portable steam engine used by a contractor to pump water. *Wabash, St. L. & P. R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296.

Where a plank which formed a temporary crossing was turned up by the negligence of contractor's servant in driving against it, and injured a person who had stepped on it. *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215.

Where a railway car which was being drawn by horses collided with a wagon. *Schular v. Hudson River R. Co.* (1862) 33 Barb. 653.

A railroad company, as warehouseman, is not liable for the destruction of goods by fire communicated from a pile-driving engine which was operated by a contractor engaged in repairing the company's wharf. *Brunswick Grocery Co. v. Brunswick & W. R. Co.* (1898) 106 Ga. 270, 71 Am. St. Rep. 249, 32 S. E. 92.

2. Work on buildings.

The employer was held not to be responsible where a servant of a contractor or a subcontractor caused injury to a person on the adja-

cent street or rightfully on the premises, by letting fall a tool (Pearson v. Cox [1877] L. R. 2 C. P. Div. 369, 36 L. T. N. S. 495; Fitzpatrick v. Chicago & W. I. R. Co. [1888] 31 Ill. App. 649); or a brick (Boomer v. Wilbur [1900] 176 Mass. 482, 53 L. R. A. 172, 57 N. E. 1004; Gardner v. Bennett [1874] 6 Jones & S. 197; Wolf v. American Tract Soc. [1898] 25 App. Div. 98, 49 N. Y. Supp. 236; Neumeister v. Eggers [1899] 29 App. Div. 385, 51 N. Y. Supp. 481; Smith v. Milwaukee Builders' & T. Exchange [1895] 91 Wis. 360, 30 L. R. A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041); or a coil of rope (Gelst v. Rothschild [1900] 90 Ill. App. 324); or a plank (Long v. Moon [1891] 107 Mo. 334, 17 S. W. 810).

The right to maintain an action was also denied, where a person walking along the street was injured by the negligence of a servant of a contractor, who threw a piece of lime into a mortar bed in the street. Strauss v. Louisville (1900) 108 Ky. 155, 55 S. W. 1075.

And where the servant of one of the contractors engaged upon a building was injured by the negligence of another contractor's servant, who dropped a tool down the elevator well. Jahl v. Ellicott Square Co. (1898) 31 App. Div. 337, 52 N. Y. Supp. 366.

And where a tenant sought to recover from his landlord damages for his son's death, caused by his inhaling sooty vapor which filled the room by reason of the acts of servants of a contractor engaged in repairing the chimney. O'Connor v. Schnepel (1895) 12 Misc. 356, 33 N. Y. Supp. 562.

And where the servant of one who had contracted to lay an upper floor in a building pushed his foot through the ceiling of the room underneath, and so caused a large piece of plaster to fall on the occupant of that room. Fitzgerald v. Timoney (1895) 13 Misc. 327, 34 N. Y. Supp. 460.

A jury is properly charged that one for whom a brick wall is being erected is not liable for damages sustained by the adjoining owner by the dropping of brick and mortar on his premises, if such occurrences were not necessarily involved in the building of the wall, but were due to the negligence of the contractor or his servants. Pye v. Faxon (1892) 156 Mass. 471, 31 N. E. 640.

3. Work on highways.

A city is not liable for injuries resulting from the fact that a horse was frightened by the whistle of a steam roller used by a contractor, and became uncontrollable. Cary v. Chicago (1895) 60 Ill. App. 341.

4. Work involving the handling of heavy articles.

Liability for the negligence of draymen, etc., has been denied under the following circumstances:

Where a person passing by was struck by a barrel which was being rolled along a skid to a truck. McMullen v. Hoyt (1867) 2 Daly, 271.

Where a hoghead, thrown from a truck, injured plaintiff, a man sent with the horse. Brophy v. Bartlett (1888) 1 Silv. Ct. App. 575, Reversing (1885) 37 Hun. 642.

Where a barrel of salt which was being delivered at the vendee's store rolled against and

injured a person passing on the footpath. De-Forrest v. Wright (1852) 2 Mich. 368.

Where the injury was caused by a truckman's negligence in rolling barrels out of his employer's store. Ridel v. Moran, F. Co. (1894) 103 Mich. 262, 61 N. W. 509.

Where a carpenter employed upon the lower floor of a warehouse was injured through the negligence of a truckman or his employees in allowing a mass of paper to slip from the sling in which it was being raised. Kueckel v. Ryder (1900) 54 App. Div. 252, 66 N. Y. Supp. 522.

5. Management of teams.

The principal employer is not liable where the injury was caused by the negligent manner in which a wagon belonging to a contractor engaged in doing certain hauling and delivery work was driven by his servant. Foster v. Wadsworth-Howland Co. (1897) 168 Ill. 514, 48 N. E. 163, Affirming (1896) 68 Ill. App. 600.

6. Management of vessels.

The owner of a ship which, through the negligence of a steamboat by which it is being towed, is brought into collision with another vessel, is not liable for the resulting injuries. Sproul v. Hemmingway (1833) 14 Pick. 1, 25 Am. Dec. 350. (See, however, subd. VII., of note to Richmond v. Slittingding, ante, 445, on Persons deemed to be independent contractors within meaning of rule relieving employer from liability).

A coal company is not liable where a contractor for the haulage of its boats on a canal so negligently operates one of them as to bring it into collision with a boat belonging to a third person. Blattenberger v. Little Schuylkill Nav. R. & Coal Co. (1839) 2 Miles (Pa.) 309.

7. Entertainments at public resorts.

The proprietor of a public resort, who employs an independent contractor to make a balloon ascension to attract visitors, is not liable for injury to a visitor by a pole which falls because of the negligence of the balloonist while he is endeavoring, by means of a new and unfamiliar appliance, to raise the pole for use in inflating the balloon. Smith v. Benick (1898) 87 Md. 610, 42 L. R. A. 277, 41 Atl. 56. The court assigns three distinct grounds for its decision, viz.: (1) That the negligence complained of was collateral to, and not a probable consequence of, the work in hand; (2) that a new method, not known to the defendant, was employed; and (3) that there were no concealed dangers against which he was bound to warn visitors.

8. Loading or unloading of ships.

A shipowner is not liable for the death of a stevedore's servant, caused by the excessive rapidity with which his fellow servants passed along a gang plank a barrel which he was handling. Rankin v. Merchants' & M. Transp. Co. (1884) 73 Ga. 229, 54 Am. Rep. 874.

9. Blasting operations.

It is desirable to notice separately those cases which relate to injuries caused by blasting operations, for the reason that, as will be shown in other notes dealing with the grounds on

which employers are held liable notwithstanding the employment of an independent contractor, the doctrine that the employer is exempt from liability under such circumstances is not accepted by all the authorities. (See subd. V. c. of note to *Thomas v. Harrington*, post, —, on *Liability of employer for acts of independent contractor where injury is direct result of work contracted for*; and subd. VII. j. of note to *Jacobs v. Fuller & H. Co.* post, —, on *Liability of employer for injuries caused by the performance of work by independent contractor, which is dangerous unless certain precautions are observed*). The courts which apply that doctrine may be said to start from the fundamental principle, that "one who in the reasonable use of his own land blasts rock thereon with due and proper care is not liable for the inevitable damage caused thereby to neighboring property." *Booth v. Rome, W. & O. Terminal R. Co.* (1893) 140 N. Y. 267, 24 L. R. A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; *French v. Vix* (1894) 143 N. Y. 90, 37 N. E. 612.

If full effect be given to this principle, it is clear that cases in which a contract is entered into for the performance of work by means of blasting must stand outside the category of those in which the employer is held responsible, on the ground that he contracted for work which "would necessarily produce the injuries complained of" (*McCafferty v. Spuyten Duyvil & P. M. R. Co.* [1874] 61 N. Y. 178, 19 Am. Rep. 267); or which is "dangerous in itself" (*French v. Vix* [1893] 2 Misc. 312, 21 N. Y. Supp. 1016, Affirmed in [1894] 143 N. Y. 90, 37 N. E. 612); or which was "intrinsically dangerous" (*Schnurr v. Huntington County* [1899] 22 Ind. App. 188, 53 N. E. 425).

In this point of view, therefore, if an injury results from the negligent manner in which such work is performed by the contractor, his negligence is merely collateral, and not such as will affect the employer with liability.

Recovery was denied under the following circumstances:

Where plaintiff's house was struck by a stone, the result of the negligent manner in which a contractor for the grading of a street carried on the blasting operations. *Kelly v. New York* (1854) 11 N. Y. 432; *Pack v. New York* (1853) 8 N. Y. 222 (in *Storrs v. Utica* [1858] 17 N. Y. 104, 72 Am. Dec. 437, *Comstock, J.*, doubted whether the second of these cases had been correctly decided upon the facts).

And where a similar injury resulted from the negligence of a contractor engaged in excavating the foundation of a house. *French v. Vix* (1894) 143 N. Y. 90, 37 N. E. 612, Affirmed (1893) 2 Misc. 312, 21 N. Y. Supp. 1016; *Roemer v. Striker* (1894) 142 N. Y. 134, 36 N. E. 803 (holding that no error had been committed in allowing the defendant to give in evidence a written contract between himself and another, whereby the latter agreed to make the excavation).

And where the servants of a contractor for the construction of a railway did their work in such a manner as, by an overcharge, to cast rocks against and into the plaintiff's house near the line. *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267. In this case the court said: "The injuries were not occasioned in consequence of the omission of any duty which was incumbent on the defendant. It had let the contract, so far as ap-

pears, to a competent person, and had provided, in the contract, that he should be responsible for any damage occasioned by blasting. The defendant did not authorize or permit a nuisance upon its premises. If it had, it would have been liable for any damage occasioned by the nuisance. Hence, if the defendant can be held liable in this case, it must be upon the naked ground that it is responsible for the careless acts of the subcontractor's servants, over whom it had no control. There is no authority in this state for imposing such a liability under such a state of facts." In this case *Dwight, C.*, delivered a very elaborate and able dissenting opinion, from which some extracts have been quoted in another section; and the decision was expressly disapproved in *Wetherbee v. Partridge* (1899) 175 Mass. 185, 78 Am. St. Rep. 480, 53 N. E. 894.

On the ground that the "work contracted for was lawful and necessary for the improvement and use of the defendant's property," the negligence of a contractor or his employee in blasting out a ledge of rock which extended close up to the wall of a building on adjoining property was held not to be chargeable to his employer, who engaged him to excavate the lot preparatory to building thereon. *Berg v. Parsons* (1898) 156 N. Y. 109, 41 L. R. A. 391, 66 Am. St. Rep. 542, 50 N. E. 957, Reversing (1895) 90 Hun, 267, 35 N. Y. Supp. 780. *Gray, J.* (with whom agreed *Bartlett* and *Haight, JJ.*), dissented on the ground that there was evidence justifying the conclusion that the employer was culpable in engaging an incompetent contractor.

Where a team, which was standing in a street crossing the one in which the sewer was being constructed, was frightened by the noise of a blast fired by the contractors in the prosecution of the work of constructing a sewer, and the plaintiff, while attempting to control them, was injured, it was held that the defendant municipality was not liable. *Herrington v. Lansingburgh* (1888) 110 N. Y. 145, 6 Am. St. Rep. 348, 17 N. E. 728. The court said: "If there was any culpable carelessness which caused the injury to the plaintiff, it was that of the contractors. They had entire control of the work and the manner of its performance. They could choose their own time for firing the blasts, and select their own agents and instrumentalities. They could make the charges of powder large or small, and they could, in some degree, smother the blasts so as to prevent falling rocks and much of the noise of the explosion; or they could carelessly omit all precautions, and for the consequences of their negligence they alone would be responsible. If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given the notice; but the duty to give it did not devolve upon the village."

Recovery was denied in a case where the plaintiff was injured by a rock thrown out by a blast set off while the foundation for a house was being excavated by a contractor. *Hunt v. Vanderbilt* (1894) 115 N. C. 559, 20 S. E. 168.

A city is not liable for a death caused by a stone which was thrown up by a blast set off during the progress of the operations incident to the excavation of a waterworks trench by a contractor. *Logansport v. Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166.

A city which, as licensor, permits the board of public commissioners to construct a sewer

from the courthouse to a sewer of the city is not liable for damages sustained by the negligent and careless manner in which the contractor blasted rock. *Schnurr v. Huntington County* (1899) 22 Ind. App. 188, 53 N. E. 425.

A passer-by, who is struck by a stone thrown up by a blast set off by a contractor engaged in constructing a sewer for a city, cannot recover damages from the city. *Blumb v. Kansas* (1884) 84 Mo. 112, 54 Am. Rep. 87, holding that the cases relating to the duty of a city to keep its streets in a safe condition for public travel were not applicable as precedents.

For other cases in which the plaintiff was held not to be entitled to recover for injuries due to blasting, see *Tibbetts v. Knox & L. R. Co.* (1873) 62 Me. 437; *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

The supreme court of New York has held that a preliminary injunction will not issue, at the instance of a tenant, to restrain his landlord from blasting in an adjoining piece of land, where it appears that he personally has not been concerned in the blasting, but has employed an independent contractor to accomplish a certain result, not in itself wrongful, reserving to himself no control over the manner in which it shall be done. *Hill v. Schneider* (1897) 13 App. Div. 299, 43 N. Y. Supp. 1. The decision was put upon the ground that it did not appear that the defendant was proceeding to do something which might injure the petitioner *pendente lite*.

It has been held that art. 16, § 8, of the Pennsylvania Constitution of 1874 is merely intended to impose upon corporations having the power of eminent domain a liability for consequential damages caused by the taking of property, and cannot be so construed as to render a railway corporation having the power of eminent domain responsible for damages caused by the negligence of a contractor in blasting rocks so as to throw them on property adjacent to the right of way. *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

c. Negligence productive of dangerous conditions of a more or less permanent character.

1. In general.

From an examination of the note to *Jacobs v. Fuller & H. Co. post.* —, on *Liability of employer for injuries caused by the performance of work by independent contractor which is dangerous unless certain precautions are observed*, it is abundantly evident that, in many instances, the decisions there cited cannot be reconciled upon the facts with those which are reviewed in this subdivision. This remark is more especially applicable to the cases in which the injury was caused by an unguarded excavation or an obstruction on or near a highway; but the essential antagonism alluded to is also noticeable in other connections, as where the plaintiff was suing for an injury to a building caused by making an excavation near it, or for damages caused to his premises by a fire which spread after being lighted for the purpose of clearing the land of a contiguous proprietor. The inconsistency thus disclosed is, it would seem, due, principally, if not entirely, to the logical difficulty which is discussed in subd. III. of the note referred to.

65 L. R. A.

2. Work on railways.

Recovery has been denied under the following circumstances:

Where a laborer was injured by the derailment of a construction train, resulting from defects in the track and in the rolling stock. *St. Louis, Ft. S. & W. R. Co. v. Willis* (1888) 38 Kan. 330, 16 Pac. 728 (case turned largely on the question whether the particular section of the road on which the accident occurred had been turned over to the company, so as to bring the construction train under its control).

Where a bridge gave way under a train, while it was being constructed, and killed a servant of the contractor for its construction. *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163.

Where the servant of contractors for the construction of a railway was injured through breathing the exhalations from a poisonous mixture which they had applied to some timber to prevent it from decaying. *West v. St. Louis, V. & T. H. R. Co.* (1872) 63 Ill. 545.

Where, owing to the negligence of a contractor in constructing defective stock gaps, and throwing down fences, cattle strayed onto land adjacent to the track. *Alabama Midland R. Co. v. Martin* (1893) 100 Ala. 511, 14 So. 401.

Where a conductor of a street car was thrown against a pile of stones negligently left near the track by a contractor engaged to repair the pavement between the rails. *North Chicago Street R. Co. v. Dudgeon* (1896) 69 Ill. App. 57.

Where a horse sank through the earth between the pavement and a bridge laid over an excavation made in a street on which a railway was being constructed. *Hauser v. Metropolitan Street R. Co.* (1899) 27 Misc. 538, 58 N. Y. Supp. 286.

Where a horse struck his foot against some rails which had been deposited on a street, preparatory to their being used. *Fulton County Street R. Co. v. McConnell* (1891) 87 Ga. 756, 13 S. E. 828.

Where a horse was frightened by the flapping of canvas suspended under a trestle as a protection against the dropping of paint on the street, the accident being due to the negligence of the servants of a contractor employed to paint the trestle, in hanging the canvas so that it became loose. *McCann v. Kings County Elev. R. Co.* (1892) 46 N. Y. S. R. 327, 19 N. Y. Supp. 668.

Where workmen employed by a bricklayer contravened the orders of a railway company's engineer by excavating a road in such a manner as to cut into a drain, the result being that the water escaped onto the premises of an adjoining land owner. *Steel v. South Eastern R. Co.* (1855) 16 C. B. 550.

Where a young child was drowned in a pool of water formed by a heavy storm on the defendant's right of way, in a corner between one of its own embankments and one belonging to an intersecting line, the premises being still in possession of an independent contractor under an uncompleted contract. *Charlebois v. Gogebic & M. River R. Co.* (1892) 91 Mich. 59, 51 N. W. 812.

Where a contractor deposited wasted earth on land outside the right of way. *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

Where a contractor's workmen left down cer-

tain bars leading into plaintiff's field. *Clark v. Vermont & C. R. Co.* (1884) 28 Vt. 103.

Where a wire stretched on a street during the construction of a railway caused injury to a person passing along the street. *Sanford v. Pawtucket Street R. Co.* (1896) 19 R. I. 537, 33 L. R. A. 564, 35 Atl. 67.

In a very elaborately argued case the declaration alleged that the defendant had made a deep cut while its road was in process of construction, and had deposited the earth taken therefrom in such a manner as to dam up a small stream and form a pond near the plaintiff's house; that the defendant had also stationed near the house a camp of convicts whom it was using in the construction of the road, and permitted the filth accumulating in the sinks of the camp to flow therefrom and be deposited near the house, by reason of which the house became infected with noxious scents, malaria, and other substances injurious to health. The defense was that, if the acts so alleged were done at all, they were done by an independent contractor. The argument of plaintiff's counsel was that the building of a railroad necessarily results in a nuisance, unless certain precautions are taken to prevent it; that the low places by which the surrounding lands are drained, and from which the water is carried off, must be filled up, and, unless certain precautions are taken to provide an escape for the water, a nuisance necessarily results; and that the railroad company cannot escape liability by having the work done by an independent contractor. The court thus disposed of this argument: "If the premises of counsel are true, the conclusion might also be true; but, if a railroad is built properly, we do not think any nuisance will result from the building. The company, under its charter, had authority of law to do this work; and, when it contracted with the construction company, it was, of course, implied that the latter would do the work in a proper and lawful manner. 'A person employing another to do a lawful act is presumed, in the absence of evidence to the contrary, to have employed him to do it in a lawful and reasonable manner; and therefore, unless the parties stand in the relation of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the work is done.' 1 Redf. Railways, 6th ed. 542. Moreover, the evidence shows that in the very place where this nuisance is said to have occurred the railroad company had provided means which, if used, would have prevented the nuisance. The superintendent directed that a waste way should be placed there; but the contractor put in a pipe which the defendant claims was one of the causes of the nuisance, (1) by being too small to carry off the water in proper time, and (2) because it was not put upon the bed of the stream, but several inches above the bed, thereby causing the water to pond near the plaintiff's house. Nor would the other things which it is claimed caused the nuisance, to wit, the throwing up of the fresh dirt, the convict camp and the hog and horse lot, render the railroad company liable. It had lawful authority for excavating the hills and filling the bottoms in order to make its roadbed. And the placing of the convict camp and the hog and horse lot near the plaintiff's house was the act of the construction company, over which, it appears from the record, the railroad company had no power 65 L. R. A.

or control. So it will be seen that the work committed to the construction company was not wrongful *per se*, nor did it necessarily result in a nuisance, and therefore does not fall within the first exception to the general rule." *Atlanta & F. R. Co. v. Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277.

A street railway company is not liable for injuries received by a child which was drawn into a machine used for the manufacture of concrete by one who had contracted for the building of the road. *Chicago City R. Co. v. Hennessy* (1884) 16 Ill. App. 153. The court said: "The accident arose from the prosecution of work by the contractor purely collateral to the construction of the road. The company contracted with Holmes to build a designated cable system, with certain specified materials to be furnished by him, among which were engines, wire, concrete, etc. How or where the contractor should procure such materials was a matter with which the company had no concern. The contract did not provide how or where the concrete should be procured or mixed, much less that it should be mixed in a machine like the one which caused the injury; nor was Holmes the agent of the company in procuring and using the machine. The making of the concrete upon the street, and the use of the machine, were the idea and device of Holmes for his own convenience and benefit. The company could not interfere or control as to where he should procure or manufacture his materials, and he might manufacture them in the public street if the municipal authorities did not object. The use of the machine was not one of the natural contingencies which the company were required to anticipate, nor which it could have provided against. Its use was only subsidiary to the performance, by the contractor, of his undertaking."

A railway company is not liable for injuries resulting from the fact that a derrick furnished to a contractor for the purpose of unloading railway iron was permitted by him to get into a defective and dangerous condition. *King v. New York C. & H. R. Co.* (1876) 66 N. Y. 181, 23 Am. Rep. 37.

A railway company is not liable for the negligence of a servant of a contractor for the construction of a portion of its road in leaving on a highway one of a number of large stones which were to be used for the abutments of a bridge. *Pawlet v. Rutland & W. R. Co.* (1855) 28 Vt. 208.

In a case where a member of a train crew on a line built by a lumber company for its own use was injured as a result of certain logs slipping off of a car, and there was evidence tending to show that the loading was done by a contractor, it was held error to refuse to submit to the jury the question whether the accident was wholly caused by negligent loading. *Haley v. Jump River Lumber Co.* (1892) 81 Wis. 412, 51 N. W. 321, 950.

The assumption in all the cases above cited is that the acts of negligence were not done in the exercise of the charter powers of the company. As to liability of the railroad company for acts of an independent contractor where injuries result from nonperformance of the absolute duties of such company, see *note* to *Anderson v. Fleming*, 66 L. R. A. —.

3. *Construction of bridges, embankments, and dams.*

A municipality is not liable for injuries

caused by the collapse of a bridge while it is under construction. *Wood v. Watertown* (1890) 58 Hun, 208, 11 N. Y. Supp. 864.

The employer is not liable, where a contractor for the work of diverting a creek erected an embankment so defectively that it could not resist the action of the water which it was intended to confine. *Allen v. Hayward* (1845) 7 Q. B. 960, 4 Eng. Ry. & C. Cas. 104, 15 L. J. Q. B. N. S. 99, 10 Jur. 92.

On the ground that the work of dredging out a canal for a city was done by an independent contractor, the city was held not to be liable to one for the flooding of his fields thereby by the building of a dam with ut construction of a by-pass to carry off water, though the city had an inspector of the work, who located the dam. *White v. Philadelphia* (1902) 201 Pa. 512, 51 Atl. 332.

A person who has employed a competent architect to erect a dam is not responsible for injuries caused by its bursting while the work is in progress. *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345.

4. Construction of telegraph and telephone lines.

The principal employer is not liable where a child's hand is caught in a pulley used by a contractor for stringing telephone wires. *Vosbeck v. Kellogg* (1890) 78 Minn. 176, 80 N. W. 957.

No recovery can be had where the plaintiff was injured by falling into a hole dug in a public street by a railroad company engaged as an independent contractor in erecting a line of poles and wires for the defendant company. *Hackett v. Western U. Teleg. Co.* (1891) 80 Wis. 187, 49 N. W. 822.

5. Laying of pipe lines.

A gas company is not liable for injuries due to an explosion of gas consequent upon the negligence of a contractor's servant, who, in the course of the work of laying its pipes, undermined a pipe belonging to another company, and thus caused it to break. *Chartiers Valley Gas Co. v. Lynch* (1887) 118 Pa. 362, 12 Atl. 435; *Chartiers Valley Gas Co. v. Waters* (1888) 123 Pa. 220, 16 Atl. 423. Commenting on a charge of the trial judge which seemed to imply that, because the pipe of the other company was necessarily undermined, and this result was therefore contemplated by the contract, the employer was liable, for the reason that there was a necessary interference with the rights of others, the court pointed out that there was no necessary interference with the rights of others unless negligence existed. Both companies had their rights, and they were perfectly consistent with each other. In some jurisdictions it may be that this case would have been referred to the doctrine discussed in the note to *Jacobs v. Fuller & H. Co.* *post*, —, on *Liability of employer for injuries caused by the performance of work by independent contractor, which is dangerous unless certain precautions are observed*.

6. Construction of buildings.

Persons contracting for the erection of buildings have been held not responsible under the following circumstances:

Where an excavation for a party wall was so 65 L. R. A.

carelessly made that it collapsed. *Lawrence v. Shipman* (1873) 39 Conn. 586.

Where the excavation for a house is so negligently made as to injure a building on the adjacent premises. *Aston v. Nolan* (1883) 63 Cal. 269; *Crenshaw v. Ullman* (1893) 113 Mo. 633, 20 S. W. 1077; *Harrison v. Kiser* (1887) 70 Ga. 588, 4 S. E. 320. (See, however, *subd. VII. of note to Jacobs v. Fuller & H. Co.*, *post*, —, on *Liability of employer for injuries caused by the performance of work by independent contractor which is dangerous unless certain precautions are observed*.)

Where a floor fell in consequence of its being overloaded. *Dillon v. Sixth Ave. R. Co.* (1882) 16 Jones & S. 283, Affirmed in (1884) 97 N. Y. 627.

Where the servant of a contractor was injured by reason of the weakness of the floor of a building which was under construction. *Humpton v. Unterkircher* (1896) 97 Iowa, 509, 66 N. W. 776.

Where a wall fell on the servant of a person who had taken a subcontract for excavation work. *Hale v. Johnson* (1875) 80 Ill. 185.

Where a roof fell while it was being constructed. *Hearn v. Quillen* (1901) 94 Md. 39, 50 Atl. 402.

Where a wall fell on a workman while it was being erected. *Gallagher v. Southwestern Exposition Ass'n.* (1876) 28 La. Ann. 943; *Treadwell v. New York* (1861) 1 Daly, 128.

Where a building fell, owing to the defective manner in which it had been constructed. *Braidwood v. Bonnington Sugar Ref. Co.* (1866; Ct. of Sess.) 2 Scot. L. R. 152.

Where the iron columns and entablatures in a new building fell, owing to their not being sufficiently propped. *Peyton v. Richards* (1856) 11 La. Ann. 62.

Where plaintiff's property was injured by the fall of a derrick used in the construction of a building. *Prairie State Loan & T. Co. v. Dolg* (1873) 70 Ill. 52.

Where a wall was so defectively built that it was blown down before it was completed. *Benedict v. Martin* (1862) 36 Barb. 288.

A landlord was held not to be liable in an action for damages brought by the parents of a child who fell into a privy vault, which a contractor had dug on the demised property and left uninclosed for several months. *Wiese v. Kemme* (1897) 140 Mo. 289, 41 S. W. 797.

Where the cap blows out of the end of a steam supply pipe which is being put in by one contractor, and injures the servant of another contractor, the owner of the building is not liable, if the accident is due to poor material, defective workmanship, or bad management. *Jones v. Philadelphia Traction Co.* (1898) 185 Pa. 75, 39 Atl. 859.

A servant of the owner of a building under construction cannot maintain an action where he received an injury by reason of the negligence of the employees of contractors for the masonry of the building in overloading one of the upper floors with brick and stone. *McEnanny v. Kyle* (1887) 14 Daly, 268.

Nor where he was injured by falling down an elevator well left open and unguarded by the contractor's servants. *Conway v. Furst* (1895) 57 N. J. L. 645, 32 Atl. 380.

Nor where he was injured by the fall of a heavy post, the accident being due to the negligent construction of the building. *Mickey v. Walter A. Wood Mowing & Reaping Mach. Co.*

(1894) 77 Hun, 559, 28 N. Y. Supp. 918, first Appeal (1893) 70 Hun, 456, 24 N. Y. Supp. 501.

A man in the employ of one who has taken a contract for the mason work on a building cannot recover damages from the principal employer for injuries caused by defects in a scaffold which had been erected for the use of one of the carpenters, where it is shown that the employer refused to provide a scaffold, and the contractor was told that the scaffold already set up was not to be used unless it was strengthened. *Larock v. Ogdensburg & L. C. R. Co.* (1882) 26 Hun, 382.

7. Repairing or reconstruction of buildings.

The rule applicable to buildings which are being reconstructed or repaired is in no way different from that which prevails with respect to buildings under construction. Hence, where the owner of a building contracts with a builder to rearrange the building according to certain plans, and, while he is in possession, plaintiff, in the employ of a company doing some electric work in the building, falls through a hole in the floor which is concealed by rubbish, the owner is not responsible for the resulting injury. *Hogan v. Arbuckle* (1902) 73 App. Div. 501, 77 N. Y. Supp. 22, Following *Murphy v. Altman* (1898) 28 App. Div. 472, 51 N. Y. Supp. 106.

Nor is he liable where his house, while it is being raised up for an addition beneath, falls upon the house of the adjoining owner. *Connors v. Hennessey* (1873) 112 Mass. 96.

Nor where an employee of an independent contractor engaged in tearing down a building was injured by the sudden collapse of the building owing to the contractor's having overweighted one of the floors with brick. *Cullom v. McKelvey* (1898) 28 App. Div. 46, 49 N. Y. Supp. 669.

Nor where one of the employer's tenants, while passing through the hall, struck his foot against a piece of plank which had been laid down to protect some tiling just put in by a contractor. *Mahon v. Burns* (1894) 9 Misc. 223, 20 N. Y. Supp. 682, Affirmed in (1895) 13 Misc. 19, 34 N. Y. Supp. 91.

Nor where the injury was caused by the negligence of the servant of a contractor for the reconstruction of a staircase in nailing cleats onto the steps in such a manner as to cause the plaintiff to fall. *Lonthan v. Hewes* (1902) 138 Cal. 116, 70 Pac. 1065.

Nor where the injury was caused by the negligence of the servants of a plumber, who, while engaged in repairing water pipes, negligently left open a trap door. *Bennett v. Truebody* (1885) 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 320; *Burns v. McDonald* (1894) 57 Mo. App. 599.

Nor where the injury resulted from leaving an opening in a temporary plank sidewalk laid down while excavations were being made underneath. *Frasal v. McDonald* (1898) 122 Cal. 402, 59 Pac. 139, 772.

Nor where the workmen of a person employed to repair the wall of a house dug up the ground, and left it so piled that, when a storm occurred, water was turned into the cellar of the adjoining house. *Dutton v. Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N. E. 405.

Nor where a ladder was so placed by workmen engaged in repairing a roof that it was blown down by the wind. *McCarthy v. Second Parish* (1890) 71 Me. 318, 36 Am. Rep. 320.

Nor where a gas fitter, by neglecting to turn

off the gas, caused an explosion. *Rapson v. Cubitt* (1842) 9 Mees. & W. 710, 6 Jur. 606, Car. & M. 64, 11 L. J. Exch. N. S. 271.

Nor where a drainpipe burst owing to the negligence of the contractor's servants, and damaged a tenant's goods. *Jefferson v. Jameson & M. Co.* (1897) 165 Ill. 138, 46 N. E. 272, Reversing (1895) 60 Ill. App. 587.

Nor where a cistern in a house was caused to overflow through the negligence of a plumber. *Blake v. Woolf* [1898] 2 Q. B. 426, 67 L. J. Q. B. N. S. 813.

Where the owner of a building which has been damaged by fire turns it over to an independent contractor to be repaired, he is not liable for injuries received by the servant of a subcontractor, who, in groping about to find a door leading to a staircase, opens by mistake a door leading to an elevator shaft, and falls down it. Under such circumstances the injured person does not enter the building under an implied invitation from the owner, and the latter cannot be held liable on the ground of the confusing arrangement of the interior. *Butler v. Lewman* (1902) 115 Ga. 752, 42 S. E. 98 (construing Ga. Civ. Code, §§ 3818, 3819).

There was held to be no evidence of liability on the part of the defendant, the owner of a house, where the workmen of the contractor, in pulling down the front wall of the house, removed a breastsummer which was inserted in the party wall between the defendant's and plaintiff's houses, without taking any precautions by shoring or otherwise, the result being that the front wall of the plaintiff's house fell. *Butler v. Hunter* (1862) 7 Hurlst. & N. 826, 31 L. J. Exch. N. S. 214, 10 Week. Rep. 214. *Wilde, R.*, considered that "the absence of a shoring is like the absence of a proper boarding, or any of the ordinary precautions which belong to the careful taking down of a wall."

This decision, however, was distinctly disapproved by Lord Blackburn in *Dalton v. Angus* (1881) L. R. 6 App. Cas. 740, 50 L. J. Q. B. N. S. 630, 44 L. T. N. S. 844, 30 Week. Rep. 196, and in *Hughes v. Percival* (1883) L. R. 8 App. Cas. 443, 446, 447, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772. See subd. VII. of note to *Jacobs v. Fuller & H. Co. post*, —, on *Liability of employer for injuries caused by the performance of work by independent contractor, which is dangerous unless certain precautions are observed*.

8. Demolition of buildings.

The owner of a building, having no actual knowledge of the condition of its walls, or how the work of removing one of such walls is being done, is not liable for the death of a woman and child on an adjoining lot, caused by the fall of such wall consequent upon an independent contractor's negligence in removing the roof from the building without properly supporting the wall. *Engel v. Eureka Club* (1893) 137 N. Y. 100, 38 Am. St. Rep. 692, 32 N. E. 1052, Reversing (1892) 45 N. Y. S. R. 940, 18 N. Y. Supp. 945, which was a reiteration of the judgment in (1891) 59 Hun, 593, 14 N. Y. Supp. 184. The court said: "It is the general duty of the owner of premises to keep the walls of his building in a safe condition, so that they will not endanger his neighbor by falling; and, if he negligently omits its performance, and his neighbor is injured, the injury is actionable. *Mullen v. St. John* (1874) 57 N. Y. 567, 15 Am. Rep. 530.

But the evidence is undisputed that the wall was safe, and would not have fallen if it had been left as it was when the contract was made,—supported by the roof. It was not a menace in its existing condition. It became dangerous only in consequence of the manner in which the contractor proceeded to take it down. It would probably have been less liable to fall, although deprived of the support of the roof, if the wall had been in perfect repair when the contractor entered upon the work. But we perceive no causal connection between the neglect to repair and the injury to the plaintiff's intestate. The sole cause in a legal sense was the negligence of the contractor in omitting to do what he was bound to do. The performance of his duty would have prevented the injury."

For a case which conflicts with this decision, see subd. VII., h, of note to *Jacobs v. Fuller & H. Co. post*, —, which deals with the performance of work which is dangerous unless certain precautions are observed.

A tenant whose premises are exposed and goods injured as a result of the manner in which a man contracting with the landlord for the removal of the adjoining house performed his work cannot recover damages from the landlord *Rotter v. Goerlitz* (1890) 16 Daly, 484, 12 N. Y. Supp. 210.

9. Work performed on streets and highways.

The defendants were employed by A to pave a district. They contracted with B to pave one of the streets. B's workmen, in the course of paving the street, left some stones at night in such a position as to constitute a public nuisance, and the plaintiff was injured by falling over these stones. No personal interference of the defendants with, or sanction of, the work of laying down the stones was proved. It was held that the defendants were not liable. *Overton v. Freeman* (1852) 11 C. B. 807, 16 Jur. 63, 21 L. J. C. P. N. S. 52, 3 Car. & K. 52. Maule, J., said: "I apprehend that, if the defendants had been present, and directed or sanctioned the doing of the act complained of, they would have been responsible for it. But here they are sought to be charged simply on the ground that they had contracted with the parish authorities to do the work, in the performance of which by their subcontractor the negligence happened which has given rise to the plaintiff's misfortune." *Creswell, J.*, said: "The defendants, not having personally interfered or given any directions as to the performance of the work, but merely having contracted with a third person to do it, cannot be held responsible for an unauthorized and unlawful act of such third person in the course of it. It is quite true, as was said in *Bush v. Stelman* (1799) 1 Bos. & P. 404, that the original contractor might be liable, equally with the subcontractor, if he in any manner directed, or countenanced the doing of, the act complained of. But there is no pretense for so charging the defendants here: They contracted with Warren to lay down the curb stone in a particular way,—not to so place the stones, and so negligently leave them, as to occasion injury to the plaintiff. If the act contracted to be done would itself have been a public nuisance, of course the defendants would have been responsible." *Williams, J.*, said: "The plaintiff's counsel has rested his argument upon a broad and intelligible ground, *viz.*, that the act complained of is a public nuisance." 65 L. R. A.

Some of the cases, it is true, would seem to justify that distinction; but it seems to me that we cannot give any weight to it without overruling *Knight v. Fox* (1850) 5 Exch. 721, 20 L. J. Exch. N. S. 9, 14 Jur. 963.

The defendants employed A for a sum of money, to fill in the earth over a drain constructed for them across a highway from their house to the common sewer, the defendants finding the carts, if necessary, to remove the surplus earth, which were to be filled by A. A filled in the earth, but left it so heaped above the level of the road that, there being neither light nor signal, the plaintiff by night drove his carriage against it, and sustained injury therefrom. The only evidence of interference or control on the part of the defendants was, that one of them, a few days before the accident, and when the work was incomplete, had seen the earth heaped over a part of the drain as it afterwards remained. It was held that there was no evidence of their liability, inasmuch as the wrong complained of was a public nuisance by A, which the defendants (whether A was their servant or only a contractor) had not authorized him to commit, having merely directed generally the doing of an act which might have been done without committing a public nuisance. *Penchey v. Rowland* (1853) 13 C. B. 182, 17 Jur. 764, 22 L. J. C. P. N. S. 81. "Unless you can show," said Maule, J., "that the work was so done that the defendants might have been indicted for obstructing a public highway, they are not liable in this action. I am satisfied that the decision in *Overton v. Freeman* (1852) 11 C. B. 807, 16 Jur. 63, 21 L. J. C. P. N. S. 52, 3 Car. & K. 52, was right, though I was afterwards less satisfied with the reasons which I gave. . . . The true result of the evidence here was that the defendants had nothing whatever to do with the wrongful act complained of. They employed somebody to do something, which might be done either in a proper or an improper manner; and he did it in a negligent and improper manner, and injury resulted to the plaintiff. That is the substance of the evidence. The question is, whether the evidence fairly justified a verdict for the defendants. We have no right to look with extreme scrupulosity in cases of this sort, to see if there is not some grain of evidence the other way. If the whole evidence, taken together, is not such as to warrant a jury in finding for the plaintiff, practically speaking there is no evidence. I am of opinion that, if the jury had, upon this evidence, found that the defendants did the wrong complained of, their verdict would have been set aside as not being warranted by the evidence. There was, in truth, no evidence for the practical purpose in hand."

A house owner is not liable for injuries received by a passer-by, who, owing to the negligence of a contractor employed to repair a footpath, falls into the area underneath the footpath. *Du Pratt v. Lick* (1869) 38 Cal. 691 (intrinsic danger of work not discussed).

A house owner is not liable, where a contractor employed to put down a stone sidewalk falls into an unguarded excavation made in the course of the operation. *Schweickhardt v. St. Louis* (1876) 2 Mo. App. 571. (The possibility of the plaintiff's being entitled to recover on the ground of the intrinsic danger of the work was not discussed. As to this phase of the subject, see subd. VI. of the note to *Jacobs v. Fuller & H. Co. post*, —, on *Liability*

of employer for injuries caused by the performance of work which is dangerous unless certain precautions are observed.)

An abutting landowner cannot be held liable, on the ground of the work's necessarily or probably involving danger, for injuries caused by an obstruction left in the street by one who had contracted to lay a sidewalk for him. *Independence v. Slack* (1895) 134 Mo. 66, 34 S. W. 1094.

A city is not liable for injuries received by the servant of a contractor, as a result of the defective shoring of the sides of a trench excavated for a sewer. *Foster v. Chicago* (1902) 197 Ill. 264, 64 N. E. 322, *Affirming* (1901) 96 Ill. App. 4.

A servant of a contractor cannot recover from the employer for injuries caused by the collapse of the sides of a ditch dug for laying a pipe line. *Vincennes Water Supply Co. v. White* (1890) 124 Ind. 376, 24 N. E. 747.

In a case where the plaintiff's intestate was struck and killed by a fragment of rock thrown up by a blast set off during the progress of the work of excavating a trench for a pipe line, it was held to be error to charge the jury on the theory that the construction of waterworks was a nuisance, and that it was therefore the duty of the city to impose on the contractor stipulations requiring him to take necessary precautions, or to abate the danger, if its attention was afterwards called to the dangerous conditions. *Logansport v. Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166.

In a leading New York case the defendants, who had received a license from the authorities to construct a public street at their own expense, were held not to be liable for an injury received by one who drove at night into an open sewer which had been left unguarded and unlighted. *Blake v. Ferris* (1851) 5 N. Y. 48, 55 Am. Dec. 304. In *Storrs v. Utica* (1858) 17 N. Y. 104, 72 Am. Dec. 437, *Comstock, J.*, distinguishes this case from those in which the liability of a municipal corporation for the defective condition of a street is in question, but takes occasion to express a doubt whether the decision was correct in view of the facts. See subd. VI. b, of note to *Jacobs v. Fuller & H. Co. post*, —, on *Liability of employer for injuries caused by the performance of work by independent contractor which is dangerous unless certain precautions are observed*. There would certainly seem to be good ground for contending that the position of a licensee of a municipality under such circumstances can be neither more nor less favorable than that of the municipality itself. But the decision is in line with several of those cited below.

Where W. contracted with the P. Gas Company to dig a trench, the work to be under the supervision of the company's engineer, and W. sublet the work to D., and, in consequence of D.'s negligence in not guarding the excavation, a foot passenger was injured, it was held that D., alone, was liable. *Wray v. Evans* (1875) 80 Pa. 103, *Approved in Edmundson v. Pittsburgh, M. & X. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

So, also, the principal employer was held not to be responsible where the plaintiff had fallen into an open trench which had been dug in a street by permission of the authorities, and left unprotected by the contractor. *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113. (It should be noticed that the trench in this case, 65 l. R. A.

having been opened under a license, did not constitute a nuisance.)

In a later case arising out of the same accident, the municipality which had granted the license was held not liable, and the general rule was laid down, that such a corporation, when it grants to one a license for a purpose proper and lawful, is not liable to one injured by reason of the misuse or abuse of that license, whether the same be by an independent contractor for the work from the licensee, or by the licensee himself. *Susquehanna Depot v. Simmons* (1886) 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434. The court said: "It is settled that the defendant had the right to grant the license to dig the ditch complained of; in this it did nothing unlawful. How, then, is it responsible for the negligent act of Florence? It certainly cannot be contended that its responsibility would be greater in a case such as this, than if Florence [the contractor] had been acting under a contract with the borough instead of Dr. Smith [the principal employer]. Yet under such a contract it would not have been liable. His employment was independent of the control and direction of the person with whom he had contracted. He was in the lawful possession of the street in which the water pipes were to be laid, and, as was said in *Erle v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642, the borough could not fill up the trench which he dug, or erect barriers which he might not tear down if they obstructed his work. . . . If, as was said in *Smith v. Simmons*, the excavation had been *per se* a nuisance, the case would be different, for in that event the public authorities would have been bound to abate it as soon as they had knowledge of the obstruction, but not being a nuisance, but lawful, the borough cannot be held for an accident happening thereby, and Florence alone must be regarded as responsible for the injury resulting to the plaintiff from his neglect."

Liability has been denied where a horse was injured by stepping into a trench which was being dug in an alley to connect defendant's drain with a private sewer belonging to his neighbor. *Zimmerman v. Baur* (1894) 11 Ind. App. 607, 39 N. E. 299.

And where a foreman in the employ of the city was knocked off of his wagon by a "coal run" built across a street for the purpose of unloading coal from a barge. *Davie v. Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395.

A municipal corporation which has employed a contractor to execute the various kinds of work mentioned in the following paragraphs is not liable under the circumstances there indicated.

Where the grading of a street was done so carelessly as to cause the surface water and sewage to back up and accumulate on the plaintiff's premises. *White v. New York* (1897) 15 App. Div. 440, 44 N. Y. Supp. 454.

Where a pile-driver hammer was left in such a position as to frighten a horse which was being driven on a highway under repair, the consequence being that the driver was injured. *Howarth v. McGugan* (1893) 23 Ont. Rep. 396.

Where a foot passenger stepped into a hole left open near the curbing while a sewer was being constructed. *Charlock v. Freel* (1891) 125 N. Y. 357, 20 N. E. 262, *Affirming* (1888) 50 Hun. 395, 3 N. Y. Supp. 226.

A highway board instructed its surveyor to

employ one S., a contractor, to repair a road. In the course of the work, with which the board did not interfere, the servants of S. left stones on the highway at night, without placing a light to show where they were, and a traveler drove his gig against the obstruction, and was injured. *Reid v. Darlington Highway Board* (1877; Q. B. D.) 41 J. P. 581. In the very brief judgment delivered for the court by Lush, J., it was held that there was no evidence of negligence on the part of the highway board or its surveyors. The precise rationale of this decision is not clear from the report, which merely mentions that plaintiff's counsel argued that the contractor's men were servants of the board.—a contention manifestly untenable. Neither the court, nor the counsel, adverted to the possibility of maintaining an action on the ground that the duty of the board to keep the highway safe for travel was primary and nondelegable. (As to this phase of the subject, see subd. IV. of note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where the injuries result from nonperformance of absolute duties of the employer.*)

In a Newfoundland case, where the court's conclusion was that there was no statutable obligation on the part of the board of works to keep a certain road in repair, the board was held not liable for an injury to a person who drove against a heap of gravel which had been left in the road through the negligence of one who had contracted for its repair. *Duchemin v. Board of Works* (1880) Newfoundland Rep. (1874-1884) 236. (This decision is in conflict with the American cases cited in subd. VI. of note to *Jacobs v. Fuller & H. Co. post*, —, on *Liability of employer for injuries caused by the performance of work by an independent contractor which is dangerous unless certain precautions are observed.*)

In Pennsylvania a municipality has been held not to be liable for an injury received by a person who fell into an open and unguarded sewer (Painter v. Pittsburgh [1863] 46 Pa. 213; Erie v. Caulkins [1877] 85 Pa. 247, 27 Am. Rep. 642); nor where the injury was received by a person who turned aside to avoid a pile of earth on a pavement, and fell into a trench dug for the purpose of laying a curbstone (Eby v. Lebanon County [1895] 166 Pa. 632, 31 Atl. 332). See also *Susquehanna Depot v. Simmons* (1886) 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434, as stated *supra*. These decisions are in conflict both with those reviewed in the above-referred to note to *Jacobs v. Fuller & H. Co. post*, —, and with those reviewed in subd. IV. of the note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from non-performance of absolute duties of employer*, and are contrary to the weight of authority.

10. *Work done on premises adjacent to streets and highways, and affecting the safety thereof.*

Where a proprietor of a house contracted with a builder to execute certain repairs, and the builder made a subcontract for the plaster work, it was held that neither the proprietor nor the principal contractor was liable for injuries caused by the upsetting of a vehicle, which resulted from the negligence of the subcontractor in leaving a heap of lime in the street, without any fence or protection, outside the space which

had been duly set apart, fenced in, and lighted by the principal contractor, in accordance with the provisions of a police act. *M'Lean v. Russell* (1850) 12 Sc. Sess. Cas. 2d series, 887, 22 Sc. Jur. 394. Lord Fullerton said: "Here there was nothing hazardous; and if a party employed to perform the very safe operation of plastering a house executed it in a dangerous manner, he, only, is blameable." Noticing the contention that there was a constructive *culpa* in employing careless persons, Lord Mackenzie said: "It is perfectly vain to say that any such blame can attach to a man who employs responsible tradesmen to execute harmless repairs on his house, or in these persons contracting with another to do part of the work."

Abutting landowners have also been held not liable under the following circumstances:

Where a firm of masons employed to do the brickwork on a building creates an obstruction in the adjacent street, while the work is in progress. *Richmond v. Sitterding* (1903) 101 Va. 354, ante, 445, 43 S. E. 562.

Where the plaintiff was injured by driving on to a pile of planks left unlighted on a road leading to a bridge over a canal. *Weber v. Buffalo R. Co.* (1897) 20 App. Div. 292, 47 N. Y. Supp. 7.

Where a wagon was overturned by a bank of earth left on a road during the progress of excavation work. *Lancaster Ave. Improv. Co. v. Rhoads* (1887) 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852.

Where a person using a street was injured by an unguarded and unlighted heap of material deposited in the street by a subcontractor for the construction of a building. *Aldritt v. Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N. W. 741 (principal contractor was defendant).

Where lumber purchased by a city was negligently piled in the street by the vendors. *Evansville v. Senhenn* (1898) 151 Ind. 42, 41 L. R. A. 728, 734, 68 Am. St. Rep. 218, 47 N. E. 634, 51 N. E. 88.

Where a person employed to haul logs left some of them on a highway, thereby creating a dangerous obstruction. *Manchester v. Warren* (1893) 67 N. H. 482, 32 Atl. 763.

It has also been held that no action was maintainable under the following circumstances:

Where a piece of timber fell on a passer-by while it was being hoisted by a derrick extending over the footway. *Vanderpool v. Husson* (1858) 28 Barb. 196 (such a derrick was declared not to be a nuisance).

Where a derrick used for setting a marble front on a building fell on a passer-by. *Potter v. Seymour* (1859) 4 Bosw. 140.

Where the iron front of a building fell upon and killed a slave. *Peyton v. Richards* (1856) 11 La. Ann. 62.

Where the cornice and a portion of the front wall of a building in course of erection fell on a passer-by. *Deford v. State* (1868) 30 Md. 179.

Where a fence built around an excavation in the sidewalk was blown down, and struck a passer-by. *Martin v. Tribune Assn.* (1883) 30 Ill. 391. The court said: "The structure being lawful, all the acts necessary to be done in completing it were collateral to the undertaking. If the fence was insufficient, or if the contractor went beyond the permit in obstructing the street, these acts are to be chargeable to the persons who did them."

Where a piece of scaffolding used by a me-

chanic in making repairs on a building was blown down by the wind, and injured a passer-by. *Hexamer v. Webb* (1886) 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755.

Where the injury was caused by falling upon a ridge of ice formed upon the defendant's sidewalk by the negligence of the employees of a contractor engaged in pumping water from his cellar. *Larow v. Clute* (1891) 60 Hun, 580, 14 N. Y. Supp. 616.

Where a person walked into a coal hole left open in the pavement. *Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699.

Where an excavation in the footway in front of a landowner's premises was not properly guarded. *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875; *Ryan v. Curran* (1878) 64 Ind. 345, 31 Am. Rep. 123 (answer alleging that the defendant's lot and appurtenances were, at the time of the injury, in the exclusive possession of the contractor, held to be sufficient); *Allen v. Willard* (1868) 57 Pa. 374.

Where a person fell into the opening made by removing, under a license from the civil authorities, a grating over an area. *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334. The decision last cited was disapproved by the Supreme Court of the United States in *Chicago v. Robbins* (1862) 2 Black, 418, 17 L. ed. 298 (1866) 4 Wall. 657, 18 L. ed. 427. But in another case involving very similar circumstances the Illinois court arrived at the same conclusion, and stated its position as follows: "While the contractor is in possession of that part of the premises upon which the excavation is to be made, with the exclusive control of the work, it becomes an incident to his undertaking to so do the work as to be reasonably safe for passers-by, observing due care for themselves; and that duty, it is declared, includes the erection and maintenance of suitable safeguards about all excavations, at all dangerous. Under circumstances where it becomes obligatory upon the contractor to provide safeguards around such excavations, the owner of the premises is not responsible for his failure or neglect of duty in that regard. Nor does it change the rule, the owner may have some work to perform about the building, where it is wholly disconnected with that which causes the injury." *Kepperly v. Ramsden* (1876) 83 Ill. 354.

Where the owner of premises, having occasion to construct an improvement in his cellar which is required by the board of health, employs a contractor, who is bound to do all work and furnish all materials, the employer is not liable for injuries to a pedestrian from colliding with a barrel placed over an open coal hole in the sidewalk, and kept there by the contractor to supply necessary ventilation for the prosecution of the work. *Maitble v. Bolting* (1893) 6 Misc. 339, 26 N. Y. Supp. 903.

The foregoing cases which relate to dangerous conditions in footpaths are more or less in conflict with those cited in subd. VI. of note to *Jacobs v. Fuller & H. Co. post*, —, on *Liability of employer for injuries caused by the performance by independent contractor of work which is dangerous unless certain precautions are observed*; and would doubtless have been differently decided in some jurisdictions.

Unless the obligation to place a boarding in front of a building under erection is imposed by a statute applicable to the locality in which the work is being executed, the owner of the building is not liable for injuries resulting from 65 L. R. A.

the fact that the contractor, by whom it was being erected, omitted to put up the boarding. *Crawford v. Peel* (1887) Ir. L. R. 20 C. L. 332. In this case *Murphy, J.*, was of opinion that, even if a breach of a statutory obligation had been proved, the owner's liability did not extend beyond the penalty imposed. The effect of applying this principle would, of course, have been to render immaterial the question whether the work was being done by an independent contractor or not. But the view taken by the learned judge seems to be in conflict with the rule established by the cases cited in §§ 799, 800, of *Labatt's treatise on Master & Servant*.

A contractor for the erection of a building is not liable for the penalty imposed by a city ordinance which forbids any person to place, leave, or deposit in the street any material, except such as is permitted by ordinance or resolution, if it appears that the ordinance was infringed by his subcontractor, and there was no necessity for putting the material in the street. *Buffalo v. Clement* (1892) 19 N. Y. Supp. 846.

11. Scavenging work.

The defendant city had made a contract with a party for the removal of the carcasses of any animals which might die or be killed within the city limits. On one occasion, after a large number of mules had been destroyed by a fire, the mayor, in order to obviate the nuisance which would have resulted from conveying the carcasses through the streets to the reduction works of the contractor, arranged with the contractor's servant to have them thrown into the *Missouri* river. This servant took a road to the river bank where it was more convenient of access, and threw the carcasses into the river at a place where it had temporarily overflowed and concealed a quarry belonging to the plaintiff. The current did not catch them, and they sank into the quarry, the result being that the plaintiff could not reopen it. For the injury so caused, the city was held not to be liable. *Hillsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352.

12. Work in harbors.

In an action against commissioners appointed by a local act (5 & 6 Vict. chap. 111), commissioners were appointed for improving a harbor, and, with the sanction of the ballast board, empowered to exhibit lights or sea-marks for the guidance of ships navigating that harbor. It was held that the contractor employed to execute the work was guilty of negligence in not obtaining, through the commissioners, the sanction of the ballast board to set up lights on the end of piles driven during the progress of the operations, and that the commissioners were not liable for damage sustained by a vessel owing to the want of such lights. *Gilbert v. Halpin* (1858; Exch. Ct.) 3 Ir. Jur. N. S. 300, *Pigot, C. B.*, dissenting. This decision was put on the broad ground that it was the duty of the contractor, either to apprise the employee that the work had reached the stage at which it was necessary to have lights to prevent accidents, or to put the lights out himself. The inference drawn was that, as the contractor had not performed this duty, he was the only culpable party against whom the injured person could proceed. This case was decided before the evolution of the doctrine discussed in subtitle V., and at the present day the conclusion of a court

with regard to the same facts would possibly be different.

13. *Excavation work.*

A landowner is not liable where a subcontractor so carelessly executed a contract for the removal of certain earth and rock from the defendant's vacant lot that a stable belonging to an adjoining landowner was injured. *King v. Livermore* (1876) 9 Hun, 298, Affirmed in (1877) 71 N. Y. 805.

A person employing a contractor to haul sand from one designated spot to another is not liable for his negligence in so digging the sand as to form a dangerous bank which caved in and injured a young child. *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376.

14. *Work involving the use of fire for the destruction of timber.*

A landowner is not liable where a person employed to clear land set fire to some of the brushwood, and the fire spread to the premises of an adjoining landowner. *Ferguson v. Hubbell* (1884) 97 N. Y. 507, 49 Am. Rep. 544.

In several cases it has been held that a railway company is not liable for injuries caused by fire which spreads to adjoining land from the timber or brushwood which a contractor is burning on its right of way. *Woodhill v. Great Western R. Co.* (1855) 4 U. C. C. P. 449; *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059; *Callahan v. Burlington & M. River R. Co.* (1867) 23 Iowa, 562.

In one case it was laid down that a railway company cannot, under such circumstances, be held liable, as a matter of law, and that the propriety of imputing such liability depends upon whether, under the given circumstances, the burning of the brush would be obviously dangerous to such landowners, or whether the circumstances were such that the operation created no danger, except in so far as it might arise from the careless manner in which the work should be done. *St. Louis, I. M. & S. R. Co. v. Yonley* (1890) 53 Ark. 503, 9 L. R. A. 604, 13 S. W. 333, 14 S. W. 800.

No action is maintainable against a railway company, where a subcontractor cuts a road through the plaintiff's premises, outside the right of way, and set fires, which, through their negligence spread and burn the plaintiff's timber. *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430.

A municipality is not liable where fire spreads from timber which is being burnt on a road by a contractor. *Carroll v. Plympton* (1860) 9 U. C. C. P. 345.

A town which enters into a contract with an individual for the repair of a highway, including the destruction by fire of brush which has theretofore been cut and piled, is not liable for damages caused by the negligence of said contractor when burning the brush. *Shute v. Princeton Twp.* (1894) 58 Minn. 337, 59 N. W. 1050.

For cases in which the defendant was held liable under similar circumstances for the reason that the work was intrinsically dangerous, see subd. VII. of note to *Jacobs v. Fuller & H. Co. post*. — on *Liability of employer for injuries caused by the performance of work by independent contractor which is dangerous unless certain precautions are observed.* 65 L. R. A.

15. *Work in mines.*

The owner or lessee of a mine, who has made a contract for its operation by another person upon such a footing that the latter is put in full control of the work, and charged with the duty of seeing that the appliances which are used are kept in safe condition, is not liable to a servant of the contractor who is injured by the breaking of the rope by which the cage is lowered and hoisted. *Shaw v. West Calder Oil Co.* (1872; Ct. of Sess.) 9 Scot. L. R. 254; *Lendberg v. Brotherton Iron Min. Co.* (1889) 75 Mich. 84, 42 N. W. 675.

Liability has also been denied under the following circumstances:

Where the roof of a drift, being left unsupported, fell on a laborer in the employ of a person operating the mine under contract. *Smith v. Belshaw* (1891) 89 Cal. 427, 26 Pac. 834; *Samuelson v. Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499.

Where the mouth of a pass leading from one of the levels in a mine to a lower level was left uncovered and unlighted owing to the negligence of a person operating the mine under a contract. *Martin v. Sunlight Gold Min. Co.* (1896) 17 New So. Wales L. R. 364.

Where a servant of a contractor engaged in sinking an air shaft is injured by an explosion of gas. *Welsh v. Lehigh & W. Coal Co.* (1886; Pa.) 5 Atl. 48; *Welsh v. Parrish* (1892) 148 Pa. 599, 24 Atl. 86.

16. *Hauling of timber.*

Liability has been denied in a case where a pile of lumber was so negligently erected by a contractor that it toppled over and fell into an adjoining lot, thereby causing the death of a man. *Andrews v. Boedecker* (1885) 17 Ill. App. 213.

The employer of a man who has contracted to deliver logs at a designated point on a river or elsewhere is not liable, where they are so negligently driven that they lodge and form a jam against a bridge, the result being that it is carried away (*Pierrepoint v. Loveless* [1878] 72 N. Y. 211; *Road Dist. No. 4 v. Pelton* [1901] 129 Mich. 31, 87 N. W. 1029); nor where, owing to an unreasonable use of the employer's dam, the lands of a third person are overflowed (*Carter v. Berlin Mills Co.* [1876] 58 N. H. 52, 42 Am. Rep. 572); nor where the logs are jammed so as to create an obstruction in a navigable river (*Moore v. Sanborn* [1853] 2 Mich. 519, 50 Am. Dec. 209 [nuisance held not to be a necessary consequence of the work contracted for]); nor where a boom of logs which is to be towed across an inlet of the sea is insecurely fastened, and, being set drifting by a storm, is driven against the piles supporting a house (*Easter v. Hall* [1895] 12 Wash. 160, 40 Pac. 728).

17. *Operation of ferries.*

A municipality is not liable, where the lessee of its ferry neglects to see that the wire rope by which it is operated is kept in safe condition. *Duncan v. Magistrates of Aberdeen* (1877; Ct of Sess.) 14 Scot. L. R. 603.

18. *Loading or unloading of ships.*

The lessee of a dock is not liable for injuries caused by the fall of a shoot which had been negligently set up by a stevedore's subcontract-

or. Woodward v. Peto (1862) 3 Fost. & F. 389.

A shipowner is not liable for injuries received by a servant of a stevedore through the negligence of his fellow servants in failing to replace a grating over a hatchway (Dwyer v. National S. S. Co. [1880] 17 Blatchf. 472, 4 Fed. 493); or in exposing a trimming hatch by the removal of dunnage (The Wm. F. Babcock [1887] 31 Fed. 418).

In the absence of notice, actual or constructive, of the defect, a shipowner is not liable for injuries received by the servant of a stevedore, as a result of the fact that an iron wheel belonging to the hoisting apparatus had become weakened, owing to wear and tear, and the want of oiling. Riley v. State Line S. S. Co. (1877) 29 La. Ann. 791, 29 Am. Rep. 349.

d. Acts constituting a trespass.

The cases presented here are those in which the employer was held not to be liable for the reason that the acts of wilful trespass from which the injuries resulted were collateral to the performance of the contract involved. For the cases in which it has been held that the trespass was not collateral to, but was directly involved in, the performance of the contract, see subd. IV. of note to Thomas v. Harrington, post, —, on *Liability of employer for acts of independent contractor where the injury was the direct result of the work contracted for.*

Railway companies have been held not to be liable under the following circumstances:

Where the servants of a contractor for the construction of its road threw down the fences of an abutting landowner. Clark v. Hannibal & St. J. R. Co. (1865) 36 Mo. 203; McKinley v. Chicago, S. F. & C. R. Co. (1890) 40 Mo. App. 449; St. Louis, A. & T. R. Co. v. Knott (1891) 54 Ark. 424, 16 S. W. 9; Chicago, R. I. & P. R. Co. v. Ferguson (1893) 3 Colo. App. 414, 33 Pac. 694.

Where wasted earth, which had been taken from an excavation was deposited on land outside the right of way. Hughes v. Cincinnati & S. R. Co. (1883) 39 Ohio St. 461.

Where a subcontractor on a railway committed a trespass in procuring timber on land not belonging to the company. Parker v. Waycross & F. R. Co. (1888) 81 Ga. 387, 8 S. E. 871.

Where, without being authorized by the company, a subcontractor on a railway hauls earth for an embankment from land which lies outside the right of way, and has not been condemned. Waltemeyer v. Wisconsin, I. & N. R. Co. (1887) 71 Iowa, 626, 33 N. W. 140 (disapproving of an instruction by which the jury

were told that the defendant was responsible for whatever injury was directly committed by anyone who, while acting in its interest in building the road, took such ground as was reasonably necessary to be used for its right of way, although it had not been condemned for that purpose); Kerr v. Atlantic, & N. W. R. Co. (1895) 25 Can. S. C. 197. In the latter case plaintiff's counsel contended that, as the company had agreed in one clause of its contract to provide the contractor with the necessary land for borrow pits, it had made itself responsible for his acts, even though such acts should constitute trespass upon the property of others. It was held, however, that, upon a proper construction of the contract, this stipulation must be taken to refer to places at which the contractor had borrowed by the consent of the company's engineer, such consent being requisite under another clause of the contract. The trespass in question was, therefore, an independent tortious act for which the company could not, upon any principle of law, be made responsible.

A municipality is not liable where the contractor for the grading of a street deposited earth or other materials on the land of an abutting owner. Fuller v. Grand Rapids (1895) 105 Mich. 529, 63 N. W. 530; Reed v. Allegheny (1875) 79 Pa. 300.

A similar decision has been rendered in a case where the materials deposited were taken from a sewer. Harding v. Boston (1895) 163 Mass. 14, 39 N. E. 411.

One who employs an independent contractor to cut standing trees on the land of a third person into lumber is not liable for damages caused to an adjoining owner by felling trees upon his fence and land. Knowlton v. Holt (1891) 67 N. H. 135, 30 Atl. 346.

The owner of a lot is not liable for unauthorized acts of trespass committed by an independent contractor employed to build a house thereon. Davison v. Shanahan (1892) 93 Mich. 486, 53 N. W. 624 (nature of trespass not stated).

In a case where the workmen of one who had contracted with the defendant to erect a building carried away some bricks and other materials belonging to the buildings of a person who owned the adjacent land, it was held error to instruct the jury that, "If the jury should be of opinion that the workmen, while they were on the land by the defendant's permission, had from want of due care injured the plaintiff's property, or had carried away the plaintiff's materials, the defendant would be liable for those acts." Gayford v. Nicholls (1854) 9 Exch. 702, 2 C. L. Rep. 1066, 23 L. J. Exch. N. S. 205, 2 Week. Rep. 453. C. B. L.

MONTANA SUPREME COURT.

Joseph LONGTIN, *Resp't.*,

v.

Thomas B. PERSELL *et al.*, *Appts.*

(.....Mont.....)

The operation of a stone quarry on

city lots for a long period of time by means of blasting, which causes vibrations of the earth and air in such a manner as to render an adjoining dwelling unsafe for occupation, and causes rents in its walls, will render the one responsible therefor liable for the injury,

NOTE.—As to liability for injuries to land and buildings from vibration of earth and air caused by blasting, see also, in this series, Benner v. Atlantic Dredging Co. 17 L. R. A. 220, and note; Emry v. R. Anoke Nav. & Water Power Co. 17 L. R. A. 699; Booth v. Rome, 65 L. R. A.

W. & O. Terminal R. Co. 24 L. R. A. 105; and Fitzsimons & C. Co. v. Braun, 59 L. R. A. 421.

As to liability for injury to person by blasting, see the following case and footnote thereto.

although he uses due care in the prosecution of the work.

(May 5, 1904.)

APPEAL by defendants from a judgment of the District Court for Lewis and Clarke County in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's property through the alleged wrongful use by defendants of their adjoining property. *Affirmed.*

Statement by **Holloway, J.:**

This action was commenced by Joseph Longtin, plaintiff, against Thomas B. Persell and W. E. Persell, copartners doing business as the Persell Limestone Company. The plaintiff owns, is possessed of, has his residence and lives on, lot 13, block 553, original town site of Helena. The defendants own and are operating a limestone quarry on portions of blocks 554 and 556 of the original town site of Helena, and within the present corporate limits of the city of Helena. The complaint alleges that, for twelve months prior to the commencement of this action, defendants, in the conduct of their operations in said quarry, had used and exploded large quantities of powder in blasting out stone, and that, by means of such blasting, fragments of rock had been hurled with great force against plaintiff's dwelling house, doing damage thereto; that pieces of rock had been thrown upon his premises; and that the explosion of such blasts of powder had caused concussions of the air to such an extent as to shake his dwelling house, and to cause rents to be made in the walls, rendering the dwelling unsafe for residence purposes, and doing damage to it to the extent of \$1,000. The answer denies that defendants caused any damage whatever to plaintiff's property, or that any damage had been sustained by plaintiff. The cause was tried to a jury, which returned a verdict in favor of the plaintiff; and from the judgment entered thereon, and from the order denying them a new trial, defendants appealed.

Messrs. Toole & Bach and M. S. Gunn, for appellants:

The blasting was done upon the property and premises of the defendants in conducting mining operations. Under these circumstances, defendants cannot be held responsible for any injury to the plaintiff's dwelling house resulting from concussions.

Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 267, 24 L. R. A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 30 Am. St. Rep. 649, 31 N. E. 328; 65 L. R. A.

French v. Via, 143 N. Y. 90, 37 N. E. 612; *Sullivan v. Dunham*, 161 N. Y. 290, 47 L. R. A. 715, 76 Am. St. Rep. 274, 55 N. E. 923; *Simon v. Henry*, 62 N. J. L. 486, 41 Atl. 692.

Messrs. Nolan & Loeb, for respondent:

The use that defendants were making of their town lots was an unreasonable use, and the operation and maintenance of a quarry on lots platted as town lots is a clear case of maintaining a nuisance.

Saven v. Johnson, 4 Pa. Co. Ct. 360, 3 Del. Co. Rep. 323; *Scott v. Bay*, 3 Md. 431; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Wood, Nuisances*, 2d ed. § 128.

The mere keeping of dangerous explosives, such as gun powder or nitroglycerin, in large quantities in a public place, or in close proximity to buildings inhabited by human beings, is a nuisance *per se*.

Webb's Pollock, Torts, p. 503, note; *Cheatham v. Shearon*, 1 Swan, 213; *Myers v. Malcolm*, 6 Hill, 293, 41 Am. Dec. 744; *Chicago, W. & V. Coal Co. v. Glass*, 34 Ill. App. 364; *Wier's Appeal*, 74 Pa. 230; *McAndrews v. Collier*, 42 N. J. L. 189, 36 Am. Rep. 508; *Kleebauer v. Western Fuse & Explosives Co.* (Cal.) 69 Pac. 246.

If so, the explosion of powder continuously for more than twelve months in maintaining and operating a quarry within the municipal limits of a city, on town lots, platted as such, is most certainly an unreasonable use of property, and a nuisance *per se*.

McKeon v. See, 4 Robt. 449, 51 N. Y. 300.

Holloway, J., delivered the opinion of the court:

Numerous errors are assigned, but it is conceded that they all raise but one question. Appellants contend that they are not liable for damages caused to respondent's premises by reason of the vibrations of the earth or concussions of the air resulting from the blasting done by them, where no negligence is alleged or proved, and, in support of this contention, rely upon the decisions in the following cases: *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 30 Am. St. Rep. 649, 31 N. E. 328; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L. R. A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; *Simon v. Henry*, 62 N. J. L. 486, 41 Atl. 692; and *Sullivan v. Dunham*, 161 N. Y. 290, 47 L. R. A. 715, 76 Am. St. Rep. 274, 55 N. E. 923.

Benner v. Atlantic Dredging Company was an action by a property owner against the dredge company which had a contract with

the government of the United States to remove an obstruction to navigation from East river, New York. In the performance of its work the dredge company used explosives, by reason of which plaintiff's building was injured. The court held that the defendant was not liable in the absence of a showing of negligence, but based its decision upon the ground that the general government had absolute power to make, or have made, the improvement mentioned, and could not be held liable for damage resulting therefrom, and that the defendant had all the authority which the government had to select the means necessary to be employed. The court said: "The defendant had the authority of the government, and kept within it, and therefore is not liable."

Booth v. Rome, W. & O. Terminal R. Company was an action by a property owner against the railroad company to recover damages for injuries caused by the explosion of blasting powder. It appeared that it was necessary for the company to do the blasting in order to make necessary excavations for its track. In the opinion of the court, emphasis is laid upon the fact that this blasting was only a temporary expedient, necessary to reduce the property to the use for which it was intended; and the court makes a distinction between a case of that kind and one where the blasting is carried on continuously.

Simon v. Henry was an action by a property owner against certain defendants who had a contract with the municipal authorities of the town of Union, New Jersey, to construct a public sewer for the town. In making excavations in the street, the defendants employed blasting powder. The plaintiff's property was injured because of concussions of the air consequent upon the explosions of such powder. The decision of this case is made upon the authority of *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L. R. A. 105, 37 Am. St. Rep. 552, 35 N. E. 592, and, with reference to that case, it is said: "In *Booth v. Rome, W. & O. Terminal R. Co.* . . . it was held that the temporary use of explosives in the blasting of rock, provided reasonable care be exercised, is lawful, and damage resulting from concussion thereby produced is *damnum absque injuria*."

Sullivan v. Dunham was an action by an administratrix to recover damages for the unlawful killing of her intestate. Certain parties were employed by defendant Dunham to remove trees growing on his land near a public highway. The employees used dynamite in their operations, and, as a result of an explosion under a tree, a portion of the stump thrown into the public highway. 65 L. R. A.

way, along which plaintiff's intestate was traveling, killed her. It was conceded that defendants were on their own land, engaged in a lawful occupation, and no negligence was charged against them, but they were held liable. On principle, this case would seem to be opposed to appellants' contention, rather than support it. However, in the body of the opinion this language is used: "When the injury is not direct, but consequential, such as is caused by concussion, which, by shaking the earth, injures property, there is no liability, in the absence of negligence;" citing *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 30 Am. St. Rep. 649, 31 N. E. 328. This seems to be purely *dictum*. The question of damages caused by concussions of the air or vibrations of the earth was not before the court. The cause of the injury was a portion of a tree thrown by force of the explosion of dynamite against the person killed. Neither is the doctrine announced supported by the authority cited, for, as we have readily seen, the case of *Benner v. Atlantic Dredging Co.* was decided upon a wholly different ground.

We are not prepared, then, to agree with counsel for appellants that the courts of New York and New Jersey have announced the doctrine, that for injuries sustained by the property of one, by concussions of the air caused by blasting on the property of another, no damages can be recovered in the absence of negligence on the part of the party causing the injury.

The court of appeals of New York has held that damages resulting from explosions of powder, which cast fragments of rock onto the property of another, can be recovered, even though no negligence be alleged or proved. *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258. And the supreme court of New Jersey has held that in a case where defendant stored a large quantity of blasting powder within the city limits of Jersey City, which by accident exploded, causing injury to plaintiff's property, defendant was liable, in the absence of any showing of negligence. *McAndrews v. Coleridge*, 42 N. J. L. 189, 36 Am. Rep. 508. We can perceive no reason for recovery in these latter cases which is not equally cogent in the one at bar, but, even if those courts should hereafter follow the rule contended for by appellants, we are not disposed to do so, for it appears contrary to reason and the great weight of authority.

In *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, the city owned a stone quarry on property adjoining plaintiff's property, and employed one Ardner to quar-

ry and break stone for use upon the streets of the city. In his operations the employee used blasting powder, and, as a result of one blast, fire was communicated to plaintiff's buildings, which were damaged thereby. The city was held liable, and the court said: "As between the owners of adjacent lands, the maxim of the common law, *Sic utere tuo ut alienum non laedas*, applies with special force, not because it forbids the exercise of the right of dominion or control of property, according to the pleasure of the owner, in one case more than in another, whether it be real or personal property, or whether it be owned for special or general uses, but because the right to use or control it according to the pleasure of the owner is limited under some circumstances more than under others. Undoubtedly the right to use property as the owner may please, provided that reasonable care is taken not to do unnecessary injury to others, is the ordinary rule. But this rule cannot be interposed to justify the committing of a trespass or the maintaining of a nuisance."

In *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.* 60 Ohio St. 560, 45 L. R. A. 658, 71 Am. St. Rep. 740, 54 N. E. 528 the defendant owned and operated a nitroglycerin plant. A certain quantity of this material, stored in a magazine, exploded, causing damage to plaintiff's property. The defendant contended, as appellants contend in this case, that it was not liable, for the reason that the damage was not caused by fragments of rock or other material being hurled against plaintiff's building or onto his property, but by violent atmospheric vibrations caused by the explosion. The defendant, however, was held liable in the absence of any showing of negligence; the court basing its opinion, apparently, upon the case of *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, and *Rylands v. Fletcher*, L. R. 3 H. L. 330, where emphasis is laid upon the fact that the use made by the defendant of its premises was an extraordinary or unusual one, and constituted a nuisance.

In *McKoon v. See*, 51 N. Y. 300, 10 Am. Rep. 659, the defendant operated marble works on property adjacent to plaintiff's property. The defendant used steam power in operating a machine for cutting stone, and the jarring of plaintiff's building, caused by the operation of this machinery, damaged the building, for which the defendant was held liable, though no negligence on his part was alleged or proved. The court reviewed the authorities at length, and held that the maxim, *Sic utere tuo ut alienum non laedas*, applies in a case of this kind. It does seem that the same reason which justi-

fies recovery in an action of this character would likewise justify recovery in the case at bar.

In *FitzSimons & C. Co. v. Braun*, 199 Ill. 390, 59 L. R. A. 421, 65 N. E. 249, the defendants were contractors of the city of Chicago, engaged to make excavations for water mains. It was necessary to use blasting powder in the prosecution of their work. The blasts caused concussions of the air and vibrations of the earth's surface to such an extent as to injure plaintiff's building. The defendants claimed that they did their work with due care, and were not guilty of any negligence whatever, particularly as there was no actual invasion of plaintiff's property by fragments of earth or rock thrown upon it. But the court held them liable for the injuries sustained, and, among other things, said: "If one who, for his own purposes and profit, undertakes to perform a work, by means of explosives, inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by the explosives on the property of such other, it is only by the merest subtilty of reasoning he should be held not liable to respond for equal or greater damage caused by the concussion of the air or of the earth. There is no ground of substantial or practical distinction. The case of *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.* 60 Ohio St. 560, 45 L. R. A. 658, 71 Am. St. Rep. 740, 54 N. E. 528, may be regarded as authority for the view that liability in such cases is not restricted to an actual invasion of the property, but damages for consequential injuries may be recovered."

Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395, is a case the facts of which are practically identical with those in the case now under consideration. The defendant relied upon the proposition that, as he had performed his work in a careful and prudent manner, he could not be held liable. But the court held otherwise, and, in disposing of his contention, said: "The fact that the defendant used quantities of gunpowder—a violent and dangerous explosive—to blast out rocks upon his own lot, contiguous to another person's, situate in a large city, must be taken as an unreasonable, unusual, and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling house, as the natural and proximate result of his blasting. For an act which in many cases is in itself lawful becomes unlawful when by it damage has accrued to the property of another. And it

would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mrs. Colton's dwelling house, or a concussion of the air around it, which had either damaged or entirely destroyed it. The defendant seems by his contention to claim that he had a right to blast rocks with gunpowder on his own lot in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence. But in this he is mistaken."

If the damages to plaintiff's property had been caused by fragments of rock thrown onto his property or against his dwelling house by the blasting which defendants were doing, the authorities are practically unanimous in holding that the defendants would be liable, even though they exercised reasonable care in their operations. Cooley, Torts, 332. We can see no reason whatever for adopting that view, and at the same time holding that they are not liable for damages occasioned by the vibrations of the ground

or the concussion of the air. The agency employed in either case is the same, and the danger as imminent in one instance as in the other.

It is to be observed that the defendants here were operating upon lots platted for city purposes, and that their operations were continuous over a period of at least one year. The liability arises from the unusual or extraordinary use to which appellants put their property, the fact that their operations were continuous, and that in these operations they used explosives in such quantities as to cause injury to plaintiff's property. These facts are at least prima facie evidence that appellants were maintaining a nuisance, and they cannot justify by showing that, in maintaining such nuisance, they exercised due care. So far as this record discloses, plaintiff was entitled to the quiet and peaceable possession and enjoyment of his property, and could properly invoke, as against these appellants, the rule of the common law quoted above.

The judgment and order are affirmed.

Brantly, Ch. J., and Milburn, J., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

*CARY et al., Pliffs. in Err.,
v.*

Mrs. T. Jane MORRISON, Admr., etc., of
W. L. Morrison, Deceased.

(129 Fed. 177.)

- *1. **Blasting by the use of gunpowder or dynamite is an appropriate and justifiable mode of removing rock from the right of way of a railroad in order to bring it to grade, and a railroad company or its grading contractors may lawfully employ it, with reasonable care.**
- 2. **While a contractor may lawfully use blasting with gunpowder or dynamite to remove rock in the right of way of a railroad company, he has no right by its use to throw rocks upon persons rightfully**

occupying or using neighboring property. Such an act is a trespass, and it is his duty to give such persons reasonable warning of coming explosions.

- 3. **It is the duty of one who is lawfully using property near to that upon which another is legally engaged in blasting, and who is warned of a coming explosion, to use reasonable diligence to escape from danger on account of it; and a failure to exercise such care, which concurs in producing his injury, waives his right of action for the trespass, and constitutes contributory negligence, which is fatal to his action for damages for the injury.**
- 4. **The question whether or not one is guilty of contributory negligence is ordinarily for the jury. It is only when the facts which condition the question are stipulated, or are established by testimony which is free from substantial conflict, and the inference from the facts is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree upon it, that the question of contributory negligence may be lawfully withdrawn from the jury.**
- 5. **The defendants were lawfully engaged in blasting rock out of the right of way of a railroad company at a point about 150 feet from a river. The decedent was rightfully walking along the bank of the river a short distance below a point opposite the place of blasting, holding the prow of a ferryboat away from the bank**

*Headnotes by SANBORN, Circuit Judge.

NOTE.—As to duty of person engaged in blasting, with respect to the safety of others, see also, in this series, *Blackwell v. Moorman*, 17 L. R. A. 729, and *note*; *Mitchell v. Prange*, 34 L. R. A. 182; and *Sullivan v. Dunham*, 47 L. R. A. 715.

As to assumption of risk of danger by person injured by blasting, see *Smith v. Day*, 49 L. R. A. 108.

As to liability for injury to land or buildings by blasting, see the preceding case and *foot-note* thereto.
65 L. R. A.

with a pole, while the ferryman was walking ahead of him, pulling the boat up the stream, in the customary way, preparatory to poling it across. The decedent had engaged his passage across the river upon the boat. The custom of the defendants was to send men out, shouting "Fire," at short intervals for a period of twelve or fifteen minutes before exploding a charge of gunpowder or dynamite, and the charges had been so heavy that rocks had fallen all around the place where the decedent and the ferryboat were, and had broken limbs and stripped foliage from the trees of the forest which intervened between the right of way and the river, and concealed the boatmen from those engaged in blasting, who were not aware of their presence before the explosion. The decedent had worked for the defendants, and knew these facts and this custom. Seven witnesses heard the cry of fire twelve to fifteen minutes before the explosion. Three heard it from two to five minutes before. When the ferrymen heard it, he shouted "Don't shoot," and he and the decedent continued to ascend the stream within 200 or 300 feet of the place of blasting. The ferryman heard it again, and answered it again, and they continued up the river. The ferryman heard it a third time, answered again, the signal to explode the blast was given, the charge was fired, and a rock fell upon the decedent and killed him. The defendant's witnesses testified that they did not hear the cry "Don't shoot." *Held*, the question whether or not the decedent was guilty of contributory negligence was for the jury.

(*Thayer*, Circuit Judge, dissents.)

(March 18, 1904.)

ERROR to the Circuit Court of the United States for the Western District of Arkansas to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her intestate. *Reversed*.

The facts are stated in the opinions.

Argued before *Nanborn*, *Thayer*, and *Hook*, Circuit Judges.

Messrs. U. M. Rose, W. E. Hemingway, and G. B. Rose, for plaintiffs in error:

The contractors were not only engaged in a lawful occupation; they were engaged in one of great public utility.

The act of traveling implies the power of locomotion, and therefore the power to get out of the way. The blast, however, could be set off only in one place. It could not get out of the way of travelers; therefore the travelers must get out of its way.

Persons engaged in blasting are bound to give reasonable notice of a contemplated blast, to those who may reasonably be expected to be within range of the explosions, in order to enable them to retire to a point of safety.

12 Am. & Eng. Enc. Law, p. 511.
65 L. R. A.

The right to remove rock by blasting for a roadbed is one of the necessary incidents to the right of construction granted to a railroad by its legislative franchise, and the proper exercise of this right, therefore, does not give a cause of action to those who suffer consequential damages therefrom.

12 Am. & Eng. Enc. Law, p. 509, note 2; *Graetz v. McKenzie*, 9 Wash. 696, 35 Pac. 377; *Wright v. Compton*, 53 Ind. 337; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258.

A railroad is the most important of highways, and those engaged in its construction are entitled to privileges as great as those of travelers on the highway.

St. Peter v. Denison, 58 N. Y. 417, 17 Am. Rep. 258; *Mitchell v. Prange*, 110 Mich. 78, 34 L. R. A. 182, 64 Am. St. Rep. 329, 67 N. W. 1096; *Fox v. Borkey*, 126 Pa. 164, 17 Atl. 604; *Hamilton v. Iron Mountain Co.* 4 Mo. App. 565, Appx.; *Wadsworth v. Marshall*, 88 Me. 263, 32 L. R. A. 588, 34 Atl. 30; *Mills v. Wilmington City R. Co.* 1 Marv. (Del.) 269, 40 Atl. 1115.

Messrs. W. E. Atkinson, George O. Patterson, and Ira D. Oglesby, for defendant in error:

The court should have peremptorily instructed the jury to find for plaintiff.

Sullivan v. Dunham, 10 App. Div. 438, 41 N. Y. Supp. 1083; *St. Peter v. Denison*, 58 N. Y. 417, 17 Am. Rep. 258.

Persons engaged in blasting, who know, or by reasonable diligence could know, that stones thrown by the blasts have been falling on or around a neighboring dwelling so as to imperil the safety of the occupants, must protect them by covering the blasts, if this can be done at reasonable cost, and, if not, must give actual warning to those in peril.

Sullivan v. Dunham, 161 N. Y. 290, 47 L. R. A. 715, 76 Am. St. Rep. 274, 55 N. E. 923.

This obligation to give warning arises in every case where it is probable that persons may be in the vicinity of the blast, who may receive injury unless afforded time to seek places of safety.

Cameron v. Vandergriff, 53 Ark. 381, 13 S. W. 1092; *Stephens v. Martins*, 1 Monaghan (Pa.) 376, 23 W. N. C. 475, 17 Atl. 242; *Mills v. Wilmington City R. Co.* 1 Marv. (Del.) 269, 40 Atl. 1114; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. 65; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Wright v. Compton*, 53 Ind. 337; *Colton v. Onderdonk*, 69 Cal. 156, 58 Am. Rep. 556, 10 Pac. 395; *Gates v. Latta*, 117 N. C. 189, 53 Am. St. Rep. 584, 23 S. E. 173.

The fact of an injury by blasting is *prima facie* evidence of negligence.

Klepsch v. Donald, 4 Wash. 436, 31 Am. St. Rep. 936, 30 Pac. 991, 8 Wash. 162, 35 Pac. 621; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Jager v. Adams*, 123 Mich. 26, 25 Am. Rep. 7; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 65, 45 Am. Rep. 30, 15 N. W. 65.

To blast rock near a public highway or dwelling house without taking every precaution to prevent injury exposes the party blasting to a suit for damages for the injury ensuing.

Wharton, Neg. 2d ed. 861; *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279.

One who, by blasting upon his own land, causes rocks or other physical objects to be thrown upon an adjacent highway, or upon land of another, causing injuries to persons or property, is guilty of a trespass, and is liable without proof of negligence on his part either in charging or firing the blast.

2 Shearm. & Redf. Neg. ¶ 688; *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *Tremain v. Cohoes Co.* 2 N. Y. 163, 51 Am. Dec. 284; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; *Munro v. Pacific Coast Dredging & Reclamation Dist.* 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Sullivan v. Dunham*, 10 App. Div. 438, 41 N. Y. Supp. 1083, 161 N. Y. 290, 47 L. R. A. 715, 76 Am. St. Rep. 274, 55 N. E. 923; *Wright v. Compton*, 53 Ind. 337; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 167, 45 Am. Rep. 30, 15 N. W. 65; *Mills v. Wilmington City R. Co.* 1 Marv. (Del.) 271, 40 Atl. 1114; *Blackwell v. Lynchburg & D. R. Co.* 111 N. C. 151, 17 L. R. A. 729, 32 Am. St. Rep. 786, 16 S. E. 12; *Gates v. Latta*, 117 N. C. 189, 53 Am. St. Rep. 584, 23 S. E. 173; Black, Law & Pr. in Acci. Cases, § 77.

Sanborn, Circuit Judge, delivered the opinion of the court:

This writ of error questions the proceedings at the trial of an action for negligence brought by Mrs. T. Jane Morrison, the administratrix of the estate of W. L. Morrison, against Cary Bros. & Hannon, a partnership composed of the defendants below, which resulted in a judgment against the defendants for \$6,000. In her complaint the plaintiff alleged that her husband, W. L. Morrison, was killed by a blow from a rock which was carelessly thrown from a blast by the defendants, who were then engaged in grading the Little Rock & Ft. Smith Railroad. The defendants denied that they were guilty of negligence, and alleged that the injury and death of Morrison were caused by his own carelessness, in that he disregarded warnings that the explosion was 65 L. R. A.

about to occur, and refused or neglected to seek a less dangerous place. At the close of the trial the court, in effect, charged the jury that Morrison was free from negligence, and that, if they believed that the defendants were guilty of carelessness which caused his injuries and death, the plaintiff was entitled to a verdict. This instruction is challenged, and its consideration necessitates a review of the facts disclosed by the evidence at the trial, which were these: Cary Bros. & Hannon had been engaged at the place where the accident occurred in blasting heavy rocks out of the right of way of the Little Rock & Ft. Smith Railroad Company for about two weeks. At the place where they were at work the right of way ran east and west parallel to, and about 150 feet distant from, a river 1,200 feet wide. The surface of the ground along the right of way was higher than that of the river, and between them was a forest, which, with its foliage, made it impossible to see the river from the surface of the ground along the right of way, although there was testimony that it was visible from a pile of timber and brush some 20 to 90 feet distant from the explosion. On the bank of the river, and about 700 feet below and east of a point upon the river directly south of the place of the blasting, was a landing place for a ferry; and between these two points, and about 350 feet from the landing, was a mill. The country was sparsely populated, and there was but one house, aside from the mill, within 700 feet of the place of the fatal blast. The contractors had been using heavy charges of powder, and had thrown rocks in every direction, some of them 700 feet from the place of the explosion, but naturally many more had fallen nearer to the place of the blasting than at a greater distance. Between the place of the explosion and the river much foliage had been stripped from the trees, and their limbs had been broken by falling rocks. The custom of the defendants had been and was to send their employees out twelve or fifteen minutes before a charge of powder was to be fired, shouting the word "Fire" at short intervals, for the purpose of warning all persons in the vicinity of the coming explosion, so that they might retire out of danger. Morrison was a laborer, a farmer, and a minister, who earned annually about \$100 by the first, about \$300 by the second, and about \$75 by the third occupation. He had been an employee of the defendants at the place of the explosion within two weeks before the accident occurred, had seen heavy charges of powder exploded, was aware of their effect, and knew how the warning of a coming blast was given, and all the facts

which have been recited. The customary method of operating the ferryboat at this time was to tow it up the stream, so that the current would not carry it below the opposite landing, and then to pole it across the river. But the defendants' witnesses testified that they were not aware that the ferryboat ever came up along the bank in that way. At a time when the defendants had a charge of powder nearly ready for explosion, about 2 or 3 o'clock in the afternoon of October 5, 1902, Morrison came from the north to the landing place of the boat for the purpose of crossing the river upon it. When the boat was ready to cross the river, it was loaded with a team of mules, a wagon, and one Davis, the owner of the mules. Thereupon the ferryman walked up along the north bank of the river, and dragged the boat after him by means of a rope attached to it, while Morrison walked along the bank behind him, and pushed the prow of the boat away from the bank with a pole. When they had arrived at a point above the mill, but below a point opposite the place of the blasting, Davis heard the cry of fire, the ferryman shouted "Don't shoot," and they proceeded on their way up the river. After a short interval Davis again heard the shout "Fire," and the ferryman again cried "Don't shoot," while they continued on their way. And after another interval Davis heard the cry of fire again, the ferryman again cried "Don't shoot," Davis heard the words "All right," the explosion occurred "right then," and a rock from the blast fell upon Morrison and killed him. The defendants' witnesses testified that they did not hear the cry "Don't shoot," did not know that Morrison and his companions were near their place of work, and that the words "All right" were addressed to the operator of the battery, and constituted the signal for the explosion. The course of proceeding of the defendants and their employees up to this time had been this: About twelve or fifteen minutes before the explosion, men had been sent out, crying "Fire," and they continued to repeat the cry at short intervals until the explosion occurred. One of the employees of the defendants stepped on some logs about 100 feet from the river, faced it, and shouted "Fire." After he had done this he walked 500 feet to the battery before the explosion. Seven witnesses testified that they heard the cry of fire twelve or fifteen minutes before the explosion. Three witnesses only, and they were on the opposite side of the river, testified that they first heard the cry from two to five minutes before the explosion. The witness Hines testified that he was sitting on the north bank of the river, opposite the

mill, when he first heard the warning; that this was twelve or fifteen minutes before the explosion; that the ferryboat was then no more than 200 feet above him (and that would have been about 150 feet below a point opposite the place of the blasting); that he heard the cry of fire five times, and that after he first heard it he went north and east 1,000 feet, in order to get out of danger before the explosion occurred. Yandell, another witness, who was on the opposite side of the river, and who did not hear the cry until from two to five minutes of the explosion, walked 120 feet away from the river after he heard it, and before the explosion, in order to place himself without the range of danger. And Prendergast, who was also on the other side of the river, testified that he heard the cry fifteen minutes before the explosion, and went under a shed for shelter. Davis was the only one of the men who were with the boat at the time of the accident who appeared at the trial, and he testified that when he first heard the cry of fire the boat was a little below a point opposite the place of explosion, and that the ferryman dragged it up the river two boat lengths, or 90 feet, and commenced to roll up his lines to start to cross the river before the blast came.

In this state of the evidence the court below instructed the jury, in effect, that there was no question of contributory negligence for their consideration, and that, if the defendants were guilty of negligence, the plaintiff was entitled to their verdict. It refused to charge, at the request of the defendants, that if Morrison was a passenger on the ferryboat, but was walking along the bank of the river, pushing the boat from the bank, and if he heard the warning, and made no effort to get out of danger, but continued to walk along the bank, he was guilty of contributory negligence. It also refused the request of the defendants to instruct the jury that it was the duty of Morrison, when he was made aware of the fact that a blast was about to be fired, to use reasonable diligence to get out of danger. It charged them that it was not the duty of Morrison to abandon the boat in the event that he was crossing the river and was a passenger when the warning was given. These rulings present the question to be considered in this case.

The railroad company and its contractors, the defendants, had the right to grade its road along its right of way. The right to accomplish a result includes the right to use the appropriate means to produce it. In a sparsely settled country, blasting by means of gunpowder or dynamite is a reasonable and justifiable way of removing

ledges and rocks for the purpose of bringing a railroad to a proper grade, and a corporation and its contractors have the right to use this method, provided they exercise reasonable care to protect other from injury. *Dodge v. Essex County*, 3 Met. 380, 383; *Whitehouse v. Androscooggin R. Co.* 52 Me. 208; *Brown v. Providence, W. & B. R. Co.* 5 Gray, 35, 40; *Blackwell v. Lynchburg & D. R. Co.* 111 N. C. 151, 153, 154, 17 L. R. A. 729, 32 Am. St. Rep. 786, 16 S. E. 12; *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 205, 23 L. R. A. 674, 45 Am. St. Rep. 894, 19 S. E. 521; *Gates v. Latta*, 117 N. C. 180, 190, 53 Am. St. Rep. 584, 23 S. E. 173; *Mitchell v. Prange*, 110 Mich. 78, 34 L. R. A. 182, 64 Am. St. Rep. 329, 67 N. W. 1096.

While a railroad company has the right to blast rock from its right of way by means of gunpowder or dynamite, it has no right, without warning, to throw rocks upon persons who are lawfully occupying or using neighboring property, and such an act is a trespass. *Sullivan v. Dunham*, 161 N. Y. 200, 47 L. R. A. 715, 76 Am. St. Rep. 274. 55 N. E. 923; *Hay v. Cohoes Co.* 2 N. Y. 159, 61 Am. Dec. 279; *Wright v. Compton*, 53 Ind. 337; *St. Peter v. Denison*, 58 N. Y. 416, 423, 17 Am. Rep. 258; *Colton v. Onderdonk*, 69 Cal. 155, 159, 58 Am. Rep. 556, 10 Pac. 395.

It is, however, the duty of one who is lawfully using neighboring property, and who is warned of a coming explosion by another, who is rightfully engaged in blasting, to use reasonable diligence to escape from danger from the approaching explosion; and a failure to exercise such care, which concurs in producing his injury, waives the right of action for the trespass, constitutes contributory negligence, and is fatal to an action for the recovery of damages on account of the injury. *Sullivan v. Dunham*, 10 App. Div. 438, 440, 41 N. Y. Supp. 1083; *Wright v. Compton*, 53 Ind. 340, 341; *Graetz v. McKenzie*, 9 Wash. 696, 35 Pac. 377, 378; *Mills v. Wilmington City R. Co.* 1 Marv. (Del.) 269, 40 Atl. 1115; 2 Shearm. & Redf. Neg. § 688a.

In the case at bar, therefore, the defendants had the right to remove the ledges and rocks from the right of way of the railroad company by explosions of gunpowder or dynamite. The decedent, Morrison, had the right to walk along the bank of the river for the purpose of accompanying the boat to its starting point, and crossing upon it to the opposite side. It was the duty of the defendants to warn Morrison and every other person within the circle of danger of the coming explosion they were about to cause. It was the duty of Morrison and of everyone thus warned to exercise reasonable

diligence to escape from the danger from the explosion and from the threatened injury, and, if they failed to exercise this diligence, and their failure contributed to their injury, it was fatal to an action for damages on account of it. The evidence is conclusive that Morrison was warned of the danger, and the conclusion is inevitable that the court below fell into an error when it refused to instruct the jury that it was his duty, after he was thus warned, to exercise reasonable diligence to escape from the threatened injury, unless the necessary deduction from the undisputed evidence was such that all reasonable men, in the exercise of an impartial judgment, would be compelled to conclude that he exercised reasonable care or diligence to escape from the impending danger. The question of contributory negligence, like every question of negligence, is ordinarily for the jury; and it is only when there is no substantial conflict in the evidence which conditions it, and when, from the undisputed facts, all reasonable men, in the exercise of a fair judgment, would be compelled to reach the same conclusion, that the court may lawfully withdraw it from them. *St. Louis, I. M. & S. R. Co. v. Leftwich*, 54 C. C. A. 1, 2, 117 Fed. 127, 128; *Union P. R. Co. v. Jarvi*, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; *Pyle v. Clark*, 25 C. C. A. 190, 192, 49 U. S. App. 260, 79 Fed. 744, 746; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569.

In the case at bar neither of these conditions existed. The evidence which conditions the question of contributory negligence is not free from substantial conflict, and, if the view of it most favorable to the defendants is taken, as it must be in this case, where the instruction which took the question from the jury was for the plaintiff, reasonable men might well conclude that the decedent was not free from negligence which contributed to his injury. The crucial fact in the case is the time when Morrison first heard the cry of fire. That time is not fixed by the testimony of any witness, but it must be found from the evidence of the witnesses who heard the cries. No one testifies when Morrison first heard them. The great preponderance of the testimony is that the shouts of fire were made at short intervals for a period of from twelve to fifteen minutes before the explosion. Seven witnesses heard them at least twelve minutes before the blast was fired. One of these witnesses was about 200 feet below Morrison, on the same bank of the river, and another was on the opposite side of the

river, 2,200 feet from the place of the explosion. Three witnesses who were on the other side of the river testified that they first heard the cry of fire, and the ferryman's answer, "Don't shoot," from two to five minutes before the explosion. The natural and rational inference from all this testimony is that the shouts of fire were given for at least twelve minutes before the blast, but that the three witnesses on the other side of the river did not hear the earlier shouts. Did Morrison first hear the warnings when the seven witnesses, many of them farther from the place of blasting than he was, first heard them, or when the three witnesses on the other side of the river first perceived them? The evidence is certainly ample to sustain a finding that Morrison first heard them when the majority of the witnesses first perceived them, twelve or fifteen minutes before the explosion. The preponderance of the evidence points to that conclusion. If he heard this warning twelve or fifteen minutes before the explosion, all reasonable men would not be compelled, in the exercise of a sound judgment, to conclude that remaining within the circle of danger, or advancing into greater danger, when he was on the bank of the river and free to escape from all danger, was the exercise of reasonable care or diligence.

Again, there is sufficient evidence in this record to warrant a finding by the jury that the ferryboat was at least 150 feet below a point opposite the place where the explosion occurred when the ferryman first cried "Don't shoot." Three witnesses testify that this cry was first heard by them from two to five minutes before the explosion. Davis says that the ferryman was walking fast, drawing the boat up the river, and then rolling up his lines to start across the river, during this time. A man walking slowly—walking only 3 miles an hour—travels 528 feet in two minutes; and the boat sank only 800 feet above the landing, and not more than 100 feet above a point opposite the place of blasting. Davis testifies that the boat was a little below a point opposite the place of the explosion when he first heard the cry of fire. Hines says that it was at least 150 feet below that point when he first heard the cry, and that he was within 200 feet of it. Davis says that the boat went about 90 feet after he first heard the warning, and the testimony of two witnesses on the other side of the river is that the boat seemed to be about opposite the place of the blasting when they first heard the cry "Don't shoot." But Davis's estimates of distance were demonstrated by the measurements to be erroneous. He thought the distance from the place of the

explosion to the point where the boat sank was 450 feet. It was 198 feet. He said he heard the first cry of fire about 900 feet above the landing. But the distance from the landing to the place where the boat sank was only 800 feet. Thus it appears that the evidence was substantial and sufficient to sustain a finding that the boat was 150 feet below the place of blasting when the ferryman first cried "Don't shoot," and when Morrison must have been aware of the danger.

Moreover, wherever the boat may have been, there were at least two minutes—time enough for one to go on a slow walk 528 feet, and on a brisk walk 700 feet, after the ferryman first cried "Don't shoot," and before the explosion occurred. It was only about 700 feet from the point on the river opposite the place of blasting to the landing. Every step down the river, away from the place of explosion, diminished the danger of injury. Every step towards it increased the danger. Would a person of ordinary prudence and diligence under such circumstances remain in the imminent danger or advance into increasing danger? Or would he flee from the point of greatest danger, when every step down the river would diminish the chance of his injury? Some reasonable men might well conclude that a person of ordinary prudence and diligence would, under such circumstances, move away, instead of advancing toward or remaining near the point of greatest danger. That was the course pursued by every person within hearing of the warning, except the men about the ferryboat. Five of those who thus retired upon hearing the warning were much farther away from the place of the explosion than Morrison was, and four of them were on the opposite side of the river. Hines, on the same bank, 200 feet below Morrison, traveled 1,000 feet north and east after he heard the cry and before the explosion occurred. Prendergast, 2,200 feet away, on the other side, took shelter under a shed. Yandell, Pointer and Travers, on the opposite side of the river, and at least a quarter of a mile distant, turned and walked farther away. The ferryman had the care of his boat. Davis had the care of his mules. Morrison had the care of nothing but himself. He was walking on the bank of the stream, with no responsibility, care, or duty, save the duty to heed the warning and use ordinary care to retire from the impending danger. This was not a case where the facts which conditioned the question of contributory negligence were stipulated, or where they were established by undisputed testimony. It was not a case where, from the facts which the evidence tended to establish, no reasonable

men could have rightfully drawn the conclusion that Morrison failed to exercise ordinary care and diligence to escape from the impending danger after he received the warning of it, and the question of his contributory negligence should have been submitted to the jury. It was a debatable question—one upon which the minds of reasonable men might honestly reach opposite conclusions—and hence one peculiarly appropriate for the determination of a jury of men of the vicinage, who are necessarily familiar with the methods of life and action in the country where the accident occurred, and of the course of action which men of ordinary sagacity usually pursue when they are notified that a heavy charge of powder to blast out rock, which has been falling from such blasts all about the place they are occupying, is about to be exploded. The facts were not so clearly established, nor the inference from them so conclusive, that the court below should have instructed the jury, either that, if Morrison was a passenger, and was walking along the bank, pushing the boat away from the land with a pole, when he heard the warning, and made no effort to escape, but continued to walk up the river until the explosion, he was guilty of contributory negligence, or that it was not his duty to abandon the boat in the event that he was crossing the river and was a passenger when the warning was given. The court gave the latter instruction. It was erroneous, because the evidence was undisputed that Morrison was not crossing the river when he heard the warning, but was walking on its bank, and because, when he heard the warning, he owed no duty to the boat, nor to the men about him, which was not subordinate to his positive duty to immediately use reasonable diligence to decrease, and if possible to entirely avoid, the impending danger.

There are other specifications of error, but the discussion of those which have been already considered sufficiently indicates the law applicable to the case, and determines the disposition which must be made of it in this court.

The judgment below is accordingly reversed, and the case is remanded to the Circuit Court, with instructions to grant a new trial.

Thayer, Circuit Judge, dissenting:

The defendants below, who are the plaintiffs in error in this court, requested the trial court to give four instructions on the subject of contributory negligence, all of which were refused, and the sole question before this court is whether a reversible error was committed in refusing these in-

structions, or any of them. The first of the four instructions was as follows:

"The evidence shows that at the time of hearing the warning, and until he was killed, Morrison was not in the boat, but was walking on the bank; that he was a passenger, and under no obligation to look out for the safety of the boat or its contents; and you are instructed that when he heard the alarm it was his duty to proceed down the bank in search for a place of safety, and that, if he did not do so, he was guilty of contributory negligence which precludes recovery in this case."

The second and third instructions embodied the same idea, namely, that if Morrison heard the alarm of fire while walking along the bank and poling the ferryboat offshore, and made no effort to get out of danger after he heard the alarm, he was guilty of contributory negligence.

The fourth instruction was a mere abstract proposition of law, to the following effect:

"The court, in this connection, instructs you that it was the duty of the decedent, Morrison, when he was made aware of the fact that a blast was to be fired, to use reasonable diligence to get out of danger."

I have not been able to conclude that the refusal of either of these instructions constitutes a reversible error. The first three of these instructions were palpably wrong and misleading, in that they ignored material facts which the testimony for the plaintiff below strongly tended to establish. This testimony was to the effect that no warning of the blast which was about to be fired was given until the ferryboat had started on its voyage across the river, and had proceeded upstream from 150 to 300 yards above the landing; that, when the alarm of fire was given, the captain of the ferryboat immediately hallooed back as loud as he could, two or three times, not to fire until the boat got away, or "Don't shoot until we get away," and that the reply immediately came back from some person in the vicinity of the blast, "All right." In other words, the testimony for the plaintiff below showed that the persons on the ferryboat and alongside of it, including the deceased, were led to believe, by the reply "All right," which was made to the captain's exclamation "Don't shoot," that the firing of the blast would be deferred until the boat had got out of danger. Obviously, then, if such was the fact, and the jury had so found, as they might well have done, under the testimony, it could not be said that the deceased was guilty of contributory negligence, as these instructions declared, because he did not drop his pole and search for a place of safe-

ty immediately after the alarm of fire was given. The first three instructions that were asked on the subject of contributory negligence wholly ignored this phase of the testimony, and the trial court properly refused these requests for that reason.

The fourth instruction, above quoted, stated merely an abstract proposition of law, giving the jury no precise direction as to what the deceased's conduct should have been on the occasion in question. If the deceased heard the alarm of fire, and also heard the captain's exclamation "Don't shoot," and the response "All right," and understood from such response, as he probably did, that the blast would not be fired until the boat was out of danger, no one can say that he did not exercise reasonable diligence in acting as he did. On the other hand, if he did not hear such response, and was not given to understand that the blast would not be fired, the exercise of reasonable diligence might, in the estimation of the jury, have required him to act differently than he did. The fault with this instruction, in my judgment, was that it was too general in its terms, not adapted to the different phases of the testimony, and was not calculated to give the jury any information concerning their duty in the premises. Instructions ought always to be adapted to the various hypotheses of fact which may be found by a jury, and a judgment ought not to be reversed because the trial court fails to give an instruction, as respects some abstract rule of law, however accurate it may be, which is not calculated to aid the jury in reaching a correct conclusion. There is abundant evidence in the record to support the conclusion that the plaintiffs in error were guilty of negligence. Indeed, I

do not understand that fact to be challenged by the majority opinion. The testimony shows that the blasts which they were in the habit of firing from this cut were very heavy. When fired they showered the surrounding country with rock, and put the lives of everyone who was within the vicinity in peril. It was shown that only a day or two previous to the accident in question a blast had been fired which threw a rock weighing 20 tons entirely across the river. Under these circumstances, it was the duty of the defendants below to have taken greater care than they appear to have taken to ascertain, before firing a blast, whether all persons within the danger line had been duly notified of the expected explosion, and were in a place of safety, or had been given time to reach a place of safety. Certainly such blasts as the one in question ought not to be fired in proximity to a ferry landing, and near a public highway, without taking such precautions as are fully adequate to protect human life. In the present instance the area of danger was so large that if the decedent, when he first heard the warning cry, "Fire," had dropped his pole and run in any direction, he might not have reached a place where he would have been any safer than by remaining where he was; but, conceding it to be true that it was his duty to have made some effort to reach a place of safety after he heard the warning cry of fire, yet the plaintiff's evidence, if credited by the jury, was of such a character as excused him from making any such effort. I think that no instruction on the subject of contributory negligence, such as was requested, ought to have been given, and that the record discloses no reversible error.

NEVADA SUPREME COURT.

William BARNES, *Respt.*,
v.
WESTERN UNION TELEGRAPH COMPANY, *Appt.*

(.....Nev.....)

1. Findings of fact by the trial court on conflicting evidence will not be disturbed on appeal.
2. A telegraph company cannot defend

a suit for negligent failure to deliver a telegram, on the ground that other persons who are not shown to have any connection with plaintiff were also negligent.

3. A telegraph company which negligently fails to deliver a telegram from one in a strange city a long distance from home, asking for money, by reason of which failure he is compelled to attempt to make the journey on foot, is liable for the price of the telegram, compensation for time lost, price of meals and lodging during the

NOTE.—For conflicting authorities as to right to recover damages for mental anguish on account of default of telegraph company, see *note* to *Western U. Teleg. Co. v. Rogers*, 13 L. R. A. 859.

For subsequent cases in this series sustaining the right, see also *Mentzer v. Western U. Teleg.* 65 L. R. A.

Co. 28 L. R. A. 72; Cashion v. Western U. Teleg. Co. 45 L. R. A. 160; Gray v. Western U. Teleg. Co. 56 L. R. A. 301; Western U. Teleg. Co. v. Crocker, 59 L. R. A. 398; and Cowan v. Western U. Teleg. Co. 64 L. R. A. 545.

For cases denying the right, see *Wilcox v.*

time he is *en route*, and damages for the mental worry and distress accompanying the physical fatigue and exertion caused by the journey.

4. Four hundred dollars is not excessive as damages to be awarded to a minor who is compelled to find his way home on foot during the winter, after being left without means in a strange city, 400 miles from home, by the negligent failure of a telegraph company to deliver a telegram.
5. Damages may be allowed for mental suffering for failure to deliver a telegram, although it is not accompanied by physical suffering or injury.
6. The rule that, for breach of contract, damages may be recovered, which may be supposed to have been contemplated by the parties thereto, renders a telegraph company liable for the hardship and suffering endured by a minor who is compelled to attempt to walk home in the winter time by the failure of the company to deliver a telegram asking for aid, where the company is informed that he is without money in a strange city, 400 miles from home.

(*Belknap, Ch. J., dissents.*)

(May 19, 1904.)

A PPEAL by defendant from a judgment of the District Court for Storey County in plaintiff's favor in an action brought to recover damages for failure to deliver a telegram. *Affirmed.*

The facts are stated in the opinion.

Messrs. George H. Fearons, Cheney, Massey, & Smith, and R. B. Carpenter, for appellant:

The damages in this case are remote and contingent, and have no connection whatever with the delay in the delivery of the message.

The damages for the breach of a contract with a telegraph company, as well as any other contract, must be limited to those which may be fairly considered as arising in the usual course of things from the breach of the very contract in question, or which both parties may reasonably have understood and contemplated, when making the contract, as likely to result from its breach.

Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *Sanders v. Stuart*, L. R. 1 C. P. Div. 326, 45 L. J. C. P. N. S. 682, 35 L. T. N. S. 370, 24 Week. Rep. 949; *Mackay v. Western U. Teleg. Co.* 16 Nev. 222; *Candee v. Western U. Teleg. Co.* 34 Wis. 471, 17 Am. Rep. 462; *Western U. Teleg. Co. v. Martin*, 9 Ill.

Richmond & D. R. Co. 17 L. R. A. 804; *Connell v. Western U. Teleg. Co.* 20 L. R. A. 172; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 706; *International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810; *Francis v. Western U. Teleg. Co.* 25 L. R. A. 406; *Morton v. Western U. Teleg. Co.* 32 L. R. A. 735; *Peay v. Western* 65 L. R. A.

App. 587; *Shields v. Washington Teleg. Co.* 9 W. Law Jour. Mar. 18, 1852; *Hill v. Western U. Teleg. Co.* 42 S. C. 367, 46 Am. St. Rep. 734, 20 S. E. 135; *Western U. Teleg. Co. v. Wilson*, 32 Fla. 527, 22 L. R. A. 434, 37 Am. St. Rep. 125, 14 So. 1; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Western U. Teleg. Co. v. Hall*, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577; *Sutherland, Damages*, 2d ed. p. 92; *Wood's Mayne, Damages*, p. 67; *Smith v. Western U. Teleg. Co.* 83 Ky. 104, 4 Am. St. Rep. 126; *Western U. Teleg. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169; *Stafford v. Western U. Teleg. Co.* 73 Fed. 273; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Bodkin v. Western U. Teleg. Co.* 31 Fed. 134.

Mr. E. S. Farrington, for respondent:

Defendant was negligent.

Western U. Teleg. Co. v. Gossett, 15 Tex. Civ. App. 52, 38 S. W. 536; *Hill v. Western U. Teleg. Co.* 42 S. C. 367, 46 Am. St. Rep. 734, 20 S. E. 135; *Western U. Teleg. Co. v. Cunningham*, 99 Ala. 314, 14 So. 579; *Western U. Teleg. Co. v. Piner*, 9 Tex. Civ. App. 152, 29 S. W. 66; *Candee v. Western U. Teleg. Co.* 34 Wis. 471, 17 Am. Rep. 452.

Even if it be conceded that T. J. Barnes lived several miles from Lovelock this would not excuse the telegraph company. It was the duty of the company to make prompt and diligent inquiry, when the message arrived, to see if Barnes was not in the town of Lovelock.

Rosser v. Western U. Teleg. Co. 130 N. C. 251, 41 S. E. 378.

The damages in this case are neither remote nor contingent, but they are the direct, natural, and proximate result of the delay in the delivery of the telegram under the special circumstances which were known to the defendant.

Hadley v. Baxendale, 9 Exch. 341, 2 C. L. Rep. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302; *Croswell, Electricity*, § 578; *Western U. Teleg. Co. v. Gossett*, 15 Tex. Civ. App. 52, 38 S. W. 536; *Hendershot v. Western U. Teleg. Co.* 106 Iowa, 529, 68 Am. St. Rep. 313, 76 N. W. 830; *Western U. Teleg. Co. v. Norton* (Tex. Civ. App.) 62 S. W. 1081; *Western U. Teleg. Co. v. Church* (Neb.) 57 L. R. A. 905, 90 N. W. 879; *Mackay v. Western U. Teleg. Co.* 16 Nev. 226; *Hale, Damages*,

U. Teleg. Co. 39 L. R. A. 463; *Western U. Teleg. Co. v. Robinson*, 34 L. R. A. 431; *Western U. Teleg. Co. v. Ferguson*, 54 L. R. A. 849; *Connelly v. Western U. Teleg. Co.* 56 L. R. A. 663; and *Robinson v. Western U. Teleg. Co.* 57 L. R. A. 611.

pp. 56-62, 282; *Fleischner v. Pacific Postal Teleg. Cable Co.* 55 Fed. 738; *Liman v. Pennsylvania R. Co.* 4 Misc. 539, 24 N. Y. Supp. 824; *Western U. Teleg. Co. v. Bowen*, 84 Tex. 476, 19 S. W. 554; *Pruett v. Western U. Teleg. Co.* 6 Tex. Civ. App. 533, 25 S. W. 794.

If it is shown that, at the time the contract was made, both parties knew these special circumstances, then the defendant will be liable for all the proximate damages resulting from a breach of the contract under such circumstances.

Hale, Damages, p. 60; Crosswell, Electricity, § 578; *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 494.

The telegram itself was sufficient to apprise the telegraph company of the importance.

Western U. Teleg. Co. v. Gossett, 15 Tex. Civ. App. 52, 38 S. W. 536; *Western U. Teleg. Co. v. Norton* (Tex. Civ. App.) 62 S. W. 1081; *Pruett v. Western U. Teleg. Co.* 6 Tex. Civ. App. 533, 25 S. W. 794; *Fleischner v. Pacific Postal Teleg. Cable Co.* 55 Fed. 738.

The amount awarded is not excessive.

Schumaker v. St. Paul & D. R. Co. 46 Minn. 39, 12 L. R. A. 257, 48 N. W. 559; *Zion v. Southern P. Co.* 67 Fed. 500; *Louisville & N. R. Co. v. Ballard*, 88 Ky. 159, 2 L. R. A. 694, 10 S. W. 429; *Slocne v. Southern California R. Co.* 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 322; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. Rep. 356; *Stutz v. Chicago & N. W. R. Co.* 73 Wis. 147, 9 Am. St. Rep. 769, 40 N. W. 653; *Higgins v. Louisville, N. O. & T. R. Co.* 64 Miss. 80, 8 So. 176; *Pittsburgh, C. C. & St. L. R. Co. v. Klitch*, 11 Ind. App. 290, 37 N. E. 560; *Malone v. Pittsburgh & L. E. R. Co.* 152 Pa. 390, 25 Atl. 638; *Lake Erie & W. R. Co. v. Close*, 5 Ind. App. 444, 32 N. E. 589.

Fitzgerald, J., delivered the opinion of the court:

This is the second appeal in this case. On the first trial the jury awarded the plaintiff \$1,200 damages, and the court gave judgment for the amount. On appeal therefrom this court reversed the judgment as being excessive. 24 Nev. 125, 77 Am. St. Rep. 791, 50 Pac. 438. This judgment of reversal was rendered October, 1897, nearly seven years ago. On the second trial, an appeal from the judgment which is here now, the court, sitting without a jury, gave judgment for the plaintiff for the sum of \$400. As the foundation of such judgment, the court found the following facts: "(1) That on the 19th day of February, 1895, at forty-five minutes past 1 o'clock in the morning, at Grand Junction, Colo., the said William

Barnes delivered to the agent of the defendant a telegram directed to his brother Thomas J. Barnes, at Lovelock, Nev., requesting him, the said Thomas J. Barnes, to wire him a ticket to Ogden, Utah. (2) At the time of delivering said telegram the said William Barnes informed the agent of the Western Union Telegraph Company that his ticket would only take him to Ogden, and that he had no means to lay over in said city of Ogden. The said William Barnes had but \$1.25 in his pocket when he arrived in Ogden in the morning of February 19, 1895. That on arriving in Ogden the said William Barnes made due inquiry as to whether his ticket had arrived. Such inquiries were made a number of times, but he received no ticket, and no reply to his telegram. He did not go to a hotel because his money was insufficient. He purchased one or two meals at a restaurant. He spent his nights in a railroad depot and on the streets, but did not sleep. He was warned by the police several times to get out of town or go to a hotel. February 21st he boarded a west-bound train clandestinely. After riding several hours he was put off of the train and walked 20 or 25 miles, when he boarded another train. Thus, alternately riding and walking, he traveled as far as Battle mountain, where he arrived absolutely without money, February 23, 1895. That during all this time the cold was intense, and the said William Barnes suffered severely from hunger and cold. (3) That said telegram was received at defendant's office at the town of Lovelock, Nev., within twenty-two minutes after it was sent, and on the morning of February 19, 1895. Said telegram was not delivered until February 22, 1895. No effort was made to deliver the telegram February 19th or February 21st. The telegram was not deposited in the postoffice addressed to the addressee, nor was the sending office notified of the nondelivery of the telegram. (4) At all times between February 19 and February 23, 1895, inclusive, the said Thomas J. Barnes had his residence in said town of Lovelock, and within 300 yards of defendant's telegraph office. Had the defendant exercised only slight diligence, said telegram could have been delivered to the said Thomas J. Barnes on the 19th day of February, 1895. Had said telegram been so delivered, William Barnes could and would have received the ticket asked for in his telegram on the 20th day of February. (5) By reason of defendant's negligent failure to deliver said telegram, plaintiff suffered damages in the sum of \$400." Appellant makes various assignments of error, but three only seem to be relied upon in the briefs of its counsel: (1) Insufficiency of

the evidence to justify the findings of fact and conclusions of law: (2) contributory negligence on the part of plaintiff; and (3) remoteness of the damages.

On the first point, to wit, the insufficiency of the evidence to sustain the findings and conclusion, it is deemed unnecessary to go into minute analysis of the evidence given at the trial. The most that can be claimed by the appellant is that the evidence is conflicting, and when such is the case the rule of this court has long been that the findings of fact by the trial court will not be disturbed.

On the second point, to wit, contributory negligence on the part of the plaintiff, counsel for appellant state no act of the plaintiff that is by them claimed to be of the nature of contributory negligence. On the contrary, the acts that are claimed by them to be of the nature of contributory negligence are the acts of two other persons. Under the heading in the brief, "Contributory Negligence," counsel say: "If there was any negligence about it, T. J. Barnes [not the plaintiff, William Barnes] and Mrs. Addington were the negligent parties." No showing whatever is made to connect the plaintiff, William Barnes, with the alleged negligent acts of T. J. Barnes and Mrs. Addington. In such case, even if the acts of T. J. Barnes and Mrs. Addington were conceded to be negligent, it could not avail the defendant.

On the third point, to wit, remoteness of the damages, it, perhaps, may be well to restate the facts in more compact form, thus: By reason of the negligence of defendant in not delivering the telegram in proper time, the plaintiff, a minor of nineteen years of age, was placed in Ogden, 400 miles distant from his home at Lovelock, Nev., with only \$1.25 in his pocket. Under such circumstances, what was the natural and proper thing for such minor to do? Upon the correct answer to this question, it would seem, the solution of the matter in controversy depends. As an illustrative analogy, one at least somewhat applicable to the situation here disclosed, suppose the railway company had contracted with plaintiff to take him to Lovelock, but had negligently broken its contract and left him at Ogden, what would be the natural and proper thing for the plaintiff to do; and what damages would that company be responsible to him for? Could it be possible that its responsibility in damages would end with the price paid for railway ticket and hotel bills while the \$1.25 lasted, and wages during the same time? Plaintiff could not remain in Ogden, because after the few hours that the \$1.25 would pay for his meals and lodging he would have nothing whereon to live. Was

he to be expected to give up his home at Lovelock, his business, his residence, his citizenship, and his friends and neighbors in Nevada, and seek new home, new business (or old business), new residence, new citizenship, and new friends and neighbors in Utah? Few of us in Nevada would be pleased to have this alternative forced upon us, and, were the scene of the drama in any other land or state, it is most probable that its citizens would feel upon the subject as we of Nevada feel.

Again, suppose it were held that he should have made the changes above intimated, what assurance is there that he could have in any tolerable time obtained employment in this land in which he, a stranger, was compelled to make his abode? And would not the defendant company, if he did make the change, be responsible to him for reasonable board and wages while he diligently sought employment? Could it be possible that its responsibility in damages would end with the price paid for the railway ticket and hotel bills in Ogden while his \$1.25 lasted, and wages during the same time? Plaintiff could not remain in Ogden, because after the few hours that his \$1.25 would support him he would have nothing whereon to subsist. Defendant had been informed of this, and thereby became chargeable with knowledge and expectancy of the results naturally flowing from the necessities to which the defendant knowingly subjected the plaintiff, and with the damages so occasioned. If defendant had not been aware, at the time the message was sent, that plaintiff was without means to remain in Ogden, his necessity for leaving there and the attendant hardships would not have been within the contemplation of the defendant. If the plaintiff had had money with which to remain at a hotel, it might have been his duty to do so, and charge the defendant for his expenses and time; but the case is different when the defendant knew that he was without funds to do this, and would likely be forced to suffer humiliation, fatigue, hunger, and cold. Under the circumstances narrated, was it not the natural and proper thing that the plaintiff should set out, winter as it was, to go afoot or otherwise, when he could honestly do so, to his home at Lovelock, Nev., 400 miles distant from Ogden, Utah? So it seems; and likewise it seems that whoever negligently caused him to be placed in such a situation should be held responsible to him therefor. The trial court awarded the plaintiff \$400 as damages, but appellant claims that that amount is excessive. We think that amount was not excessive. The elements of the damages would be: (1) Price of telegram; (2) wages or compensation for time lost

in reaching his home at Lovelock; (3) price of meals and lodging during the time he would be *en route*; and (4) "mental worry and distress" accompanying the physical fatigue and cold while out on the winter journey,—of course, including the physical suffering itself. Surely \$400 could not reasonably be deemed excessive for all this.

Whether or not damages for mental suffering can be allowed is, among the courts of the United States, a veritable *questio vexata*; some appellate courts hold that such damages can be allowed, and others hold that they cannot. Sometimes the question is whether damages for mental suffering accompanying physical suffering can be allowed, and sometimes the question is whether damages for mental suffering unconnected with physical suffering can be allowed. If mental suffering can be allowed for in any case, what difference would it make whether there were physical suffering or not? Suppose, by reason of the negligence of a defendant, damages resulted to a plaintiff, said damages coming from two sources: (1) Physical suffering, \$100; and (2) mental suffering accompanying the physical suffering, of \$100 more—making in all \$200. If the second element, to wit, the \$100 allowed for mental suffering accompanying the physical suffering, was allowed, what difference could it make if the said or similar mental suffering existed by reason of a defendant's negligent act unaccompanied by physical suffering? The reason given in some of the cases why damages cannot be allowed for mental suffering alone is that the just estimation of such damages is so difficult. But if such mental suffering accompanied by physical suffering can and must be estimated, cannot and should not mental suffering unaccompanied by physical suffering be estimated and allowed for in damages? Clearly, if so in one case, logically and reasonably it must be so in the other. That such damages can be allowed, see the following cases: *Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L. R. A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044; *Thompson v. Western U. Teleg. Co.* 107 N. C. 449, 12 S. E. 427; *Gray, Communication by Telegraph*, § 65; 4 *Lawson, Rights, Rem. & Pr.* § 1970; 2 *Thomp. Neg.* § 11, p. 847; *Sedgw. Damages*, 8th ed. § 894; *Sutherland, Damages*, 2d ed. § 97, 4th ed. § 975; 29 *Am. Law Rev.* 267; *Meadows v. Western U. Teleg. Co.* 132 N. C. 40, 43 S. E. 512; *Sherill v. Western U. Teleg. Co.* 109 N. C. 527, 14 S. E. 94; *Cashion v. Western U. Teleg. Co.* 123 N. C. 267, 31 S. E. 493; *Bennett v. Western U. Teleg. Co.* 128 N. C. 103, 38 S. E. 294; *Lyne v. Western U. Teleg. Co.* 123 N. C. 129, 31 S. E. 350; 8 *Am. & Eng. Enc. Law*, pp. 658, 662, 663; *Bryan v. Western* 65 L. R. A.

U. Teleg. Co. 133 N. C. 603, 45 S. E. 938; *Hendricks v. Western U. Teleg. Co.* 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543; *Graham v. Western U. Teleg. Co.* 109 La. 1071, 34 So. 92; *Joyce, Electric Law*, § 825; *Western U. Teleg. Co. v. Bowles* (Tex. Civ. App.) 76 S. W. 456; *Western U. Teleg. Co. v. Chambers* (Tex. Civ. App.) 77 S. W. 273; *Western U. Teleg. Co. v. Shaw* (Tex. Civ. App.) 77 S. W. 433; *Western U. Teleg. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728, 10 Am. St. Rep. 772, 9 S. W. 598; *SoRelle v. Western U. Teleg. Co.* 55 Tex. 308, 40 Am. Rep. 805; *Shearm. & Redf. Neg.* § 605; *Chapman v. Western U. Teleg. Co.* 90 Ky. 265, 13 S. W. 880; *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163; *Western U. Teleg. Co. v. Moore*, 76 Tex. 66, 18 Am. St. Rep. 25, 12 S. W. 949; *Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L. R. A. 844, 16 Am. St. Rep. 920, 12 S. W. 857; *Western U. Teleg. Co. v. Feegles*, 75 Tex. 537, 12 S. W. 860; *Stuart v. Western U. Teleg. Co.* 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. 351; *Western U. Teleg. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574; 3 *Sutherland, Damages*, 259; *Scott & J. Telegraphs*, § 418; *Sedgw. Damages*, 35; *Kenihan v. Wright*, 125 Ind. 536, 9 L. R. A. 514, 21 Am. St. Rep. 250, 25 N. E. 822. Many other authorities to the same effect might have been cited, and as many, perhaps, against the doctrine; but we think the better reasoning is in those cases establishing the doctrine. The cases for and against the doctrine will, perhaps, nearly all be found referred to in the cases above mentioned.

That damages may be recovered for the mental suffering occasioned and accompanied by physical injury or fatigue is very generally held by the authorities; and pain of mind directly resulting from exposure, cold, hunger, exertion, and deprivation of a place to sleep, to which the plaintiff was subjected as a natural result of defendant's negligence, would properly come within this well recognized rule. See *Riley v. West Virginia C. & P. R. Co.* 27 W. Va. 147; *McCoy v. Milwaukee Street R. Co.* 88 Wis. 56, 59 N. W. 453; *Central R. & Bkg. Co. v. Lanier*, 83 Ga. 588, 10 S. E. 279; *Caldwell v. Central Park, N. & E. River R. Co.* 7 Misc. 67, 27 N. Y. Supp. 397; *Davidson v. Southern P. Co.* 44 Fed. 476; *Wright v. Compton*, 53 Ind. 337; *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 10 Am. St. Rep. 827, 4 S. E. 211; *Carpenter v. Mexican Nat. R. Co.* 39 Fed. 315; *Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 138; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911; *Hoover*

v. *Haynes*, 65 Neb. 557, 91 N. W. 392, 93 N. W. 732. Where railroad companies have negligently left passengers at the wrong station, and thereby exposed them to cold, fatigue, and suffering, verdicts for damages for larger amounts in proportion to the hardship undergone than the judgment here bears to the injury sustained have been held not excessive. *Lake Erie & W. R. Co. v. Close*, 5 Ind. App. 444, 32 N. E. 588; *Louisville & N. R. Co. v. Ballard*, 88 Ky. 159, 2 L. R. A. 694, 10 S. W. 429, and other cases cited in the brief. This much under the first branch of the rule laid down in the case cited by counsel for appellant, to wit, the English case of *Hadley v. Baxendale*, 9 Exch. 341, 354, 23 L. J. Exch. N. S. 179, 182, 2 C. L. Rep. 517, 18 Jur. 358, 2 Week. Rep. 302, to wit, damages which may fairly and reasonably be considered as naturally arising from the breach of contract.

Under the second branch of the rule laid down in the *Hadley-Baxendale Case*, we think the same result would follow, to wit, damages which arise from circumstances peculiar to the case where those special circumstances are known to the person who has broken the contract. The English court ruled that damage of the last-mentioned kind "must be supposed to have been contemplated by the parties to the contract, and is recoverable." See Wood's *Mayne on Damages*, p. 21. In *Western U. Teleg. Co. v. Norton* (Tex. Civ. App.) 62 S. W. 1081, a telegram was sent requesting the sendee to meet the sender at a flag station on the railroad, and it was held that the telegraph company might reasonably infer that as a result of its failure to deliver the message the sender would be compelled to walk alone in the night, subject to distress of mind. Other cases indicating that the damages are not too remote are cited in the brief, including *Hendershot v. Western U. Teleg. Co.* 106 Iowa, 529, 68 Am. St. Rep. 313, 76 N. W. 828; *Pruett v. Western U. Teleg. Co.* 6 Tex. Civ. App. 533, 25 S. W. 794. We think, in the case at bar, that the evils and damages coming to plaintiff by reason of defendant's negligently causing him to be placed in the situation that he was on his arrival at Ogden and during his journey to Battle mountain were reasonably within the contemplation of the parties, plaintiff and defendant, when they entered into their contract of sending the telegraphic message at Grand Junction, Colo. The evils and damages that came to plaintiff after his arrival at Battle mountain, to wit, breaking of his leg, etc., were not claimed or allowed for in damages in the case, and therefore need no consideration in this opinion.

Under the circumstances of the case, we, 65 L. R. A.

for the foregoing reasons, think the damages awarded to the plaintiff by the trial court were neither remote nor excessive, and therefore its judgment in the case is affirmed.

Talbot, J., concurs.

Belknap, Ch. J., dissenting:

Upon the facts I think the damages are excessive, and not within the contemplation of appellant when it entered into the contract to transmit the message.

The case of *Squire v. Western U. Teleg. Co.* 98 Mass. 232, 93 Am. Dec. 157, was tort for neglect to deliver a telegraphic message seasonably. In that case, as in this, there were no special stipulations or restrictions attached as to defendant's liability, and it was held responsible according to the general rules of law. The court in that case said: "These rules, in their application to damages in actions of this nature, are well settled and familiar. A party who has failed to fulfil a contract cannot be held liable for remote, contingent, and uncertain consequences, or for speculative or possible results which may have ensued on his breach of duty, although they may be traceable to that cause. The reason is that damages of such a nature are not the natural or necessary incidents of a contract, and cannot be deemed to have been within the contemplation of parties when they agreed together. A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service would be a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party has bound himself to perform, and to the compensation paid and received therefor. The practical rule, founded on a wise policy, and at the same time consistent with good sense and sound equity, is that a party can be held liable for breach of a contract only for such damages as are the natural or necessary, and the immediate and direct, results of the breach,—such as might properly be deemed to have been in contemplation of the parties when the contract was entered into,—and that all remote, speculative, and uncertain results . . . must be excluded, as forming no just or legitimate basis on which to determine the extent of the injury actually caused by a breach." Let us apply the law as there laid down to the facts as stated in the opinion of the majority. The direction in the message to send a ticket to the plaintiff at Ogden was of a

pecuniary nature, and the breach of the contract should be measured by standards applicable to pecuniary matters. The natural consequence of a failure to deliver the message would be the actual damage plaintiff sustained, such as his reasonable expenses during the delay, loss of time, and the cost of the message. Mental anguish was not the natural or necessary consequence of the breach, nor its immediate or direct result. It was the secondary, and not the primary, consequence, and damages for it could not have been within the contemplation of the parties when they entered into the contract.

I therefore dissent from the judgment.

Fannie PAINTER, *Appt.*,

v.

Enna KAISER, *Respt.*

(.....Nev.....)

1. A contract by one named as executrix in a will, that in consideration of the withdrawal of opposition to its probate she will distribute money which comes into her hands as executrix as fast as a certain sum shall accumulate, may be enforced against the promisor in her individual capacity.
2. A legatee may enforce a provision in an agreement by the executrix to distribute money received by her whenever a certain amount shall accumulate, in consideration of the withdrawal of opposition to the probate of the will, although the agreement was not signed by such legatee.

(April 30, 1904.)

APPEAL by plaintiff from an order of the District Court for Washoe County sustaining a demurrer to the complaint in an action brought to enforce a contract to distribute funds received by defendant as executrix under the will of Charles Kaiser, deceased. *Reversed.*

Statement by Talbot, J.:

This is an appeal from an order sustaining a demurrer to a complaint, entitled in the second judicial district court, against the defendant individually, and not as executrix, and containing the following allegations:

"That on the 5th day of November, 1901, the following agreement was made and entered into at Reno, Nevada, between plaintiff and defendant:

"[Title of the Estate.] Whereas Charles

NOTE.—As to personal liability of executor or administrator on contracts made in official capacity, see also, in this series, note to Rich v. Sowles, 15 L. R. A. 850; also Germania Bank v. Michaud, 30 L. R. A. 286, and Grafton Nat. Bank v. Wing, 43 L. R. A. 831. 65 L. R. A.

Kaiser, a resident of the town of Reno, Washoe county, Nevada, died at San Francisco, California, on the 18th day of October, 1901, leaving an instrument which purports to be his last will and testament; and whereas Mrs. Emma Kaiser, widow of said Charles Kaiser, did on the 24th day of October, 1901, file her petition in said court praying for the probate of said document as the last will and testament of said Charles Kaiser, deceased, and that she be appointed executrix thereof as provided in said document; and whereas Mrs. Mary Kent, daughter of said Charles Kaiser, deceased, residing in Churchill county, Nevada, and Mrs. Lillie Esden, daughter of said deceased, residing at Wadsworth, Washoe county, Nevada, have contemplated the filing of objections to the probate of said will; and whereas it may be a question of uncertainty and litigation in the settlement of said estate as to how much of the property of said deceased was separate or community property, and whether or not said will is the last will and testament of said deceased, lawfully executed:

"Now, therefore, in consideration of the premises, and for the purpose of making an amicable settlement and adjustment of all differences which have or may arise between the parties hereto respecting the probate of said will and the distribution of said estate, and for the purpose of preventing and precluding litigation between the parties hereto respecting the probate of said will and the distribution of said estate, this agreement made and entered into this 5th day of November, 1901, by and between Mrs. Enna Kaiser, widow of said Charles Kaiser, deceased, and Charles Kaiser, son of said deceased, both residing at Reno, Nevada, the parties of the first part, and the said Mrs. Mary Kent and the said Mrs. Lillie Esden, the parties of the second part, witnesseth:

"That, for and in consideration of the purposes aforesaid and the faithful performance of the covenants, promises, and agreements by the respective parties hereto, made and entered into, it is mutually covenanted, promised, and agreed as follows:

"First: That said parties of the second part do waive, relinquish, and withdraw any and all objection, protest, or contest to the admission and probate of said document, bearing date the 28th day of September, 1901, and heretofore filed in said court and cause, as the last will and testament of said Charles Kaiser, deceased, and do consent and agree that said document may be admitted to probate as the last will and testament of Charles Kaiser, deceased, and that said Mrs.

Emma Kaiser be appointed executrix thereof.

"Second: That the said parties of the first part do hereby remise, release, and quitclaim unto the said estate of Charles Kaiser, deceased, and to the parties named in said will as the legatees and distributees thereof, according to their respective shares as therein stated, all and singular their right, title, and claim of, in, or to the property and estate of said Charles Kaiser, deceased, of every kind and character and wheresoever situated as being community property.

"Third: It is mutually covenanted, promised, and agreed by all the parties hereto, that all the property and estate of said Charles Kaiser, deceased, except the homestead hereinafter mentioned, is the separate property of said Charles Kaiser, deceased, and of said estate, and that the same and the whole thereof shall be inventoried, returned, and distributed as the sole and separate property of said Charles Kaiser, deceased."

(The fourth and fifth sections provide for the setting apart of the homestead, the release of commissions, and the relinquishment of any claim for family allowance in excess of \$1,600.)

"Sixth: That all of the parties hereto for themselves, their heirs, executors, administrators, and assigns, release, remise, and forever quitclaim all their right, title, estate, and interest which they now do or hereafter may have, of, in, or to said estate or any part thereof, save and except their right, title, and interest therein as heirs and legatees of said Charles Kaiser, deceased, under and by virtue of said last will and testament, and do mutually covenant and agree that all and singular the property and estate of said Charles Kaiser, deceased, except said homestead, of whatever kind and character, wherever situated, be administered, settled and distributed under and in accordance with said will, and not otherwise; that is to say, that there shall be set over and distributed to said Mrs. Emma Kaiser one half thereof, to said Mrs. Mary Kent one eighth thereof, to said Mrs. Lillie Eaden one eighth thereof, to said Charles Kaiser one eighth thereof, and to Mrs. Fannie Painter one eighth thereof."

(Section 7 provides for the payment of funeral expenses, the debts of the estate, and the cost of administration.)

"Eighth: It is further agreed that whenever, during the administration of said estate, and before the final distribution thereof, said executrix shall have in her possession money belonging to said estate, in excess of the sum of five thousand dollars (\$5,000), that she will, upon request, pay

to the said parties entitled thereto their respective share and proportion thereof, as above stated, without application to the court for an order for partial distribution, and that the parties to whom the same is paid will execute and deliver to said executrix proper vouchers and receipts therefor.

"In witness whereof, the said parties hereto have hereunto set their hands and seals to this agreement, in duplicate, this 5th day of November, 1901.

"Emma Kaiser. [Seal.]

"Charles Kaiser, [Seal.]

"Mrs. Mary Kent. [Seal.]

"Mrs. Lillie Eaden. [Seal.]"

"(2) That plaintiff was not present when said agreement was made, but had theretofore authorized her sisters, Mary Kent and Lillie Eaden, to take whatever steps they were advised were necessary or proper to protect plaintiff's interests in said estate. That plaintiff was immediately informed of said agreement after it was executed and ratified, and approved the same, and elected to and did adopt the same, and claims the benefits thereof, and in consequence thereof received the payments thereunder from defendant as hereinafter stated.

"(3) That thereafter, and under and pursuant to said agreement, the said will of said Charles Kaiser was admitted to probate, and said defendant was appointed, and still is, the executrix of the estate of Charles Kaiser, deceased. That due notice has been given to the creditors of said estate, and that all claims and debts against said estate have been paid. That no account of said executrix has been filed in said estate, and no petition or distribution thereof had by order of court.

"(4) And under and by virtue of said agreement, and without any application to or order of said court, said defendant paid to plaintiff, out of the moneys of said estate, the sum of \$4,000 on January 15, 1902, and the further sum of \$4,000 on July 11, 1902.

"(5) That on the 7th day of November, 1902, the defendant had in her possession and under her control, as executrix of said estate, and belonging to said estate, more than \$47,000 in money; and, as plaintiff is informed and believes, the defendant still has said sum in her possession and under her control as aforesaid. [Here follows an allegation of demand.]

"(6) That on November 7, 1902, defendant had, and now has, at least \$40,000 of the money of said estate, which should have been then distributed and paid to plaintiff and others, as provided in said agreement, and of which the plaintiff then was, and

now is, entitled to have and receive the sum of \$5,000 as her share and portion thereof, and said money is the separate property of plaintiff.

"(7) That ever since said November 7, 1902, said defendant has, and now does, fail, neglect, and refuse to pay plaintiff her share of said money, or any part thereof.

"Wherefore plaintiff prays judgment against defendant for the sum of five thousand dollars (\$5,000), with interest thereon at 7 per cent per annum since November 7, 1902, and for costs of suit herein."

The demurrer, which was sustained, was taken on the grounds: First, that this complaint does not state facts sufficient to constitute a cause of action; secondly, that the plaintiff has no legal capacity to sue, because the complaint shows that the plaintiff is not a party to the contract, and for the further reason that she cannot bring suit against the executrix for any portion of her share of the estate before it is distributed; and, thirdly, that there is a defect or misjoinder of parties defendant, because the complaint shows that the defendant is the executrix of the estate of Charles Kaiser, deceased.

Messrs. Cheney, Massey, & Smith for appellant.

Messrs. Curler & King for respondent.

Talbot, J., delivered the opinion of the court:

The two matters for our determination are whether the defendant is liable individually on a contract made by her personally and before her appointment as executrix, by which she agreed that after her appointment she would, without any degree of distribution, pay to the plaintiff and the other legatees named in the will the amount of their respective proportions of any money which might come into her hands in excess of \$5,000; and, if she is so responsible, the question arises, secondly, whether the plaintiff in this action can recover on the contract set out in the complaint, when she was not one of the parties that signed it, because it was for her benefit, and was accepted and partly executed between her and the defendant. If the action were against the respondent as executrix, there would be force in the contention of her counsel that she had no authority to enter into a contract binding the estate, that money could not be taken out of the estate to meet such an agreement, and that the statute relating to distribution must be followed; but the suit is not brought, and no relief is asked, against the defendant in her representative capacity, nor against the estate, nor under the statute; and, as the personal judgment sought and execution

thereon could not affect or reach the money or property of the estate, the matter for consideration is not confined to the broad proposition, as urged in the demurrer, whether an heir or legatee can bring suit against the executrix for any portion of her share of the estate before distribution is ordered, but whether she is bound individually by her contract when she promises, for valuable considerations yielded to her, to perform some act pertaining to the management of the estate, such as the payment of money owing or to become due from the estate to heirs or others.

We see no reason why she could not bind herself to make such payment before the decreeing of distribution by the court, or contemporaneously with or at any time after the execution of her contract, and even regardless of her appointment or acting as executrix. The promise to pay when the money came into her hands was as binding as any timely condition which fixed in advance an exact date when payment should be made, instead of naming this contingency. If, to meet the personal obligation which she incurred by the execution of the contract, she uses the money belonging to the estate, she takes the risk of not having the same allowed to these legatees finally by the court; and if other devisees or heirs appear who are entitled to the money, or a part of it, she and her bondsmen will be liable to them, and it is not apparent that the enforcement of her promise will work any injury to the estate. After receiving the benefits which the agreement provided for her, she should not be allowed to repudiate that part of it which is advantageous to the others interested. Beginning early in the common law, the rule has long prevailed, and the authorities are numerous and in harmony,—those in the United States following the English cases,—to the effect that administrators and executors become personally liable on their promises made under circumstances similar to those existing here, although they cannot so bind the estate. Ordinarily, they must do many acts and make many contracts for which they are liable personally, and for which they are entitled to be reimbursed ultimately on the presentation and allowance of their accounts by the probate court. The rule is well stated by the supreme court of Ohio in *Waldemith v. Waldemith*, 2 Ohio, 160: "If the action is founded on a promise made by the testator or intestate in his life, the defendant must be sued in his representative character; he may plead *plene administravit*, and the judgment must be *de bonis testatoris*; but, if the plaintiff rely on a promise by the executor after the death of the

testator, it is not necessary to name the defendant as executor, yet this may be done; they may be named as administrators by way of description, or for the purpose of showing the circumstances of the transaction and the origin of the liability; but the defendants cannot plead *plene administravit*, and the judgment should be *de bonis propriis*. . . . If the declaration presents a claim to which the defendant is liable in his representative capacity only, as on an obligation executed by the testator, he must be sued as executor, and the judgment must be *de bonis testatoris*; but, if it present a demand which originated from the acts of the defendant in his capacity of executor, but for which he has become individually liable, as if he should settle a debt due from the estate and give his own note in the character of executor, he may be described in the writ and declaration as executor, or that description may be omitted, and in either case the judgment would be *de bonis propriis*." In *Austin v. Munro*, 47 N. Y. 360, it was said: "The rule must be regarded as well settled that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors, and do not bind the estate, notwithstanding the services rendered or goods or property furnished, or other consideration moving from the promisee, are such that the executors could properly have paid for the same from the assets, and been allowed for the expenditure in the settlement of their accounts. The principle is that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator. *Ferrin v. Myrick*, 41 N. Y. 315; *Reynolds v. Reynolds*, 3 Wend. 244; *Demott v. Field*, 7 Cow. 58; *Myer v. Cole*, 12 Johns. 349. The rule is too well established in this state to be questioned or disregarded, and any departure from it would be mischievous." In *Luscomb v. Ballard*, 5 Gray, 403, 66 Am. Dec. 375, the supreme court of Massachusetts said: "The law is that by a promise, the consideration of which arises after the death of the testator or intestate, the estate cannot be charged, but the executor or administrator is personally liable on his contract. And whether the amount is to be repaid from the estate is a question for the court of probate in the settlement." Upon a demurrer in

Holderbaugh v. Turpin, 75 Ind. 84, 39 Am. Rep. 124, it was held that, where a complaint charges the execution of a contract by an administrator in his individual capacity, it binds him individually, although it relates to matters connected with the estate; and that, where he enters into a contract upon a consideration accruing subsequent to the death of the decedent, it is deemed his individual contract. This doctrine has been applied, and has bound the executor or administrator personally for work done or goods sold to one as executor (*Corner v. Shew*, 3 Mees. & W. 350; *Myer v. Cole*, 12 Johns. 349; *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83); for funeral expenses which he has ordered or ratified (*Corner v. Shew*, 3 Mees. & W. 350; *Brice v. Wilson*, 8 Ad. & El. 349); where he indorses a promissory note of the deceased (*King v. Thom*, 1 T. R. 489; *Curtis v. Bank of Somerset*, 7 Harr. & J. 25); or if he makes a note and signs it as executor (*Dunne v. Deery*, 40 Iowa, 251; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Woods v. Ridley*, 27 Miss. 119; *Germania Bank v. Michaud*, 62 Minn. 459, 30 L. R. A. 286, 54 Am. St. Rep. 653, 65 N. W. 70); where he submits a disputed question to arbitration without express limitation of his liability (*Riddell v. Sutton*, 5 Bing. 200, 2 Moore & P. 345, 7 L. J. C. P. 60, 30 Revised Rep. 569); where a judgment states that it was rendered against him as administrator, if the facts or record show personal liability. *Rich v. Soules*, 64 Vt. 408, 15 L. R. A. 850, 23 Atl. 723); and under the same rule, and more directly, executors have been held personally liable for the payment of legacies, upon their agreement or implied promise to pay the same (*Davis v. Reyner*, 2 Lev. 3; *Evans v. Foster*, 80 Wis. 509, 14 L. R. A. 117, 50 N. W. 410). In *Perry v. Cunningham*, 40 Ark. 185, the acceptance by an administrator of an order drawn on him by a creditor of the estate, conditioned to pay "as soon as accruing rents of the estate would permit," rendered him personally liable upon receipt of the rents. An executor becomes bound personally upon his promise to pay the debt of the testator in consideration that the creditor will forbear for a time to press his claim. *Bishop*, Contr. enlarged ed. § 1252; 1 Story, Contr. 5th ed. § 361, and the cases there cited. These principles are also reiterated in 1 *Bishop*, Contr. 8th ed. 128, and in the elaborate note mentioned in the brief (52 Am. Dec., beginning at page 118).

The objection that the plaintiff cannot maintain the suit because she was not a signatory to the contract is untenable under *Miliani v. Tognini*, 19 Nev. 134, 7 Pac. 279,

and under the decisions cited there and in 9 Cyc. Law & Proc. pp. 377-382. In that case this court said: "The precise question presented is this: Can a plaintiff maintain an action on a simple contract to which he is not a party, upon which he was not consulted, and to which he did not assent, when it contains a provision for his benefit? Besides the statute which provides that 'every action shall be prosecuted in the name of the real party in interest,' this court has held in three different cases that the bene-

ficiary named in such a contract may maintain an action thereon in his own name."

The order and judgments sustaining the demurrer and dismissing the action are reversed, and the case is remanded with direction to the District Court to fix a time within which the defendant will be allowed to answer.

Belknap, Ch. J., and Fitzgerald, J., concur.

NEW HAMPSHIRE SUPREME COURT.

Charles BIGELOW *et al.*
v.

George E. WHITCOMB *et al.*

(72 N. H. 473.)

The public does not, by laying out a highway, acquire a right to prevent the owner of the fee from removing and applying to his own use timber standing therein, which the public may desire to preserve for shade or ornamentation.

(March 1, 1904.)

ACTION transferred by the Superior Court for Cheshire County for the opinion of the Supreme Court, which was brought by the tree wardens of the town of Hinsdale to recover damages for the alleged wrongful cutting by defendants of trees growing in a highway. *Case discharged.*

Plaintiffs, acting under the provisions of the statute, had designated certain trees for preservation for shade and ornamentation, without tendering any compensation to defendants for their use for that purpose. Subsequently defendants cut down the trees, and plaintiffs brought this action to recover the statutory penalty therefor.

Further facts appear in the opinion.

Messrs: John E. Allen, Charles H. Hersey, and Streeter & Hollis, for plaintiffs:

If the statute does not provide for compensation to the owner of the fee in the highway for the preservation of trees growing therein, it is not for that reason unconstitutional.

The right acquired by the public in the land of individuals, laid out for public highways, is an easement or right of way,—a right to employ it for the purposes of con-

structing, maintaining, and using a public highway thereon.

Makepeace v. Worden, 1 N. H. 16; *Copp v. Neal*, 7 N. H. 275; *Baker v. Shephard*, 24 N. H. 208; *Roue v. Addison*, 34 N. H. 306; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Blake v. Rich*, 34 N. H. 282; *Cressey v. Northern R. Co.* 59 N. H. 564, 47 Am. Rep. 227.

The private ownership in the trees and grass is subordinate to the public easement; and such trees and grass growing upon the land may be cut down and removed whenever, in the judgment of the proper authorities, the cutting and removal are necessary to the full enjoyment of the land for highway purposes.

Baker v. Shephard, 24 N. H. 208.

If the full enjoyment of the easement requires the preservation of trees to shade and beautify the public ways, the right to preserve the trees is a part of the easement to which the land was subjected when the highway in question was laid out.

Com. v. Temple, 14 Gray, 69; *Weller v. McCormick*, 52 N. J. L. 470, 8 L. R. A. 798, 19 Atl. 1101; *Baker v. Normal*, 81 Ill. 108.

If compensation was necessary, the fact that it had not been made at the time the trees in question were cut does not establish the defendants' right to cut them.

Orr v. Quimby, 54 N. H. 590.

Messrs. Cain & Benton and Mitchell & Foster for defendants.

Walker, J., delivered the opinion of the court:

This action is brought under chap. 98, p. 592, Laws 1901, relating to the protection and preservation of ornamental and shade trees in highways. It provides (§ 1) that one or more tree wardens shall be appointed by the mayors of cities and the selectmen of towns; (§ 2) that "towns and cities shall have control of all shade and ornamental

NOTE.—As to ownership and control of trees in highways generally, including right of owner of fee to cut down, see note to *Chase v. Oshkosh*, 15 L. R. A. 558.
65 L. R. A.

trees situated in any public way or ground within their limits, which the tree warden deems reasonably necessary for the purpose of shade and ornamentation; and it shall be the duty of the tree wardens, as soon as possible after their appointment, to carefully examine the trees, situated as aforesaid, and to plainly mark such trees as they think should be controlled by the municipality, for the purposes aforesaid, by driving into each tree, at a point not less than 3 nor more than 6 feet from the ground, on the side toward the highway, a nail or spike, with the letters 'N. H.' cut or cast upon the head. . . . They shall also have the power to designate from time to time, in the same manner as hereinbefore directed, such other trees within the limits of the public ways and grounds as in his [their] judgment should be preserved for ornament or shade;" (§ 3) that "if any of the trees designated as aforesaid should prove to be private property, and the owners thereof refuse to release or convey their interest therein to the municipality, the tree warden shall acquire them for the use of the city or town, by purchase, if it can be done at a fair price. Failing in this, he may, on petition for that purpose, acquire them in the same way and manner, and with the same right of appeal to their owners, as in the case of land taken for a highway;" (§ 4) that towns and cities may appropriate money "to be used by the tree warden in planting, pruning, protecting, and, whenever necessary, acquiring shade and ornamental trees within the limits of their public ways and grounds;" (§ 5) that such trees shall not be removed except after a public hearing, etc.; (§ 6) that "it shall be unlawful to cut, destroy, injure, deface, or break any public shade or ornamental tree;" and (§ 8) that "persons violating any of the provisions of this act shall forfeit not less than \$5 nor more than \$100, to be recovered in an action of debt by the tree warden."

It is apparent that the legislature, in enacting this statute, recognized that there might be a private ownership in trees located within the limits of highways, and provided the means by which such private ownership might be legally terminated by the public upon due compensation therefor. *McCarthy v. Boston*, 135 Mass. 197, 200. No attempt is made to authorize the warden to appropriate trees standing in the highway, without a hearing and compensation, unless they are public property. Private property in such trees, when it exists, is fully protected. Hence the question in this case is not whether the statute is constitutional, but whether the plaintiffs, as tree

wardens have observed the statute in attempting to appropriate the trees in question to the public use of shade and ornamentation. Their proceedings in the premises have been based entirely upon the theory that the trees were not private property, and that the defendants had no legal rights thereto; in other words, that the trees were public property, for the greater protection and preservation of which it was only necessary that they should be marked in the prescribed manner.

It is assumed, in the absence of a finding to the contrary, that the trees in question stood on the side of a country road, and that their ownership was not peculiar, but depended upon the legal effect of the laying out of ancient highways upon the property rights of the landowners. If, when the highway was laid out, the public acquired the right, not only to construct and maintain a road over the land and to pass and repass thereon, but the right to deprive the landowner of the natural growth upon the side of the traveled path whenever a later public sentiment might require it for ornamentation or comfort, the landowner's title to such growth is not an absolute one, and the public may terminate his limited and qualified right at pleasure, and without further compensation. And it is the plaintiffs' contention that from the time when the highway was laid out, early in the last century, until they marked the trees, as provided in the statute, in 1902, the defendants, or their ancestors in title, might have legally cut down the trees, and used the logs and wood for their own purposes, by virtue of their ownership of the adjoining land; but that, after the trees were designated by the tree wardens for shade and ornament, their right to appropriate them as their property ceased, or was in abeyance, by virtue of an original right which was vested in the public when the highway was laid out. This theory might not be inaccurately stated to be that the public acquired the right to use the natural growth of the land, with a permissive right in or license to the abutter to use and consume it until such time as the public might indicate its desire to use it for some highway purpose. On the other hand, it is denied that the public acquired any right to the products of the soil, as the grass and trees naturally growing thereon, except to remove them from the ground when necessary for the convenience or safety of public travel over the way; and that, so long as they do not constitute an obstruction or menace to travelers, the abutter has an absolute right to have them grow there, and an equally unlimited right to remove them.

It is a general principle, which is not controverted in this case, that, "in highways laid out through the lands of individuals in pursuance of statutes, the public has only an easement, a right of passage; the soil and freehold remain in the individual whose lands have been taken for that purpose." *Makepeace v. Worden*, 1 N. H. 16. And it was held in that case that if surveyors of highways, in making or repairing roads, cut and convert to their own use wood growing thereon, they are trespassers. "The right acquired by the public in a highway legally established for the public use is only that of an easement,—a right of passage over the land. . . . This right consists in the power to make the road and to keep it in repair suitable for travel, and in its free use by the public for all proper purposes, until discontinued. In making or repairing highways, however, nothing can be taken from the land over which they are laid, by the town authorities, for any purpose except the legitimate end of constructing the roads. Everything growing or standing upon the land—the trees, timber, etc.—belongs to the owner, and everything that goes to form the land itself also belongs to him, except what is necessary to be actually used in the making or repairing of the highway." *Rowe v. Addison*, 34 N. H. 306, 311, 312. See also *State v. New-Boston*, 11 N. H. 407, 409; *Troy v. Cheshire R. Co.* 23 N. H. 83, 93, 95 Am. Dec. 177; *Blake v. Rich*, 34 N. H. 282; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Winchester v. Capron*, 63 N. H. 605, 56 Am. Rep. 554, 4 Atl. 795; *Bailey v. Sweeney*, 64 N. H. 296, 9 Atl. 543; *Perley v. Chandler*, 6 Mass. 454, 456, 4 Am. Dec. 159; *Jackson ex dem. Yates v. Hathaway*, 15 Johns. 447, 453, 8 Am. Dec. 263. "The owner of the land, therefore, retains his title in trees, grass, growing crops, buildings, and fences standing in the highway at the time of the laying out (unless he fails to remove them within a reasonable time after notice to do so), as well as in any mines or quarries beneath, which are not part of the surface of the earth upon and of which the highway is made." *Denniston v. Clark*, 125 Mass. 216, 221. He "owns the trees growing upon it, and may maintain trespass against anyone cutting them or gathering their fruit, or for any other invasion of his possession. But, of course, the proper public guardians of the highway may cut down any trees which are a permanent obstruction to the use by the public of any part of the highway." *Jones, Easements*, § 479; *Turner v. Ringwood Highway Board*, L. R. 9 Eq. 418, 21 L. T. N. S. 745, 18 Week. Rep. 424.

In *Baker v. Shephard*, 24 N. H. 208, it was held that by the laying out of a highway 65 L. R. A.

the public acquire no right to use the trees growing upon the land to build or repair the road. In the opinion of the court, Judge Bell says (page 215): "The question is whether the trees growing upon the land laid out for a highway are all to be deemed materials subject to the same rules as sand, gravel, etc.,—liable to be cut down at the discretion of the agent for building the road, and to be used for the repairs of the road. If they are not, then the question is whether the agent or surveyor has a right to cut down any trees growing in the highway land, except such as it is necessary to cut down and remove for the purpose of building and repairing the road in a reasonable and proper way; and whether the trees properly cut down for this purpose can be deemed materials, and applied, at the pleasure of the agent or surveyor, to the construction or repair of the traveled way." After showing the difficulty of assessing damages occasioned by the acquisition by the public of such rights in trees growing by the side of a highway, he proceeds (page 217): "The appraisal must have been made of the trees as they were. Their increased size and value is derived from their being permitted to occupy and draw their nourishment from the soil of the landowner, to the profits of which, subject to the public easement, he is exclusively entitled. Can the trees be taken and applied to the public use without allowing him anything for their increased value? For how many years may the public leave the trees, in which they are supposed to have a right, to grow upon the highway, and thus deprive the owner of the profits of his land? It is this circumstance, that the increase of growing timber makes a part of the natural profits of the soil, which marks a clear line of distinction between the trees and the inanimate sand and gravel, which are always materials liable to be used upon the highways." And he concludes that the only right the public "acquire in relation to such trees is that of cutting down and removing to a convenient distance, for the use of the owner, such trees as it is necessary to remove in order to the making or repair of the road in a proper and reasonable manner. In this conclusion we are supported by the ancient authorities."

A similar result was reached in *Tucker v. Eldred*, 6 R. I. 404, where it was held that, in opening a new highway or amending an old one, the town sergeant or surveyor may, under the law, remove growing trees or brushwood from the space appropriated to the highway, but has no right, as included in the original assessment of damages or the easement of the public, to use such trees or underbrush in the building or amendment

of the roadway; and that, if he does so use them, he becomes a trespasser. In *Suffield v. Hathaway*, 44 Conn. 521, 26 Am. Rep. 483, it was held that the selectmen of a town have no right, as against the owner of land on the highway, to divert the water from a spring on such owner's side of the road to a public watering trough on the other side. The court says: "As between the public and the respondent, the owner of the spring, the latter is entitled to any and all uses of it which do not interfere with the public safety, do not obstruct or hinder public travel, and do not increase the public burden of making repairs. . . . The right of the owner to the use of the spring under these limitations takes precedence of the right of the officers to divert it to the lands of others, if in so doing their sole motive is to establish a public watering place. Of course, such places afford great relief to man and beast; but, commendable as is the act of establishing them, towns have no right to take private property without compensation for that purpose." In *Deaton v. Polk County*, 9 Iowa, 594, the question arose upon an assessment of damages in the laying out of a highway, the plaintiff claiming that he was entitled to compensation for timber growing in the highway; but the court held that his title to the trees was not divested or affected by the condemnation proceedings. For the same reason it has been held that the public acquire no right to remove stones embedded in the ground below the grade of a highway, and to use them in repairing the road. *Winter v. Peterson*, 24 N. J. L. 524. 61 Am. Dec. 678; *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861, 35 N. W. 2; *Overman v. May*, 35 Iowa, 89, 97; 7 Geo. III. chap. 42, § 3; 13 Geo. III. chap. 78, §§ 16, 27.

On the other hand, it was decided in *Felch v. Gilman*, 22 Vt. 38, that the highway officers may use trees growing in the highway in repairing the road; but the reasoning of the court is not so convincing as to warrant a re-examination of the decision in *Baker v. Shephard*, 24 N. H. 208, or to weaken the force of the numerous authorities to the contrary. *Phifer v. Cox*, 21 Ohio St. 248, 255, 8 Am. Rep. 58.

Upon this examination of the authorities, the question is presented whether, in laying out a highway under statutory authority, the public acquire a right to prohibit the landowner from removing the trees standing in the highway next to his land, for the purpose of preserving them for shade and ornamentation. If the public cannot deprive the owner of his trees by using them in constructing or repairing the road, can they deprive him of his property right in them by

preventing him from cutting them down and using them in such a manner as he sees fit? It is no more a deprivation of his property right to cut down his trees and devote them to the useful and necessary work of road construction than it is to appropriate them, standing, for the purposes of shade and ornamentation. An effective prohibition against one's use and enjoyment of his property in a usual and otherwise appropriate manner deprives him of his property as much as its actual taking or asportation against his will. *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 511, 512, 12 Am. Rep. 147. By the act of these plaintiffs, if valid, the defendant's common right to remove the trees is destroyed, his right of user is materially curtailed, and his property is taken. "Before the public can assume to say that a man cannot cut down his own trees, they must have acquired an interest therein by purchase or by the right of eminent domain. To prevent a man from using his property is virtually taking it from him to a certain extent, and that cannot be done without compensation." *Lancaster v. Richardson*, 4 Lans. 136, 141. Moreover, the additional servitude is imposed upon the owner's land of supporting the trees for a public purpose. Their future growth and nourishment is to be derived from his soil. He is not only deprived of the valuable right to convert the trees into lumber and wood, which may be called the natural profits of the land, but he must allow the trees to remain upon the land and draw their sustenance therefrom. If he desires to cut off the branches of fruit trees standing on his side of the highway (*Stackpole v. Healy*, 16 Mass. 33, 36, 8 Am. Dec. 121), for the purpose of grafting them and thus of increasing his income from the land, he is met with the refusal of the public to allow the arboreal symmetry of the road to be thus impaired. He finds that his right of property in the trees is practically superseded by the public right of preserving them for shade or ornament, or both.

If such a right was acquired when the road was originally laid out, and if damages were assessed therefor, the statutes authorizing the laying out of highways furnish little convincing evidence in support of that contention. By the act of February 8, 1791, it was enacted "that at any time hereafter, when there shall be occasion for any new highways or private roads, to be laid out in any town or place in this state, the selectmen of such town or place be, and hereby are, empowered, on application made to them, if they see cause, to lay out the same; . . . and if such road be for the benefit of the town or public, due recompense shall be made by the town to the owners of

land through which such road is laid out, for all damages such owners sustain thereby." Laws ed. 1792, p. 278; Laws 1797, p. 309; Laws ed. 1805, p. 328; Laws ed. 1815, p. 385. The first section of the act of July 3, 1829, is a re-enactment of the first part of the statute above quoted, with some additions not material to the present inquiry, while § 2 provides "that when the selectmen of any town shall lay out a highway, they shall make return thereof, in which the way shall be particularly described and the width thereof stated, and shall cause the same to be recorded by the clerk. And such selectmen shall assess the damages thereby sustained by the owners of the land, and shall insert in the record the sums so assessed." Laws 1829, p. 543, chap. 52. In Rev. Stat. 1843, chap. 49, § 13, and in Comp. Stat. 1854, chap. 52, § 16, the language used is that "such selectmen shall assess the damages sustained by each owner of the land required for such highway, and insert the same in their return." In the revision of 1807 it is provided that the selectmen "shall assess the damages sustained by each owner of the land or other property taken for such highway, and insert the same in their return." Gen. Stat. chap. 61, § 15. This language also occurs in Gen. Laws 1878, chap. 67, § 19, and in Pub. Stat. 1901, chap. 67, § 18. In the highway legislation of the state no attempt appears to have been made to state specifically the property right taken for highways, or the elements of the damages sustained by the landowner. But the court has frequently been called upon to define the extent of the power conferred for which damages are assessable, and the rights retained by the landowner for which he is not entitled to damages. In 1816 it was decided, in *Makepeace v. Worden*, 1 N. H. 16, that the public have only a right of passage in highways; that is, an easement only. In 1827 a similar holding was announced in *Avery v. Maxwell*, 4 N. H. 36. The decision in *Baker v. Shephard*, 24 N. H. 208, was announced in 1851, to the effect that the public did not acquire, by the laying out of a highway, a right to use the timber growing thereon for its construction or repair. These decisions, and others of a similar import, give a restricted interpretation to the language of the legislature authorizing the taking of private property for highway purposes (Angell, *Highways*, § 83), and have been recognized by successive legislatures without any substantial modification. The legislative intention in these respects, having been determined so long ago, and acted upon for so many years, cannot now be treated as an open question. The general principle underlying these decisions seems to be

that the landowner was deprived of such rights only, and was paid for such rights only, as were reasonably necessary for the construction and maintenance of a way for public travel. "The compensation originally paid him for the taking of land for the road was computed upon the basis that the road would be built in a manner suited to the then existing circumstances." *Hinckley v. Franklin*, 69 N. H. 614, 615, 45 Atl. 643.

No logical argument in favor of the plaintiffs' contention can be drawn from the undoubted fact that, upon the laying out of a highway under the statute, the public acquire the right to use the soil within the limits of the way for its construction and repair, and thus to deprive the owner of the profits of the land, which he might otherwise enjoy. As was shown in *Titus v. Boston*, 149 Mass. 164-166, 21 N. E. 310: "It has from the earliest times been the practical construction of our laws authorizing land to be taken for public use that the towns or corporations had the right, as one of the incidents of the taking, to use the gravel or soil of one part of a way for the construction of another part." See also *Denniston v. Clark*, 125 Mass. 216, 222, 223; *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 360. The practically universal understanding and construction of the public right to use the soil of the way, for more than a hundred years, is evidence of great force upon the question whether it was in fact acquired and paid for when the way was laid out; and, for a similar reason, the fact that, anciently, arboreal shade and ornamentation of rural highways was not deemed a matter of much importance, is equally strong evidence that the public, by laying out a highway, did not acquire a right to compel the abutter to suffer his trees to remain for that purpose. The evidence of such an intention is wanting. "The *locus in quo*, although part of a turnpike road, is the soil and freehold of the plaintiff. He has the exclusive right of property in the land, subject, however, to the easement or rights incident to a public highway, such as the right of passage over it, and the right which the turnpike corporation has to construct a convenient pathway, and to keep it always in good repair. To accomplish these purposes, the corporation may dig up and remove from place to place, within the limits laid out for the road, any earth, sand, and gravel, and may dig or cut up sods and turf; but it by no means follows that the corporation has the right of herbage, which is the exclusive property of the owner of the soil, as well as all trees, mines, etc." *Adams v. Emerson*, 6 Pick. 57, 58; *Bailey v. Sweeney*,

64 N. H. 296, 9 Atl. 543; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363.

If the public highway easement for travel and communication authorizes the construction and operation, either on, above, or below the roadbed, of horse, electric, or steam railways, without the consent of the adjacent landowners, whose title extends to the center of the way (*Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327), it does not follow that a right to appropriate the natural profits of that part of the way which is not actually used for travel to the public use of ornamentation of rural highways was originally taken and paid for. The right to use the way for public travel may include the right to use it in all reasonable ways for the convenient accomplishment of that purpose; but it is an unwarranted inference to say that it also includes a right to use property for the æsthetic purpose of highway ornamentation, which had never before been deemed a constituent part of the road for travel, and which could not even be used in repairing the roadbed. *Johnson v. Atlantic & St. L. R. Co.* 35 N. H. 569, 572, 69 Am. Dec. 560. The kind of vehicles the public use in passing over the way may not determine the question of the right of passage; the right under the easement may justify the use of many modes of conveyance of which the men who laid out the way had not, and could not have had, the slightest conception. But property, like trees standing in the highway, which had no useful connection with the public passage over the way, and which, when constituting an obstruction to such passage, was necessarily removed as a nuisance, cannot be deemed to have been taken at the laying out of the road. If it had been taken and used for some public highway purpose, it may be it could have been subsequently used for a somewhat different public purpose. Trees and herbage in the highway, which do not interfere with or obstruct the public use of the road, and which are the natural profits of the unused land, were not taken, because they were not needed for highway purposes. Hence they cannot now be used by the public without compensation to the owner. 3 Kent, Com. 433; *State v. New-Boston*, 11 N. H. 407, 409; *Perley v. Chandler*, 6 Mass. 454, 456, 4 Am. Dec. 159; *Woodruff v. Neal*, 28 Conn. 165; *Overman v. May*, 35 Iowa, 89, 97.

The idea of providing for the shade and ornamentation of highways is of comparatively modern origin. It does not seem to have commanded the attention of the people in the early part of the last century. In 1858 the mayor and aldermen of Portsmouth

were "authorized to set out and maintain trees and shrubbery or public squares and highways at the expense of the city" (Laws 1858, chap. 2128, § 1, p. 2024), and the next year similar authority was conferred on the mayor and aldermen of Dover. Laws 1859, chap. 2258, p. 2131. In 1861 a general statute was passed for the preservation and protection of shade trees, which provide: [§ 1] "That any town or city shall have full control of the shade trees situated within the limits of any public street or highway in, or passing through, any town or city; and shall have full power to make such laws, from time to time, as may be deemed necessary for the protection and preservation of the same. [§ 2] If the owner of real estate in any town or city shall desire to remove any shade tree or trees situated between the carriage path and sidewalk, or within the limits of any public street, he shall obtain leave of the selectmen of the town or mayor and aldermen of the city wherein the trees may be located, or conform to laws which the town or city may have provided relative to shade trees. [§ 3] Nothing in the foregoing shall be construed to debar the owner of real estate to plant, rear, and protect any tree or trees between the carriage path and sidewalk in any public street or highway on which his estate be situate, if it do not interfere with the public travel." Laws 1861, chap. 2502, p. 2543; Gen. Stat. 1867, chap. 34, §§ 9-11. It will be observed that these provisions recognize the property right of the abutter in the shade trees in the highway, subjecting them merely to certain regulations as to their removal. No attempt was made to deprive him of his ownership of the trees. By Laws 1868, chap. 1, § 6, p. 127, towns were authorized to raise money for the planting of shade trees; and in 1875 such an abatement of taxes was authorized "to any person who shall set out and protect shade trees by any street or highway adjoining his land, as the said mayor and aldermen or selectmen shall deem just and equitable." Laws 1875, chap. 39, § 2, p. 464; Gen. Laws 1878, chap. 37, §§ 9-11, p. 113; Laws 1889, chap. 82, p. 97. These statutes were embodied in Pub. Stat. 1901, chap. 40, §§ 4, 9-11, pp. 164, 166, without any material change. In 1895 it was enacted that the mayor and aldermen of cities and the selectmen of towns be authorized "to designate and preserve trees standing and growing in the limits of highways, for the purposes of shade or ornament;" and that "whoever shall wantonly or intentionally injure or deface any trees thus designated . . . shall forfeit not less than \$5 nor more than \$100." Laws 1895, chap. 85, p. 439. At the next session the legislature au-

thorized selectmen to set out nursery trees, which might be presented to them, in such highways as the donor should indicate; but provided that "nothing in this act shall be construed to compel any party to have trees in the highway on the side next his land, without his consent." Laws 1897, chap. 44, p. 36.

From this examination of legislation previous to the act of 1901, it is apparent that it was no part of the legislative purpose to deprive abutters on highways of their property in the trees growing therein, but to more effectually guard and preserve such trees (*Chase v. Lowell*, 149 Mass. 85, 21 N. E. 233) so long as they were permitted to remain in the highway. The provision in Laws 1901, chap. 98, § 2, p. 592, that "towns and cities shall have control of all shade and ornamental trees situated in any public way or ground within their limits," was not intended to have a more extensive meaning, or to be more expressive of the purpose to appropriate private property to a public use, than language of similar import used in Laws 1861, chap. 2502, § 1, p. 2543, where the rights of abutters on highways were recognized and protected. The legislature has thus furnished evidence of a public policy based on an assumption or recognition of the fact that in laying out highways the abutter retained his property in the trees therein, which, not being obstructions, were allowed to stand in the untraveled part of the way. This practical contemporaneous construction of the rights of the landowner is evidence of great weight upon the question whether the public acquired the right, when the way was laid out, to terminate at any subsequent time his proprietary dominion of trees in the highway. That such a power has not been directly recognized in the legislation upon the subject, which is readily susceptible of a construction excluding its existence, is a very significant evidentiary fact.

Whether a different result might not be reached in the case of the laying out of a

street in a city or populous community, where all the land taken is required for actual, present use (2 Dill. Mun. Corp. § 608; *Boston v. Richardson*, 13 Allen, 146, 159; *Bloomfield & R. Natural Gaslight Co. v. Calkins*, 62 N. Y. 386; *Chesapeake & P. Teleph. Co. v. Mackenzie*, 74 Md. 36, 47, 28 Am. St. Rep. 219, 21 Atl. 690), it is unnecessary to consider; for it seems plain that trees growing by the side of an ancient rural highway, upon land not required for the accommodation of actual travel, belong to the owner of the adjacent land, who cannot be deprived of his right, as owner, without compensation, after a legal hearing. *Winchester v. Capron*, 63 N. H. 605, 56 Am. Rep. 554, 4 Atl. 795. Whether the trees are useful for shade and add to the beauty of the way, or whether they are only useful for lumber and wood, cannot determine the question of his ownership. If they are his property, he is entitled to the beneficial use of them, subject to such reasonable regulations as the public use of the highway may require. *White v. Godfrey*, 97 Mass. 472, 475; *Bliss v. Ball*, 99 Mass. 597; *Clark v. Dasso*, 34 Mich. 86; *Bills v. Belknap*, 36 Iowa, 583; *Everett v. Council Bluffs*, 46 Iowa, 66. But to permanently deprive him of the beneficial use of his property, or of the profits or income usually derivable therefrom, is not a reasonable regulation, but is an extinction of his right without corresponding compensation, and amounts to confiscation. As this proceeding is based upon the theory that the defendants had no right, under any condition, to cut down the trees in question,—in effect, that their property right in the trees had been legally divested and fully paid for,—and as the plaintiffs have not proceeded to divest the defendants of their title in the manner pointed out in § 3 of the act, the result is that the prosecution cannot be maintained.

Case discharged.

All concur.

NORTH CAROLINA SUPREME COURT.

J. F. RODMAN *et al.*

v.

J. W. S. ROBINSON, *Appt.*

(.....N. C.)

1. A man who is decreed by the court to perform his contract to convey

land has no right to raise the objection that the dower rights of his wife are not sufficiently guarded, where she is not a party to the action, nor bound by the decree.

2. A contract for the purchase and sale of real estate is not void because made on Sunday, under a statute forbidding the doing of any labor, business, or work "of his ordinary calling" on that day.

NOTE.—For other cases in this series as to validity of contracts made on Sunday, see *Western U. Teleg. Co. v. Yopst*, 3 L. R. A. 224; *Anderson v. Bellinger*, 4 L. R. A. 680, and *note*; *Rapp v. Reehling*, 7 L. R. A. 498, and 65 L. R. A.

note; *Tyler v. Waddingham*, 8 L. R. A. 657; *Bryan v. Watson*, 11 L. R. A. 63, and *note*; *Waters v. Richmond & D. R. Co.* 16 L. R. A. 834; and *First M. E. Church v. Donnell*, 46 L. R. A. 858.

where such transaction is not a part of the ordinary calling of either party to it.

3. An agreement to pay the purchase price is a sufficient consideration to support a contract to convey real estate.
4. A contract made on Sunday cannot be declared void because opposed to public policy.
5. The promisee in a contract to convey real estate is not limited to an action for damages in case of breach by the other contracting party; but he may have a decree requiring specific performance of the contract.
6. One who has contracted to convey real estate is not entitled to relief from performance of his contract because he has made a bad bargain, in the absence of fraud or mistake.

(March 29, 1904.)

APPEAL by defendant from a judgment of the Superior Court for Pender County requiring him specifically to perform his contract to convey real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. John D. Kerr and F. N. Cooper, for appellant:

The contract sued on, being an executory contract for the sale of land, made and executed on Sunday, and supported by no consideration, is void. It is against public policy.

See preamble to N. C. Const.; also art. 9, § 1; Code, §§ 291, subsec. 5, 596, 1115, 1117, 3782.

The contract sued on is void for illegality. It is directly in conflict with § 3782 of the Code, and contravenes the spirit of numerous statutes.

Melvin v. Easley, 52 N. C. (7 Jones, L.) 356; *Covington v. Threadgill*, 88 N. C. 186; *Sharp v. Farmer*, 20 N. C. (4 Dev. & B. L.) 122; *Puckett v. Alexander*, 102 N. C. 95, 3 L. R. A. 43, 8 S. E. 767; *Burbage v. Windley*, 108 N. C. 362, 12 L. R. A. 409, 12 S. E. 839; *Blythe v. Lovinggood*, 24 N. C. (2 Ired. L.) 20, 37 Am. Dec. 402; *Lindsay v. Smith*, 78 N. C. 328; *Ingram v. Ingram*, 49 N. C. (4 Jones, L.) 188; *Williams v. Carr*, 80 N. C. 295; *Griffin v. Hasty*, 94 N. C. 438; *Stute v. Howard*, 82 N. C. 626; *Sloan v. Williford*, 25 N. C. (3 Ired. L.) 307; *Bland v. Whitfield*, 46 N. C. (1 Jones, L.) 122.

Penal statutes, when acting upon the offending person, are construed strictly; but, when acting upon the offensive thing, they have a liberal construction, so as to advance the remedy, and promote the purpose of its enactment.

24 Am. & Eng. Enc. Law, pp. 537, 547; *Morgan v. Bailey*, 59 Ga. 683.

Messrs. Shepherd & Shepherd also for appellant.
65 L. R. A.

Messrs. E. K. Bryan and Connor & Connor, for appellees:

At this time the wife has no right in the land, but only a contingent right.

Gatewood v. Tomlinson, 113 N. C. 312, 18 S. E. 318.

Even though she had an interest in the land at this time, this would not be a point which the defendant could raise, but the point, if any, would be for the plaintiffs in this case.

Farthing v. Rochelle, 131 N. C. 563, 43 S. E. 1; *Fortune v. Watkins*, 94 N. C. 304.

By legislative enactment in this state a party is given the right to make a deed for his real estate without the signature of his wife, and the deed conveys the entire land, subject to the right of dower of the wife, in the event she survives her husband.

Code, § 2106; *Mayho v. Cotton*, 69 N. C. 289; *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Fleming v. Graham*, 110 N. C. 374, 14 S. E. 922; *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772.

The answer of the defendant in this case is in the nature of a cross bill in equity under the old practice, and is, in effect, asking for a decree annulling the contract. So that, in order to allow proof, the answer must allege facts, not conclusions of law, and the facts must be pleaded.

Willis v. Branch, 94 N. C. 142; *Harris v. Balfour Quarry Co.* 131 N. C. 553, 42 S. E. 973; *Lewis v. Clyde S. S. Co.* 132 N. C. 904, 44 S. E. 666; *McQueen v. People's Nat. Bank*, 111 N. C. 509, 16 S. E. 270; *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364; *Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357.

If it is the defendant's land, and no homestead has been allotted, and he is solvent, with no judgments against him, he can convey it subject to the inchoate right of dower of his wife, without the wife joining in the deed for the purpose, alone, of assent.

Gatewood v. Tomlinson, 113 N. C. 312, 18 S. E. 318; *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772.

The contract was good at common law.

Drury v. Defontaine, 1 Taunt. 131; *Clark*, Contr. p. 393; *Benjamin*, Sales, § 552; *Melvin v. Easley*, 52 N. C. (7 Jones, L.) 356; *White v. Morris*, 107 N. C. 92, 12 S. E. 80; *State v. Ricketts*, 74 N. C. 192; *Dorough v. Equitable Mortg. Co.* 118 Ga. 178, 45 S. E. 22.

The policy of the law in this state is contained in the statute and the Constitution.

Swann v. Swann, 21 Fed. 299.

If a contract is valid, it is valid whether executed or executory.

A promise for a promise is a valuable consideration.

Hove v. O'Mally, 5 N. C. (1 Murph.) 287, 3 Am. Dec. 693; 9 Cyc. Law & Proc. p. 323; *Worthy v. Brady*, 91 N. C. 265; *Puffer v. Lucas*, 101 N. C. 281, 7 S. E. 734; *Wilson v. Lineberger*, 92 N. C. 547; *Forney v. Shipp*, 49 N. C. (4 Jones, L.) 527; *Whitehead v. Potter*, 26 N. C. (4 Ired. L.) 257; *Hurlburt v. Simpson*, 25 N. C. (3 Ired. L.) 233; *Abrams v. Suttels*, 44 N. C. (Busbee, L.) 99; *Clark*, Contr. pp. 149, 165.

When a contract is once made, neither party to it can be relieved of its obligations without the consent of the other party.

Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913; *Blanton v. Kentucky Distilleries & Warehouse Co.* 120 Fed. 318; *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464; *Central Coal & C. Co. v. George S. Good & Co.* 57 C. C. A. 161, 120 Fed. 793.

The legislature could not pass a law that would prohibit a contract made as this one was.

Melvin v. Easley, 52 N. C. (7 Jones, L.) 356; *White v. Morris*, 107 N. C. 92, 12 S. E. 80.

In the case of a breach of contract of sale, the injured party is entitled, at his election, to a bill for specific performance, and is not bound to bring an action at law for damages.

Bryson v. Peak, 43 N. C. (8 Ired. Eq.) 310; *Kitchen v. Herring*, 42 N. C. (7 Ired. Eq.) 190; *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464; 22 Am. & Eng. Enc. Law, p. 941; *Welborn v. Sechrist*, 88 N. C. 287; *Springs v. Sanders*, 62 N. C. (Phill. Eq.) 67; *Young v. Griffith*, 84 N. C. 715.

It is as much a matter of course, in a court of equity, to decree specific performance, as it is for a court of law to give damages for a breach.

2 Minor, Inst. p. 867; *Story*, Eq. Jur. § 751; *Bispham*, Eq. § 364; *Pom. Eq. Jur.* § 1402; *Hargrove v. Adcock*, 111 N. C. 106, 16 S. E. 16; *Stamper v. Stamper*, 121 N. C. 251, 28 S. E. 20; *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141; *Hennessy v. Woolworth*, 128 U. S. 438, 32 L. ed. 500, 9 Sup. Ct. Rep. 109.

That the plaintiffs did not agree to pay as much as the land is worth does not relieve the defendant from the contract.

Stamper v. Stamper, 121 N. C. 251, 28 S. E. 20; *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141; *Moore v. Reed*, 37 N. C. (2 Ired. Eq.) 580.

Clark, Ch. J., delivered the opinion of the court:

On Sunday, September 14, 1902, the defendant, who then was and still is the own-

er in fee and possession of the land described in the complaint, contracted in writing dated September 13, 1902, with plaintiff Rodman to sell him said land, possession to be given the 1st of January, 1903, and deed to be delivered the 1st of April, 1903, at which time the purchase money was to be paid. In December, 1902, defendant informed Rodman that he would not deliver possession, nor accept the purchase money, and repudiated the contract. Nevertheless Rodman did tender the \$4,200, the agreed price, in money, on 1st of April, 1903, or as soon thereafter as defendant could be found, and demanded the deed, but defendant refused to accept the money or deliver the deed. The contract is admitted in the answer, and judgment for specific performance was rendered upon the pleadings, and defendant appealed.

The first assignment of error is: "Because it appears from the answer that defendant was at the time of signing said alleged contract to convey a married man, and his wife is still living, and entitled to dower and homestead right in said land, and the judgment does not sufficiently guard and protect such right." The wife has an inchoate right of dower, but she has no present right to the property, nor to its possession, nor any dominion over it. She has only a right therein contingent upon surviving her husband, which may not happen. *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 318. The Code, § 2103, expressly provides that upon the death of the husband the widow shall be entitled to dower. Besides, this is an objection which the plaintiff alone could make. The wife is not a party to this action, and the decree in no wise affects her contingent interest. Having taken the contract without the wife's signature, the plaintiff could not obtain a decree compelling her to join in the deed. *Farthing v. Rochelle*, 131 N. C. 503, 43 S. E. 1; *Fortune v. Watkins*, 94 N. C. 304. The Code, § 2106, recognizes the right of the husband to alien without the joinder of the wife, the conveyance having no effect upon the wife's contingent right of dower. *Fleming v. Graham*, 110 N. C. 374, 14 S. E. 922; *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772; *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Mayho v. Cotton*, 69 N. C. 289. As to the homestead right, it was not necessary for the wife to join in the contract, because the answer admits that no homestead had been allotted in this land. *Mayho v. Cotton*, 69 N. C. 289, approved in *Joyner v. Sugg*, 132 N. C., at page 589, 44 S. E. 122. Besides, the answer further admits the solvency of the defendant, that there is no judgment docketed against him, and that

he owns other lands more than sufficient in value for the allotment of the homestead. *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437. The conveyance or contract is valid, subject to the contingent right of dower. *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 318, and *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772. The wife is not a party to this action, and not estopped by the judgment if the above admissions should prove untrue. The wife not being a party, the exception that her "rights are not protected by the decree" has no place here.

The second assignment of error is: "Because the contract to convey was entered into and signed upon Sunday, and, no consideration being passed, and the defendant having repudiated the contract the week following, said contract is not enforceable, and the judgment should have declared said contract to be void." The promise to pay \$4,200 purchase money was a sufficient consideration. *Puffer v. Lucas*, 101 N. C., at page 284, 7 S. E. 734; *Worthy v. Brady*, 91 N. C. 265, 108 N. C. 440, 12 S. E. 1034; *Clark. Contr.* pp. 149, 169; 9 Cyc. Law & Proc. 323. The contract having been accepted by plaintiff, the attempted repudiation thereof by the defendant without the consent of the plaintiff has no effect. *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464; *Ryan v. United States*, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913. So this exception hinges upon the question whether the contract is invalid because entered into and signed on Sunday. This point has been settled in this state by repeated decisions. A contract entered into on Sunday is not invalid at common law. *Clark, Contr.* p. 393; *Drury v. Defontaine*, 1 Taunt. 131 (in which it was held that a vendor could recover the price of a horse sold on Sunday); *Benjamin, Sales*, § 552. Our statute—Code, § 3782—is copied almost verbatim from the first part of the statute 29 Car. II. chap. 7 (1678). The other part forbidding service of process on Sunday is omitted from our statute, which merely provides that "on the Lord's Day, commonly called Sunday, no tradesman, artificer, planter, laborer, or other person shall . . . do or exercise any labor, business, or work of his ordinary calling . . . upon pain that every person so offending . . . shall forfeit and pay \$1.00. This part was construed by Lord Mansfield in *Drury v. Defontaine*, 1 Taunt. 131, not to invalidate a sale of a horse on Sunday, where the sale was not a part of the vendor's ordinary calling. This statute is the foundation of nearly all the Sunday legislation in this country. It is not alleged in the answer that this contract was made

and entered into by either the plaintiff Rodman or the defendant, Robinson, in pursuance by either of his ordinary calling. In *Melvin v. Easley*, 52 N. C. (7 Jones, L.) 356, the court said: "The statute in its operation is confined to manual, visible, or noisy labor, such as is calculated to disturb other people; for example, keeping an open shop or working at a blacksmith's anvil. . . . The legislature has power to prohibit labor of this kind on Sunday on the ground of public decency. . . . But when it goes further, and . . . prohibits labor which is done in private, . . . the power is exceeded, and the statute is void." In that case it was held that selling a horse on Sunday was not forbidden by the statute, as dealing in horses was not Melvin's "ordinary calling." Again, it is said in *State v. Ricketts*, 74 N. C. 192: "In this state in general every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there be some act of the legislature forbidding it to be done on that day." This has been cited and approved in *White v. Morris*, 107 N. C., at page 99, 12 S. E. 80 (in which Davis, J., calls attention to the fact that prior to the Code civil process could not legally be served on Sunday, but now the restriction applies only to forbid arrests in civil actions on that day), approved, also, in *State v. Penley*, 107 N. C. 810, 12 S. E. 455; *Ashe, J.*, in *State v. McGimsey*, 80 N. C. 377, 30 Am. Rep. 90, and *State v. Howard*, 82 N. C., at page 626; *Merrimon, Ch. J.*, in *State v. Moore*, 104 N. C. 749, 10 S. E. 183; *Taylor v. Ervin*, 119 N. C. 276, 25 S. E. 875,—all these last holding that it was not illegal to hold court on Sunday if the judge deemed it necessary, though, out of considerations of propriety, it ought not to be done unless necessary. In *State v. Brooksbank*, 28 N. C. (6 Ired. L.) 73, *Ruffin, Ch. J.*, held that it was not indictable to sell goods in open shop on Sunday, and in *State v. Williams*, 26 N. C. (4 Ired. L.) 400, the court, through the same judge, held it not indictable to work on Sunday, it not being indictable either at common law (citing *Rea v. Brotherton*, 1 Strange, 702; *Rea v. Cor*, 2 Burr. 785) or by our statute, adding (p. 400): "It is clear, for example, that the making of bargains on Sunday was not a crime against the state, for contracts made on that day are binding. It has often been so ruled in this state, and after elaborate argument and time to advise." *Covington v. Threadgill*, 88 N. C. 189, is *obiter* merely, and *Waters v. Richmond & D. R. Co.* 108 N. C. 349, 12 S. E. 950, is a construction of § 1632, S. C. Gen. Stat. 1882, which is a part of the statute

29 Car. II., which has been omitted in our statute.

Counsel for defendant contend that Christianity is a part of the law of the land, and hence, independent of any statute, the contract is invalid. If the observance of Sunday were commanded by statute as an act of religion or worship, such statute would be absolutely forbidden. The founder of the Christian religion said that His "Kingdom was not of this world," and under our Constitutions, both state and Federal, no act can be required or forbidden by statute because such act may be in accordance with or against the religious views of anyone. The 1st Amendment to the Federal Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" and the Constitution of this state (art. 1, § 26) reads: "All men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should in any case whatever control or interfere with the rights of conscience." If, therefore, the cessation of labor, or the prohibition or performance of any act, were provided by statute for religious reasons, the statute could not be maintained. The Seventh Day Baptists, and some others, as well as the Hebrews, keep Saturday, and the Mahomedans observe Friday. To compel them or anyone else to observe Sunday for religious reasons would be contrary to our fundamental law. The only ground upon which "Sunday laws" can be sustained is that, in pursuance of the police power, the state can and ought to require a cessation of labor upon specified days to protect the masses from being worn out by incessant and unremitting toil. If such days happen to be those upon which the larger part of the people observe a cessation of toil for religious reasons, it is not an objection, but a convenience. Yet such statute cannot be construed beyond its terms so as to make the signing of a contract on Sunday invalid when the words prohibit only "labor, business, or work of one's ordinary calling." It is incorrect to say that Christianity is a part of the common law of the land, however it may be in England, where there is union of church and state, which is forbidden here. The beautiful and divine precepts of the Nazarene do influence the conduct of our people and individuals, and are felt in legislation and in every department of activity. They profoundly impress and shape our civilization. But it is by this influence that it acts, and not because it is a part of the organic law, which expressly denies religion any place in the supervision

or control of secular affairs. As a cotemporary construction of the Federal Constitution, it may be well to recall that one of the first treaties of peace made by the United States—that with Tripoli—which was sent to the Senate with the signature of George Washington, who had been president of the convention which adopted the United States Constitution, began with these words: "As the government of the United States is not in any sense founded on the Christian religion." This treaty was ratified by the Senate. If it was presumption in Uzza to put forth his hand to stay the tottering ark of God at the threshing floor of Chidon, it is equally forbidden under our severance of church and state for the civil power to enforce cessation of work upon the Lord's Day in maintenance of any religious views in regard to its proper observance. That must be left to the consciences of men as they are severally influenced by their religious instruction. Churches differ widely, as is well known, on this subject; the views of Roman Catholics and Presbyterians, for instance, being divergent, and the views of other churches differing from both. Even if Christianity could be deemed the basis of our government, its own organic law must be found in the New Testament, and there we shall look in vain for any requirement to observe Sunday, or, indeed, any day. The Master's references to the Sabbath were not in support, but in derogation, of the extreme observance of the Mosaic day of rest indulged in by the Pharisees. The Old Testament commanded the observance of the Sabbath, but that was an injunction laid upon the Hebrews, and it designated Saturday, not Sunday, as the day of rest, prescribing a thoroughness of abstention from labor which few observe, even of the people to whom the command was given. Sunday was adopted by Christians in lieu of Saturday long years after Christ, in commemoration of the Resurrection. The first "Sunday law" was enacted in the year 321 after Christ, soon after the Emperor Constantine had abjured paganism, and apparently for a different reason than the Christian observance of the day. It is as follows: "Let all judges and city people, and all tradesmen, rest upon the venerable day of the Sun. But let those dwelling in the country freely and with full liberty attend to the culture of their fields, since it frequently happens that no other day is so fit for the sowing of grain or the planting of vines; hence the favorable time should not be allowed to pass, lest the provisions of Heaven be lost." Code Just. lib. 3, title 12, 1, 3. Evidently Constantine was still something of a heathen. As late as

the year 409 two rescripts of the Emperors Honorius and Theodosius indicate that Christians then still generally observed the Sabbath (Saturday, not Sunday). The curious may find these set out in full in Code Just. lib. 1, tit. 9, 1, 13. Not till near the end of the ninth century was Sunday substituted by law for Saturday as the day of rest by a decree of the Emperor Leo (Leo, Cons. 54). The subsequent development of Sunday laws will be found in Lewis's "Sunday Legislation." This legislation has differed in different Christian countries, and still differs, and the divergence is very great, even in the legislation of the states of this Union. The Saxon laws, under Ine (about A. D. 700), forbade working on Sunday, but under Alfred (A. D. 900) and Athelstane (A. D. 924) the prohibition was merely against marketing on Sunday, and there seems to have been no statute against working on Sunday (whatever the church may have enjoined) until the above-cited statute, 29 Car. II., chap. 7 (1678), the first part of which is almost verbatim our statute (Code, § 3782). See 4 Bl. Com. 63. Indeed, it appears from the records of Merton College, Oxford, that at its manor of Ibstone, in the latter part of the thirteenth century, contracts with laborers provided for cessation from work on Saturdays and holidays; but it was stipulated that work should be done in regular course on Sunday. Thorold Rogers, "Work and Wages," chap. 1. Indeed, it seems that this was usual in England till the time of the commonwealth and the rise of the Puritans to power; but the change was not enacted into law till the above-cited statute of Charles II. in 1678. The first Sunday law in this country was enacted in Virginia in 1617 (three years before the landing at Plymouth), and punished a failure to attend church on Sunday, with a fine payable in tobacco. This was re-enacted in 1623. Henning's Statutes at Large, Va. 1619-1660, vol. 1, p. 123. Plymouth Colony (Records, vol. 11, p. 214) made it punishable by imprisonment in the stocks to go to sleep in church; and on June 10, 1650, the same colony made it punishable by whipping to do "any servile work or any such like abuse" on the Lord's Day. "So any sin committed with an high hand, as the gathering of sticks on the Sabbath day, may be punished with death, when a lesser punishment might serve for gathering sticks privily and in need." Records of Massachusetts Bay, vol. 2, p. 93. Publicity did not then have the virtue attributed to it as now, but the reverse. Hutchinson's History of Massachusetts, vol. 1, p. 390, says: "Divers other offenses were made capital, viz., profaning the Lord's Day in a careless or scornful neg-

lect or contempt thereof (Numbers 15, 30-36)." The New Haven Colony Records, 1653-1655, p. 605, contain a similar provision that profaning the Lord's Day by "sinful servile work or unlawful sport, recreation, or otherwise, whether wilfully or in a careless neglect, shall be duly punished by fine, imprisonment, or corporally, according to the nature and measure of such sin and offense;" providing further that, if "the sin was proudly, presumptuously, and with a high hand committed," such person "shall be put to death." On May 19, 1668, after the union of New Haven and Connecticut in one colony, unnecessary travel or playing on Sunday, or keeping out of the meeting house, was made punishable by imprisonment in the stocks; adding: "The constables in the several plantations are hereby required to make search for all offenders against this law, and make return thereof." Colonial Records of Connecticut, 1665-1667, p. 88. Similar laws, but of less severity, were enacted in some other provinces. While the statutes of the several states still differ on the subject of Sunday legislation, all of these enactments are now based upon the police power, that some rest may be guaranteed to the workers, and to avoid offense by the noise and tumult of traffic and labor to the great majority who desire a day of quiet and peace for their devotional services. Bishop on Contracts, § 536, says: "It is abundantly settled that a Sunday contract is good when it does not come in conflict with any statute." We do not deny the constitutionality of a Sunday law based on the police power, which is well settled. *Judefind v. State*, 22 L. R. A. 721, and notes (78 Md. 510, 28 Atl. 405). We hold that our statute does not make void the contract here sued on. In the language of Caldwell, J., in *Swann v. Swann*, 21 Fed. at page 305: "It would be downright hypocrisy for a court to affect to believe that the moral sense of the community . . . would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord's Day." And the same is true of the enforcement of any contract which is not forbidden by statute to be made on Sunday.

Among the authorities elsewhere which hold in accordance with our decisions that a note on contract made on Sunday is valid are *Barrett v. Aplington*, Fed. Cas. No. 1,045; *More v. Clymer*, 12 Mo. App. 11; *Glover v. Cheatham*, 19 Mo. App. 656; *Sanders v. Johnson*, 29 Ga. 526; *Dorough v. Equitable Mortg. Co.* 118 Ga. 178. 45 S. E. 22; *Ray v. Catlett*, 12 B. Mon. 532; *Hazard v. Day*, 14 Allen, 487, 92 Am. Dec. 790; *Geer v. Putnam*, 10 Mass. 312; *Kaufman v. Hamm*, 30 Mo. 388 (which held valid a

promissory note made on Sunday); *Foster v. Wooten*, 87 Miss. 540, 7 So. 501; *Horacek v. Keebler*, 5 Neb. 355; *Fitzgerald v. Andrews*, 15 Neb. 52, 17 N. W. 370; *Swisher v. Williams*, Wright (Ohio) 754; *Bloom v. Richards*, 2 Ohio St. 387; *Hellams v. Abercrombie*, 15 S. C. 110, 40 Am. Rep. 684 (which holds a mortgage executed on Sunday to be valid); *Mills v. Williams*, 16 S. C. 593; *Lucas v. Larkin*, 85 Tenn. 355, 3 S. C. 647 (privy examination on Sunday valid); *Gibbs & S. Mfg. Co. v. Brucker*, 111 U. S. 597, 28 L. ed. 534, 4 Sup. Ct. Rep. 572; *Allen v. Gardiner*, 7 R. I. 22; *Moore v. Murdock*, 26 Cal. 514; *Johnson v. Brown*, 13 Kan. 529; *Burks v. French*, 21 Kan. 238; *Boynton v. Puge*, 13 Wend. 425; *Miller v. Roessler*, 4 E. D. Smith, 234; *Batsford v. Every*, 44 Barb. 618; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Eberle v. Mehrbach*, 55 N. Y. 682; *Amis v. Kyle*, 2 Yerg. 31, 24 Am. Dec. 463; *Behan v. Ghio*, 75 Tex. 87, 12 S. W. 996; *Schneider v. Sansom*, 62 Tex. 201, 50 Am. Rep. 521; *Richmond v. Moore*, 107 Ill. 426, 47 Am. Rep. 445; *Main v. Johnson*, 7 Wash. 321, 35 Pac. 67; *Raines v. Watson*, 2 W. Va. 371; *Clark*, Contr. 395; and there are others to same purport. There are decisions to the contrary, but they will be found almost entirely in states where the statute, unlike ours, is not restricted to "labor, business, or work done in one's ordinary calling," but is extended in its terms so as to embrace the prohibition of contracts of all kinds on Sunday. In such cases, as is said in *Swann v. Swann*, 21 Fed. 299: "Contracts made on the Lord's Day are not void on religious or moral grounds, but upon the familiar and established doctrine that when a statute inflicts a penalty for doing an act—no matter what that act may be—a court of justice will not enforce a contract made in violation of such statute." The execution of a will on Sunday seems to be held valid everywhere. The Pennsylvania court in 1850 was evenly divided on the question whether a marriage contract executed on Sunday was such worldly employment or business as was forbidden on that day (*Re Gangwere*, 14 Pa. 417, 53 Am. Dec. 554); but better advised later, in 1882 they held that a contract of marriage entered into on Sunday was valid (*Markley v. Kessering*, 2 Pennyp. 187).

To sum up the whole matter, the validity, in the courts, of any act done on Sunday, depends, not upon religious views, but upon the statute of each particular state, and our statute only forbidding "labor, work, or business of one's ordinary calling" does not invalidate a contract, as here, which was not an act done as a part of the plaintiff's usual business or calling. Bishop, Contr. § 65 L. R. A.

538, and cases cited. As was said in *State v. Ricketts*, 74 N. C. 192: "What religion or morality permit or forbid to be done on Sunday is not within our province to decide."

The third exception is that the agreement to convey was void because without consideration and against public policy. Both these points have been disposed of. See also *Dowdy v. White*, 128 N. C. 17, 38 S. E. 129, as to mutual promises being sufficient consideration, and on public policy see note at end of opinion in *Swann v. Swann*, 21 Fed. 308.

The fourth and last exception is that the decree is "for specific performance, while the plaintiff at most is entitled only to damages for breach of contract." In *Bryson v. Peak*, 43 N. C. (8 Ired. Eq.) 310, it is held: "In case of a breach of contract of sale, the injured party is entitled, at his election, to a bill for specific performance, and is not bound to bring an action at law for damages." To same purport, *Springs v. Sanders*, 62 N. C. (Phill. Eq.) 67; *Young v. Griffith*, 84 N. C. 715; *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16; *Stamper v. Stamper*, 121 N. C. 251, 28 S. E. 20; *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141; *Hennessey v. Woolworth*, 128 U. S. 438, 32 L. ed. 500, 9 Sup. Ct. Rep. 109.

The allegation that the defendant made a bad trade, there being no fraud or mistake alleged, does not exempt him from specific performance. *Stamper v. Stamper*, 121 N. C. 251, 28 S. E. 20; *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141; *Moore v. Reed*, 37 N. C. (2 Ired. Eq.) 590. If, as the defendant admits, he is liable to damages for the difference between the contract price and the value of the land, then he is not hurt, because he would have to pay the difference, and there would be no reason for a refusal to decree specific performance. There is no fraud or mistake as alleged. The land is described by metes and bounds, and that is sufficient. Laws 1891, p. 524, chap. 465; *Carson v. Ray*, 52 N. C. 609, 78 Am. Dec. 267; *Fortesque v. Crawford*, 105 N. C. 29, 10 S. E. 910; *Farthing v. Roehelle*, 131 N. C. 563, 43 S. E. 1. The decree should have directed the defendant to make reasonable effort to get his wife to sign the deed. *Svepsson v. Johnston*, 84 N. C. 449; *Welborn v. Sechrist*, 88 N. C., at page 292. But that was error against the plaintiffs, who are not appealing.

No error.

Walker, J., concurs in result. Connor, J., having been of counsel, did not sit on the hearing of this case.

MISSISSIPPI SUPREME COURT.

Donis AYCOCK, *Appt.*,
v.

Bud HAMPTON.

(.....Miss.....)

The putative father of a bastard child may maintain a writ of habeas corpus to recover possession of it from its maternal relatives after the death of its mother, where there is nothing to show that he is an improper person to have custody of it.

(April 4, 1904.)

A PPEAL by petitioner from a judgment of the Circuit Court for Alcorn County dismissing his petition for a writ of habeas

corpus to recover possession of his illegitimate daughter. *Reversed.*

The child which was the subject of controversy in this case was a girl eleven or twelve years old. She had lived with her mother until the mother died, and was then taken by her maternal uncle, the defendant in this case.

Further facts appear in the opinion.

Messrs. Lamb & McKenzie, for appellant:

If the mother is dead, the father has the right to the custody and control of the child.

3 Am. & Eng. Enc. Law, 2d ed. p. 888.

If under the law a father is entitled to the custody of his child, and is deprived of

NOTE.—*Right of mother, or reputed father, of illegitimate child to its custody or control.*

- I. Mother generally entitled to custody, 689.
- II. Reputed father's right to custody in general, 690.
- III. Rights of mother, or reputed father, as against each other.
 - a. Mother's right as against reputed father, 690.
 - b. Reputed father's right as against mother, 692.
- IV. Rights of mother, or reputed father, as against other persons.
 - a. Mother's right as against others than reputed father, 692.
 - b. Reputed father's right as against others than mother.
 1. As against parish, 693.
 2. As against town or county, 694.
 3. As against strangers, 694.
 4. As against relatives, 694.
- V. Right of mother, or reputed father, to guardianship of child.
 - a. Mother's right of guardianship, 695.
 - b. Mother's right to appoint testamentary guardian, 696.
 - c. Reputed father's right of guardianship, 696.
 - d. Reputed father's right to appoint testamentary guardian, 696.
- VI. Right of mother or reputed father, as against guardian of child.
 - a. Mother's right as against guardian, 696.
 - b. Reputed father's right as against guardian, 696.
- VII. Rights of mother, or reputed father, in proceedings affecting custody.
 - a. Notice, 696.
 - b. Consent, 696.
 - c. Right to appear or be heard, 697.

This note does not include cases involving the right of the reputed father or mother of an illegitimate child to its earnings or services.

See note to *Sheers v. Stein*, 5 L. R. A. 781, on *Custody of child; common-law rule.*

I. Mother generally entitled to custody.

As a general rule the mother of an illegitimate 65 L. R. A.

child is entitled to its custody. *Ex parte Glover*, 4 Dowl. P. C. 291, 1 H. & W. 508; *Alfred v. McKay*, 36 Ga. 440; *Petersham v. Dana*, 12 Mass. 429; *Friesner v. Symonds*, 46 N. J. Eq. 521, 20 Atl. 257; *Ousset v. Euvrard* (N. J. Eq.) 52 Atl. 1110; *People v. Landt*, 2 Johns. 375; *Roballna v. Armstrong*, 15 Barb. 247; *Re Lessler*, 17 Abb. Pr. 307, note; *Burns v. Com.* 129 Pa. 138, 18 Atl. 756; *State v. Howard*, 1 Swan, 133.

In *Austin v. McCluney*, 5 Strobb. L. 104, it is said: "Of necessity, the mother of an illegitimate child must exercise power and control over him whilst of tender age."

The mother of a bastard child is entitled to its custody, care, and government. In her center all the powers of both the parents of a legitimate child. *Young v. State*, 53 Ind. 536.

So, the mother of a minor bastard child is entitled, under Ga. Civ. Code, § 2509, to his custody, and may exercise paternal power over him, and he cannot enter into a valid contract of service without her consent. *Perry v. State*, 113 Ga. 936, 39 S. E. 315.

A mother may, under Ky. Rev. Stat. chap. 64, § 3, bind out as an apprentice her infant illegitimate child under the supervision of the county court, subject to its judgment as to the suitability of the person to whom it is proposed to bind the child. *Baker v. Winfrey*, 15 B. Mon. 499.

The law secures to the mother of a bastard its care, custody, and possession, if she chooses to keep her child. *People v. Mitchell*, 44 Barb. 245.

In *State v. Howard*, 1 Swan, 133, it is said: The court has no power to bind an illegitimate child as an apprentice without the mother's consent, while she provides for its maintenance and support.

An illegitimate child should not be taken from the care and protection of its mother and bound out as an apprentice, in the absence of some necessity therefor. *Baker v. Winfrey*, 15 B. Mon. 499.

That the mother of an infant illegitimate child has received temporary relief from the overseer of the poor does not authorize the apprenticing of the child under a statute providing therefor when the mother has been

this right, how, then, can he get relief or assert his right, except as he has undertaken to do in this cause?

Pote's Appeal, 106 Pa. 574, 51 Am. Rep. 540; *Com. v. Anderson*, 1 Ashm. (Pa.) 55; *Richards v. Hodges*, 2 Wms. Saund. 83; *Moritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 762; *Rea v. Cornforth*, 2 Strange, 1162; *Rea v. Cornfoot*, 1 Bott, Poor Law Cas. 465.

Messrs. Boone & Curlee for appellee.

Whitfield, Ch. J., delivered the opinion of the court:

The putative father was entitled to the custody of his illegitimate daughter, about eleven or twelve years old. There is nothing to show that he was an improper per-

son to have the custody of his child. The learned court below seems to have proceeded on the idea that a putative father had no legal standing to maintain a writ of habeas corpus. The case of *Moritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 763, states the true rule. The court says: "Though a bastard be not looked upon as a child for any civil purpose, the ties of nature are regarded in respect to its maintenance. The putative father, though not legally related to it, is so far considered its natural guardian as to be entitled to the custody of it. In *Rea v. Cornforth*, 2 Strange, 1162, the court granted an information for the abduction of a natural daughter from the protection of her putative father, thinking that a bastard is within 4 & 5 Ph. & M. chap. 8,

chargeable to the city. *People ex rel. Hellbronner v. Hoster*, 14 Abb. Pr. N. S. 423.

II. *Reputed father's right to custody in general.*

The power of the putative father over his illegitimate child was denied in the Roman law, and it is equally so in the Spanish law. 2 Kent, Com. 216, note, Citing *Acosta v. Robin*, 7 Mart. N. S. 387.

It is a universally recognized principle of the common law that the father of a bastard child has no parental power or authority over his illegitimate offspring. *Timmins v. Lacy*, 30 Tex. 116.

In *Jones v. Stockett*, 2 Bland, Ch. 400, it is stated: The father has no right to the custody of his bastard child.

In point of law, neither the father nor the mother has any particular right to the custody of an illegitimate child. *Re White*, 10 L. T. 340.

The right of the putative father to the custody and services of his natural child must arise out of contract, in which the parties are at liberty to stipulate for themselves. When the father assumes and discharges the duties of the parent, corresponding duties arise on the part of the natural child, and this is true so long as these relations exist. But these relations are merely conventional, and, being voluntary, may be dissolved at pleasure. *King v. Johnson*, 2 Hill, Eq. 624.

But, in equity, the rights of a putative father are always recognized. *Re Ullee*, 54 L. T. N. S. 286.

III. *Rights of mother, or reputed father, as against each other.*

a. *Mother's right as against reputed father.*

The right of the mother of a natural child to its custody is, in general, superior to that of the reputed father. *Dalton v. State*, 6 Blackf. 357; *Acosta v. Robin*, 7 Mart. N. S. 387; *Ramsay v. Thompson*, 71 Md. 315, 6 L. R. A. 705, 18 Atl. 502; *Hudson v. Hills*, 8 N. H. 417; *State v. Stikall*, 22 N. J. L. 286; *Bustamento v. Analla*, 1 N. M. 255; *People ex rel. Trainer v. Cooper*, 8 How. Pr. 288; *People ex rel. Davenport v. Kling*, 6 Barb. 366; *People v. Landt*, 2 Johns. 375; *Pote's Appeal*, 106 Pa. 574, 51 Am. Rep. 540; *King v. Johnson*, 2 Hill, Eq. 624; *Queen v. Armstrong*, 1 Ont. Pr. Rep. 6; *O'Rourke v. Campbell*, 13 Ont. Rep. 503. 65 L. R. A.

On an application for an habeas corpus to bring up the body of an infant illegitimate child in order to restore it to the mother, the latter was held entitled to its custody in preference to the father, though from his circumstances he was better able to educate it. *Ex parte Knee*, 1 Bos. & P. N. R. 148, 8 Revised Rep. 772.

A negro child, the issue of a customary marriage between slaves is illegitimate where his parents, after becoming free, did not continue their assumed marital relations; and the mother is entitled to have the custody and control of the child as against the putative father. *Allen v. Allen*, 8 Bush, 491.

So, the approval of the reputed father is not sufficient to authorize the court to apprentice a minor son, the issue of an unratified slave marriage, notwithstanding the opposition of his mother and her ability to support and maintain him. *Timmins v. Lacy*, 30 Tex. 116.

Nor can the father of an illegitimate child, by legitimating it and declaring it to be his heir, deprive the mother of its custody. *Lawson v. Scott*, 1 Yerg. 92.

The reputed father is not entitled to the custody of his illegitimate child as against the mother and without her consent. *Robalina v. Armstrong*, 15 Barb. 247.

The court is without power to take a natural child from the care of the mother and give it to the father. *Re Doyle*, *Clarke*, Ch. 154; *State v. Howard*, 1 Swan, 133.

The custody of an illegitimate child two years of age will not be awarded to the father as against the claims of the mother, where the father's moral character is no better than that of the mother, and the latter neither neglects, abuses, nor falls properly to care for the infant. *Pratt v. Nitz*, 48 Iowa, 33.

But, if it appear that the child is abused, the court will interfere in its behalf and direct it to be placed elsewhere. *People v. Landt*, 2 Johns. 375. In this case the reputed father sought to take the child from the custody of the mother and one whom she had married, by whom it was alleged the child was ill-treated. The court declined to interfere on the ground that the allegation was not sustained.

The mother's right of custody seems to be uniformly upheld when the child is of tender years. *Anonymous*, 5 Jur. 1198, 3 Mann. & G. 547, 4 Sc'tt, N. R. 200.

In *McGungai v. Mong*, 5 Pa. 269, the court

which punishes the taking away of any maid or unmarried woman child from the possession of the father, mother, or person having the governance of it. Between the father and the mother, however, the latter seems to have the prior claim. *Ex parte Knee*, 1 Bos. & P. N. R. 148, 8 Revised Rep. 772. . . . In *Res v. Cornfoot*, 1 Bott. Poor Law Cas. 465, it was held that a putative father has a natural right to the care and education of his illegitimate child; and in *Newland v. Osman*, 1 Bott, Poor Law Cas. 466, he was allowed to take it from the parish and maintain it. It may be safely said, then, that the law recognizes the rights of putative paternity for purposes of nurture and education." *Pote's Appeal*, 106 Pa. 574, 51 Am. Rep. 540, also lays

said: The putative father has no right to the custody of his illegitimate child within the years of nurture, for till seven years of age the child shall stay with the mother for nurture.

The putative father of an illegitimate child, who offers to give a bond that he will maintain, educate, and care for it, is properly refused the custody of the child, an infant three months old, requiring the nursing and care of the mother,—especially where the father does not appear to be a proper person to be intrusted with the care of the child. *Debler v. State*, 22 Ind. App. 383, 53 N. E. 850.

An offer made by the putative father to take his illegitimate child, twenty-two months old, and support it, is no defense in an action on the bond given by him to indemnify the town against the expense of its maintenance, where the mother refuses to part with the child. *Hudson v. Hills*, 8 N. H. 417.

The mother of a bastard child three or four years old is entitled to its custody, and the putative father and his surety, on a bond given for the maintenance of the child, cannot exonerate themselves from liability by demanding the infant. *Carpenter v. Whitman*, 15 Johns. 208.

In *Re Doyle*, Clarke, Ch. 154, the court considered itself without power to take the illegitimate child about six years of age from the custody of its mother, and to place it with the reputed father, who had, for the most part, supported it, and who desired to bring up the child as a member of his family.

Nor can the mother of an illegitimate child two years of age be deprived of the right to its care and custody by a compromise entered into between the putative father and the superintendents of the poor of the county, whereby it was agreed that, if the father should take possession of and support the child, he should be released from liability on the bond given by him to secure the child's maintenance; and that, if the mother refused to surrender the child, he should likewise be discharged. *People v. Mitchell*, 44 Barb. 245.

One who applies to the directors of the poor for the custody of his illegitimate child, and offers to educate and maintain it, but is refused its custody on the ground that the child is too young to be taken away from its mother, and that the directors have no power to deliver it, is not released from the obligation of his 65 L. R. A.

down the same doctrine; the court there saying: "That the putative father was a proper person to present this petition cannot, we think, be doubted. The putative father of an illegitimate child is entitled to the custody of the child as against all but the mother. If the mother be dead, and the father a suitable person, it shall be taken from the maternal grandparents, and delivered to him." *Com. v. Anderson*, 1 Ashm. (Pa.) 55. To the same effect are the English cases, *Richards v. Hodges*, 2 Wms. Saund. 83; *Burwell's Case*, 1 Vent. 48; *Sherman's Case*, 1 Vent. 210; and *Newland v. Osmer*,—referred to in Burn, Justice of Peace, 234. In *Moritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 762, it was said that, although a bastard may not be looked upon

bond, given to secure the support of the child. *Bucks County v. Dungan*, 64 Pa. 402.

In an action on a bond given to indemnify the parish against the expense of maintaining an illegitimate child, a plea that after the infant attained the age of seven years the putative father offered thenceforth to keep and maintain it, and requested the overseers to give it to him, is bad without showing that the child was within the power and custody of the overseers. Sir J. Mansfield, Ch. J., observed: "I say nothing upon the grand point, whether, after the child is out of the age of nurture, any father whatsoever, be he who he may, can go to the mother and claim the custody of the child." *Strangeways v. Robinson*, 4 Taunt. 498.

And in an action of debt upon a bond executed in consideration of £14 to indemnify the plaintiff, alleged to be the father of a bastard child, against all damages and charges which he might be put to on account of such a child, a plea that the child was an infant under seven years of age, and in the keeping of the mother, and that it was not in defendants' power to take it from her and keep it, so as to indemnify plaintiff, was held no excuse. The court said: "We need not in this case say whether the father or the mother hath a right to have the child while under seven years of age, because the defendants have bound themselves to keep the plaintiffs harmless against all the world." *Hulland v. Malken*, 2 Wils. 126.

The courts will not permit the reputed father to obtain possession of his natural child by force or fraud.

If the putative father of a bastard daughter three years of age obtains possession of the child by fraud, the court will, on habeas corpus, order her restored to her mother. *Rex v. Soper*, 5 T. R. 278.

A natural child five years old will be taken on habeas corpus from the possession of its putative father and restored to the mother, where he acquired custody by force or fraud. Lord Kenyon, Ch. J., remarked: "Where the father has the custody of the child fairly, I do not know that this court would take it away from him. . . . But where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before." *Rex v. Moseley*, 5 East, 221, note, 7 Revised Rep. 695.

as a child for any civil purpose, the ties of nature are respected in regard to its maintenance. The putative father, though not legally related to it, is so far considered its natural guardian as to be entitled to the custody of it. The learned Chief Justice Gibson, delivering the opinion of the court after a full discussion of all the cases, concludes as follows: "It may be safely said, then, that the law recognizes the rights of putative paternity for purposes of nurture and education." We may allow large abatements, perhaps, from the estimate which the law makes in respect of the natural tenderness of parents for their own offspring in cases like this, but it is certain that the rule referred to is grounded in that consid-

eration. 3 Am. & Eng. Enc. Law, 2d ed. p. 888, states the rule as follows: "The mother, as guardian by nature, has the right to the custody and control of her bastard child until it shall have attained an age when it can, in contemplation of the law, make an election between father and mother. If, on the other hand, the mother be dead, the father has the right to the custody and control of the child." The distinction between the right of a bastard to assert its rights for any civil purposes in the courts is a very different one from that which entitles it to have the ties of nature, as regards its maintenance and nurture, enforced.

Reversed and remanded.

An action for false imprisonment will lie in the name of an illegitimate child detained by her reputed father, who fraudulently took her from the custody of her mother. *Robalina v. Armstrong*, 15 Barb. 247.

The putative father of a bastard child will not be awarded its custody according to the terms of a contract made with the mother, whereby the father was to pay a stipulated sum for the support of the child until it became one year old, after which it was to be surrendered to him, where the mother was ignorant of the provisions of the contract, and her signature was obtained thereto by fraud. *State v. Noble*, 70 Iowa, 174, 30 N. W. 396.

b. Reputed father's right as against mother.

A putative father who has given the requisite bond for the support of his illegitimate child is, by the terms of the Illinois act of June 23, 1827, entitled to have charge and control of the child as against the mother; and, should she refuse to surrender the infant on demand, the reputed father is thenceforth released from liability on the bond so long as she persists in her refusal. *Wright v. Bennett*, 7 Ill. 587.

A reputed father who obtained possession of his illegitimate child with the assent of its mother, and without force or fraud, under an arrangement for its support, will not be deprived of its custody in favor of the mother,—especially where the arrangement is obviously for the advantage, not only of the child, but of all the parties concerned. *Queen v. Armstrong*, 1 Ont. Pr. Rep. 6.

A mother may transfer her right to the custody of her illegitimate children to the putative father, and such transfer will be upheld in the absence of fraud or duress, where the change of custody is advantageous to the children. *Ousset v. Euillard* (N. J. Eq.) 52 Atl. 1110.

In *People ex rel. Davenport v. Kling*, 6 Barb. 366, the court refused to take an illegitimate child from the custody of its father and grandfather, where it was well provided for, and return it to its mother, who was of weak mind and in indigent circumstances.

An illegitimate daughter twelve years of age will not be awarded to the mother on habeas corpus, as against the reputed father by whom she had been placed at school; but she will be permitted to choose for herself. *Anonymous*, 5 Jur. 1198, 3 Mann. & G. 547, 4 Scott, N. R. 200.

65 L. R. A.

The father is entitled, as against the mother, to the custody, control, and obedience of the issue of a marriage null in law, where, by statute, such issue are declared to be legitimate. *Graham v. Bennet*, 2 Cal. 503.

The father of a colored boy, the issue of a slave marriage legalized by statute, or the master to whom such father apprenticed him, is entitled to his custody as against a master who persuaded the mother to sign articles apprenticing the boy to him under representations that, if she did not do so, he would send him out of the state, where she had voluntarily yielded control of the child to the father, and did not desire to withdraw him from the father's custody. *Mitchell v. McElvin*, 45 Ga. 558.

IV. Rights of mother, or reputed father, as against other persons.

a. Mother's right as against others than reputed father.

The custody of a bastard child will be restored on habeas corpus to the mother, from whom it had been taken, first by stratagem and later by force, leaving the question of the right of custody and guardianship to be settled in the forum of chancery. *Rex v. Hopkins*, 7 East, 579, 3 Smith, 577, 8 Revised Rep. 686.

In *Com. v. Fee*, 6 Serg. & R. 255, the court took an illegitimate child from its alleged paternal grandfather, who had secured possession of the infant by force and artifice and restored it to the custody of the mother. The court said: "We give no opinion on the general question of the right of the putative father to the custody of his child; the case does not require it; it is the grandfather who has taken possession of this child."

The mother of an illegitimate minor child may reclaim it from the custody of one holding the child as a peon or servant, under a gift from the putative father, to whom the mother had surrendered the infant to be maintained and educated by him as its legitimate father. *Bustamento v. Analla*, 1 N. M. 255.

The surety on a bond given to save a town harmless from the expense of maintaining an illegitimate child remaining with its mother, but who had offered to take the child and support it at his own expense, is not entitled to its custody. The reputed father of the child was dead. *Falls v. Belknap*, 1 Johns. 486.

But where the mother of an illegitimate child has, in the tender years of infancy, either

abandoned or neglected the child, and others have taken care of and adopted it; or, if the mother has placed it for protection in the hands of persons who have agreed to become *in loco parentis* to it, and she afterwards asserts her rights as guardian for nurture, and claims the child in the character of its mother,—the court does not recognize any such right as absolute, but will exercise its discretion by refusing to interfere if by so doing the interests of the infant will be best protected. *Re Holeshed*, 5 Ont. Pr. Rep. 251.

So, where an illegitimate child had been left with its maternal grandmother, who, being unable to support it, gave it, with the mother's consent, to others, by whom it had been brought up to the age of three years and ten months, the court refused to award its custody to the mother, who had married and desired to take the child to her home. *Ibid*.

A mother will not be awarded the custody of her infant illegitimate daughter, as against one who adopted it with her consent, although the proceedings were invalid, where the adopted parents have cared for the child for over three years and have become greatly attached to it. *Re Bush*, 47 Kan. 264, 27 Pac. 1003.

In *Moritz v. Garnhart*, 7 Watts, 802, 32 Am. Dec. 762, which holds that the maternal grandfather, who had taken charge of an illegitimate child which had been abandoned by both its mother and putative father, may maintain an action for its abduction by the mother's father-in-law, the court remarks: Even the mother, after an abandonment for six years, could reclaim the child only through an order of the court, who would not lightly deprive the foster father of the expected fruit of his pains in the duty and services of the child.

Where the mother of a bastard negro child gave the infant to its alleged paternal grandmother, promising never to take the child from her, and it had for four years been well cared for by her, the court refused to award its custody to the mother, who supported herself by taking in washing and claimed to have reformed, although up to the time she gave the child away she was a common prostitute. *Fullilove v. Banks*, 62 Miss. 11.

One at whose door an illegitimate infant, abandoned by its parents, was found in a sick and almost dying condition, and who nursed it back to health, will be allowed to retain its custody as against a person of dissolute habits claiming to be its mother. *Young v. State*, 15 Ind. 480.

That a natural child may be taken from the mother and placed beyond the reach of contamination from her vicious habits, is stated in *Jones v. Stockett*, 2 Bland, Ch. 409.

In *Heritage v. Hedges*, 72 Ind. 247, it is said: It was highly proper to remove the child from the custody of a mother, whose unchaste and improper conduct would have exerted an evil influence upon the life and character of her child. The child was none the less entitled to this protection because born out of wedlock.

But the mother of an illegitimate child, although leading an immoral life, will be awarded its custody as against strangers with whom she had left it under an agreement to pay for its maintenance, where she intends to place the child with her sister, a respectable married woman in good circumstances. *Queen v. Nash*, L. R. 10 Q. B. Div. 451, 52 L. J. Q. B. N. S. 65 L. R. A.

442, 48 L. T. N. S. 447, 31 Week. Rep. 420, 13 English Ruling Cases, 26.

An infant illegitimate child will be taken from the custody of the keeper of a house of ill fame to whom it had been given, and restored to the mother, who offers to the child a respectable home. *Re Nofsinger*, 25 Mo. App. 116.

So, the tender, by the keeper of a house of ill fame, of a sufficient bond for the support of an infant illegitimate child given to her by its mother, will not prevent the binding out of the child as an apprentice, with the mother's consent, to the maternal grandmother, a woman of means and excellent character. The provision of Md. act 1793, chap. 45, forbidding the court to bind out a child if any person furnish bond for its support, applies only to suitable persons. *Johnson v. Brannaman*, 10 Md. 495.

The possession of a child having no father, by one to whom she had been confided by the mother, is, in effect, the mother's custody; and she is entitled to retain the child as against a stranger having no superior right, unless it appears that she is an improper person to have such custody. *Jones v. Harmon*, 27 Fla. 238, 9 So. 245.

In *Copeland v. State*, 60 Ind. 394, the mother of an illegitimate child, who had formerly abandoned it, was awarded its custody as against one to whom it had been indentured by an orphan asylum of which it had been an inmate, where the mother had married, and was a suitable person to have possession of the child.

One to whom an illegitimate minor child has been apprenticed acquires no right to its custody as against the mother residing in the county, and able to support the child. *Alfred v. McKay*, 36 Ga. 440.

If the child is of sufficient age the court may respect its wishes as to its custody.

Thus, a mother will be denied the custody of her illegitimate child which she had left for seven years with others, who had taken good care of it, where the child itself, who was eight years old, desired to remain with its then protectors. *Re White*, 10 L. T. 849.

In *Re Lloyd*, 3 Mann. & G. 547, 4 Scott, N. R. 200, 5 Jur. 1198, an illegitimate child between eleven and twelve years of age was brought up on a writ of habeas corpus obtained by the mother, from the custody of one with whom she had been placed by the putative father. The court simply set the child free from restraint, and told her she was at liberty to go where she would, saying it would not exercise a discretion for her. The child refused to go with her mother, who attempted to take forcible possession of her, whereupon a court officer was sent with her for her protection.

b. Reputed father's right as against others than mother.

1. As against parish.

The reputed father may remove his illegitimate child from the parish, and maintain it himself. *Shermah's Case*, 1 Vent. 210; *Newland v. Osomond*; *Sayer*, 93.

An order that the father should pay so much money a week to the parish till the child was twelve years old was quashed; for the father might take it away and maintain it himself. 2 *Bouvier's Bacon*, Abr. 97, Citing *Burwell's Case*, 1 Vent. 48; Anonymous, 1 Vent. 59;

LeRoy v. Sharpe, 8ld. pt. 1, p. 222; King v. Burrell, 1 Mod. 20.

The reputed father of an illegitimate child should not be required to pay a specified sum to the parish weekly till the child is twelve years old, but should be required to pay a certain sum weekly so long as it should be chargeable to the parish. *Burwell's Case*, 1 Vent. 48.

In a declaration on a bond of indemnity against the expense of maintaining a bastard child over nineteen years of age, a plea that the father was able and willing to maintain her, and had requested possession of her from the overseers, who had refused to deliver her to him, constitutes a good defense, without adding that the child was willing to go to the defendant to be maintained by him. *Bownes v. Marsh*, 10 Q. B. 787.

Richards v. Hodges, 2 Wms. Saund. 83, was an action of debt upon bond given to church wardens of a parish by the putative father, who pleaded that he would have maintained the infant during the time she was provided for by the parish, and offered to do so, thus raising the question of his right to the custody of the child. But the matter went off on error in the proceedings, and the question was not discussed by the court.

But in an action on a bond given to the overseers of the poor by a putative father, a plea that the father was able and willing to maintain the child, and had requested the plaintiffs, who were overseers of the poor, to deliver the child to him, but that the child had been provided for by them of their own wrong, was held bad. Says *Tindal, Ch. J.*: "The broad objection that has been taken to the plea is, that the putative father has no right by law to the custody of the bastard child. . . . Perhaps, on consideration of the authorities referred to, they would rather make against than support it." *Pope v. Sale*, 7 Bing. 477.

In *Queen v. Smith*, Sett. Cas. 64, 1 Bott, Poor Law Cas. 497, Cited in 1 Burn. Justice of Peace, by Chitty, 379, it was objected to an order requiring the putative father to pay 1 shilling a week till the child was eight years old, that it should be so long as the child is chargeable; possibly the father may take him. The court said: "As to the father's taking him, he ought to have done it at first; and, by suffering the order to be made, it shall be deemed a refusal in law; besides, he shall not then be suffered; he may sell him, or make away with him, as too often happens."

2. As against town or county.

The reputed father of an illegitimate child may be trusted with its nurture and care if the mother is dead, subject to the further order of the court, in case of ill-treatment of the child by him or failure to provide for it. *Dodge County v. Kemnitz*, 32 Neb. 238, 49 N. W. 226, Affirmed on rehearing in 38 Neb. 554, 57 N. W. 385.

Though a bastard be not looked upon as a child for any civil purpose, the ties of nature are respected in regard to its maintenance. The putative father, though not legally related to it, is so far considered its natural guardian as to be entitled to the custody of it, for purposes of nurture and education. *Moritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 762.

The reputed father of a bastard child, who has undertaken to support it after it has be-
65 L. R. A.

come a town charge, is entitled to its custody as against the town or any of its officers, that he may perform his contract; nor can an action brought against him by the child, through the agency of the township overseer of the poor, for false imprisonment, be sustained. *Adams v. Adams*, 50 Vt. 158. In this case the mother made no claim to the custody of the child.

3. As against strangers.

The court granted an information against the defendants for taking away a natural daughter under sixteen years of age, under the care of her putative father. *Rex v. Cornforth*, 2 Strange, 1162.

The right of a father to the custody of his illegitimate child is superior to that of a stranger. *People ex rel. Trainer v. Cooper*, 8 How. Pr. 288.

The reputed father of illegitimate children, who has married the mother and thereby rendered them legitimate, is, after her death, entitled to their custody and control as against one to whom they had been apprenticed by the public authorities. *Adams v. Adams*, 36 Ga. 236.

A reputed father, who has acknowledged and legitimated his natural child, although eccentric, is entitled to her custody as against strangers, where he possesses affection for her, and has treated her with ordinary care. *Re Celina*, 7 La. Ann. 162.

The putative father has no right to the custody and control of the child, except, perhaps, as against a stranger; and his right to this extent is questionable. *Hudson v. Hills*, 8 N. H. 417.

But the custody of an illegitimate child will not be awarded to the father after its abandonment by the mother to the charitable care of strangers, in an action brought by the father asking relief from a judgment in bastardy proceedings requiring him to pay a specified sum to the mother for the child's maintenance, offering to execute a bond to save the county harmless from expense on account of the child, and praying that he may be decreed entitled to the custody and possession of the child. The court holds that the judgment, not having been appealed from, is conclusive; that, if the mother fails to perform the trust with which she is invested as respects the allowance made for the support of the child, she may be compelled to perform it, or she may be superseded and another appointed in her place to see to the expenditure of the allowance; and, if necessary, the child can be put under guardianship. But these remedies must be sought by someone acting for the child, since, in respect to them, the father is not the real party in interest; that as father of the child he has, in law, no better title to its custody, and no better right to act for it, than any other person. *Olson v. Johnson*, 23 Minn. 301.

4. As against relatives.

The putative father, the mother being dead, is entitled to the custody of his natural child as against the maternal grandfather, appointed by the mother as its guardian; and, unless satisfied that the father's custody is likely to be hurtful to the child, it should be left with him, although the father, accompanied by a magistrate and constables, compelled the grandfather to surrender the child to him. *Re Brandon*, 7 Ont. Pr. Rep. 347.

The father of an illegitimate child has, in Canada, the right to its custody and care as against a stranger or person other than the mother, such as a grandfather or grandmother. *O'Rourke v. Campbell*, 13 Ont. Rep. 583.

The father of an illegitimate child, if a proper person, is entitled to its custody after the death of the mother, as against its grandmother. *Com. v. Anderson*, 1 Ashm. (Pa.) 55.

In a controversy between the putative father of a bastard child, whose mother was dead, and its maternal grandmother, for its custody, the court said: "The father of a bastard child, merely as such, has no right to its custody." The child should have been discharged from restraint if the evidence showed that the restraint was illegal; and, if it was above seven years of age and had no mother or guardian to receive it, and was of sufficient age and discretion, it should have been permitted to select its own custodian. Such a controversy is best settled by a court of chancery. *Matthews v. Hobbs*, 51 Ala. 210.

The putative father is entitled to the custody of his illegitimate child seven years of age, as against its maternal uncle, whom the mother, when dying, requested to look after the child, and who agreed to do so, when such uncle is a young, unmarried man, whereas the father, who supports the child, desires to return it to the care of one who looked after it during the first six years of its life. *Re Kerr*, Ir. L. R. 22 Eq. 642, Affirmed in Ir. L. R. 24 Eq. 59.

A reputed father, who acknowledged his infant illegitimate daughter, was awarded her custody as against a maternal aunt, who had been reported by the master to be a fit guardian for the child. *Ord v. Blackett*, 9 Mod. 116.

V. Right of mother, or reputed father, to guardianship of child.

a. Mother's right of guardianship.

The mother of an infant illegitimate child is its natural guardian. *Dalton v. State*, 6 Blackf. 357; *Ramsay v. Thompson*, 71 Md. 315, 6 L. R. A. 705, 18 Atl. 502; *People ex rel. Heilbronner v. Hoster*, 14 Abb. Pr. N. S. 423; *Nine v. Starr*, 8 Or. 49.

So, the mother of an illegitimate child is entitled to its custody as against the putative father, to whom she was married subsequent to the birth of the child, and from whom she had been divorced. The natural guardianship of the mother devolved on the father at the marriage, but his power ceased on its dissolution. *Wright v. Wright*, 2 Mass. 109.

The mother of an illegitimate child is not recognized in law as entitled to all the rights of guardian for nurture. She differs from a stranger only in this, that the law holds, in obedience to the law of nature, that, during the period of nurture,—that is, while the infant is under the age of seven years,—it ought not to be, and should not be permitted to be, separated by force, fraud, or stratagem from the quiet possession, care, and protection of the mother. *Re Holedshed*, 5 Ont. Pr. Rep. 251.

See *supra*, III. a.

While the mother of an illegitimate child is legally entitled to its custody, as its natural guardian, yet it may be taken from her and placed in the custody of others, if the welfare and permanent good of the child require it. *Hope's Petition*, 19 R. I. 486, 34 Atl. 994.
65 L. R. A.

The application of the mother of a natural child, which has received a legacy, to be appointed its natural tutrix, will be denied, where she took no interest in the child until it acquired an estate, is herself without means, and desires to remove the child from the state. *Haley's Succession*, 50 La. Ann. 840, 24 So. 285.

In *Re Ullee*, 53 L. T. N. S. 711, Affirmed in 54 L. T. N. S. 286, the application of the mother of illegitimate children, the youngest of whom was seven years of age, to be appointed their guardian, was denied on the ground that it would be detrimental to the best interests of the infants, who were left in the control of testamentary guardians appointed by the father.

But in *Barnardo v. McHugh* [1891] A. C. 388, 65 L. T. N. S. 423, 40 Week. Rep. 97, 55 J. P. 628, 61 L. J. Q. B. N. S. 721, an illegitimate child was taken from the custody of the managers of a church, to whom it had been confided by the mother under an agreement to leave it with them for twelve years, and returned to her, on the ground that compliance with her wishes would not be injurious to the child.

In equity, the wishes of the mother as to the custody of her illegitimate child are primarily to be considered, and the court should accede to them unless it would be detrimental to the interests of the child. *Queen v. Barnardo* [1891; C. A.] 1 Q. B. 194, 64 L. T. N. S. 72, 39 Week. Rep. 195, 55 J. P. 5, Affirmed in [1891] A. C. 388, 65 L. T. N. S. 423, 40 Week. Rep. 97, 55 J. P. 628, 61 L. J. Q. B. N. S. 721.

On applications relating to the guardianship of illegitimate infants, regard is always had to the mother, the putative father, and the relations on the mother's side. *Re Ullee*, 54 L. T. N. S. 286.

Neither the putative father nor the mother of an illegitimate child has the legal right of guardianship. *Rex v. Felton*, 1 Bott, Poor Law Cas. by Const. p. 478, Cited in *Macpherson, Infants*, p. 67.

The mother of an illegitimate child is not necessarily entitled to act as its guardian. *Byrne v. Love*, 14 Tex. 87.

In *Queen v. Nash*, L. R. 10 Q. B. Div. 454, 52 L. J. Q. B. N. S. 442, 48 L. T. N. S. 447, 31 Week. Rep. 420, 13 English Ruling Cases, 26, Jessel, M. R. says: "In a reported case [*Re Lloyd*, 3 Mann. & G. 547, 4 Scott, N. R. 200, 5 Jur. 1198] Maule, J., a very eminent judge, is said to have asked whether the mother of an illegitimate child was anything but a stranger to it. I am disposed to think that this was said ironically; but, if not, the judge in making the observation must have been referring only to the strict legal rights as to guardianship.

But in *Barnardo v. McHugh* [1891] A. C. 388, 65 L. T. N. S. 423, 40 Week. Rep. 97, 55 J. P. 628, 61 L. J. Q. B. N. S. 721, *Herschell, J.*, says: When Maule, J., asked, How does the mother of an illegitimate child differ from a stranger?—it does not appear to me that he was speaking ironically, but, rather, stating plainly the legal doctrine that an illegitimate child was *nullius in law*, and that no one possessed in relation to it the full parental rights which the law recognizes in the case of legitimate offspring.

The mother of an illegitimate child, who fails to support it, whereby it becomes a town charge, thereby loses her right to its custody as guardian. *Adams v. Adams*, 50 Vt. 158.

b. Mother's right to appoint testamentary guardian.

A mother cannot legally appoint a testamentary guardian of her illegitimate child; nor can a guardian so appointed have a habeas corpus to remove the child from the custody of one to whom it had been confided by the mother. *Ex parte Glover*, 4 Dowl. P. C. 291, 1 H. & W. 508.

c. Reputed father's right of guardianship.

The putative father is entitled to the custody of his natural child as against all but the mother: if the mother be dead, and the father a suitable person, the child should be taken from the maternal grandparents and confided to his guardianship. *Pote's Appeal*, 106 Pa. 574, 51 Am. Rep. 540.

After an illegitimate child attains the age of seven years, the father has an equal claim with the mother to the guardianship; and, where the property of the child is derived from the father, that would turn the scale in his favor, unless counterbalanced by objections of sufficient weight to the contrary. *Byrne v. Love*, 14 Tex. 87.

The putative father, on the death of the mother, is entitled to the guardianship of their illegitimate offspring. This is impliedly recognized by *Paschal's Digest*, art. 3884, providing that the father, while living, and, where there shall be no lawful father, then the mother if living, shall be entitled to the guardianship of their minor children. The court said: "The law should never receive such a construction as would tend to dry up the sources of natural affection. Nor should the child, who is innocent of the guilt of its parents, be denied all claim to the protection and love of its father. Neither should the father be denied the privilege of assuming voluntarily the duties and responsibilities" of a parent. *Barela v. Roberts*, 34 Tex. 554.

But in *Friesner v. Symonds*, 46 N. J. Eq. 521, 20 Atl. 257, letters of guardianship were granted to the mother's father, although the putative father of the child resisted the application. On the death of its mother an illegitimate child becomes an orphan, and a guardian may be appointed for it.

d. Reputed father's right to appoint testamentary guardian.

A father cannot appoint a testamentary guardian for his illegitimate minor child. *Sleeman v. Wilson*, L. R. 13 Eq. 36, 25 L. T. N. S. 408, 20 Week. Rep. 109, 1 Moak, Eng. Rep. 538; *Holbrook's Estate*, 20 W. N. C. 79, 3 Pa. Co. Ct. 265.

The father of a natural child cannot appoint a testamentary guardian for such child in the absence of express statutory authority. *Ramsay v. Thompson*, 71 Md. 315, 6 L. R. A. 705, 18 Atl. 592.

The persons designated in the father's will as guardians of his natural child were appointed by the court without any reference to the master. In *Peckham v. Peckham*, 2 Cox, Ch. Cas. 46; *Chatteris v. Young*, 1 Jac. & W. 106, 20 Revised Rep. 342; *Ward v. St. Paul*, 2 Bro. Ch. 583; *Barry v. Barry*, 1 Molloy, 213. 65 L. R. A.

VI. Right of mother, or reputed father, as against guardian of child.

a. Mother's right as against guardian.

In *Re Darcy*, 11 Ir. C. L. Rep. 298, the mother was awarded the custody of her illegitimate children, the issue of a void marriage, as against testamentary guardians named in the father's will.

See *Re Ullee*, 53 L. T. N. S. 711, Affirmed in 54 L. T. N. S. 286, *supra*, V., a.

But the duly appointed guardian of an illegitimate child is entitled to her custody as against strangers, to whom her mother, in her lifetime, gave the child until it should arrive at the age of twenty-one years. *Johns v. Emmert*, 62 Ind. 533.

b. Reputed father's right as against guardian.

In a contest between the putative father of an illegitimate child five years old, whose mother is dead, and the child's legally appointed guardian, its custody should be awarded to the guardian. The court says: "The extent to which the authorities go is to give him [the father] the right to the custody of his child next to its mother, as against strangers; but I have failed to find any decision which gives him that right against the guardian of the child's person." *Com. ex rel. Waleisa v. Waleisa*, 2 Legal Chronicle, 281.

In *Pote's Appeal*, 106 Pa. 574, 51 Am. Rep. 540, the guardianship of the maternal grandfather of an illegitimate child was revoked, and the custody awarded to the putative father.

See also *Ord v. Blackett*, 9 Mod. 116, *supra*, IV., b, 4.

VII. Rights of mother, or reputed father, in proceedings affecting custody.

a. Notice.

That the putative father has been appointed guardian of his infant illegitimate child by the probate court gives him no right to the custody of the child as against the mother, where she had no notice of the application for such appointment. *Dalton v. State*, 6 Blackf. 367.

The subsequent appearance of the master in court, when he was released and his supposed apprentice was, with his consent, bound to another, neither dispenses, nor is a compliance, with the notice required, by statute, to be served upon the person in possession of the children intended to be bound out. *Baker v. Winfrey*, 15 B. Mon. 409.

Notice of an application for appointment as guardian of an illegitimate minor need not be given to the putative father, although he lives in the county, under a statute providing generally for notice to the minor's "parent." The court said: "There is no reason why the legislature should confer upon the father the right to notice in such cases. He has no right to the custody of the child, or to the use or control of its estate. *Re Gibson*, 154 Mass. 378, 28 N. E. 296.

b. Consent.

Bastards are within the meaning of the marriage act, 26 Geo. II. chap. 33, which requires the consent of the father, guardian, or mother, to the marriage of persons under age who are-

not married by banna. *King v. Hodnett*, 1 T. R. 96.

Under the supreme court in equity act 1890 (53 Vict. chap. 4) the consent of both parents of an illegitimate child is essential before the court will grant an application for leave to adopt. The court says: "Without stopping to inquire as to the right of custody or control of the child, in such cases, as between the parents, I think it sufficient to say that the act . . . only authorizes the order to be made on the consent of the parents." *Re C. F.* 1 N. B. Eq. Rep. 313.

The consent of the mother of a natural child is essential to the validity of its adoption, under a statute empowering the court to make a decree of adoption with the consent of the parents of an infant. *Booth v. Van Allen*, 7 Phila. 401.

But the consent of a mother who has abandoned her illegitimate child for a period of one year is not necessary, by the express terms of S. D. Comp. Laws, § 2625, as amended by Laws

1890, chap. 3, to render valid an adoption of the infant by others. *Richards v. Matteson*, 8 S. D. 77, 65 N. W. 428.

c. Right to appear or be heard.

The mother of a bastard child has the right to file objections to proceedings instituted by its father for the purpose of legitimating the child. The court observes: "Independently of any statute, it would seem that she would have a right to be heard in court whenever steps are taken to place her child under the control, or in the custody, of another." *Henderson v. Shiflett*, 105 Ga. 303. 31 S. E. 186.

The putative father is a proper person to present a petition for the appointment of a guardian for his minor illegitimate child, whose mother is dead. *Pote's Appeal*, 106 Pa. 574, 51 Am. Rep. 540.

A. W. R.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina *ex rel.* A. T. MIAL, *Appt.*,
v.

J. C. ELLINGTON *et al.*

(.....N. C.....)

One appointed for a definite time to a legislative office has no vested property interest or contract right thereto of which the legislature cannot deprive him during the existence of the term.

(*Montgomery and Douglas, JJ., dissent.*)

(December 2, 1903.)

APPEAL by relator from a judgment of the Superior Court for Wake County in a quo warranto proceeding to test defendant's title to the office of road superintendent. *Affirmed.*

From the findings of the trial court the following facts appeared:

At the session of 1889 (Pub. Laws, chap. 363, p. 360) an act was passed entitled, "An Act Providing an Alternative Method of Constructing and Keeping in Repair the Public Roads of Raleigh Township, Wake County." It was provided by said act that the justices of the peace of Raleigh township should meet, and, if a majority so decided, adopt the method of keeping in repair the public roads of said township in accord-

ance with the provisions of said act; that, when they had so adopted said method, it was by said act made the duty of the county commissioners at their regular meeting, and biennially thereafter, to appoint a supervisor of roads for said township; that said supervisor should hold his office for two years; that, in the event of a vacancy, the same should be filled by said board of commissioners. Provision was made for removal for cause, and upon notice. Said supervisor was required to qualify by taking the oath of office, and giving bond in an amount to be fixed by the board. The duties prescribed for said supervisor were that he should formulate a plan for the permanent improvement of the public roads of said township outside the city of Raleigh by the use of the labor of county convicts and workhouse hands, etc. He was required to disburse all funds paid to him upon the warrant of the county commissioners for the purpose of carrying out the provisions of the said act, and to keep an account thereof, as well as a list of all tools, etc., in his possession, and to make a report thereof to the commissioners. The duties of said supervisor in all other respects were specifically pointed out in the several sections of said act. His compensation was to be fixed by the board of commissioners, but the same was not to exceed \$750 per annum. Pursuant to the provisions of said act, the method prescribed therein for working the roads of Raleigh township was duly adopted by the justices of the peace, and a supervisor duly elected. At the session of 1891 (Pub. Laws, chap. 218, p. 182) the maximum limit of the salary of the supervisor was fixed at \$1,200. At the session

NOTE.—For other cases in this series on the question of public office as property of the incumbent, see *Atty. Gen. v. Jochim*, 23 L. R. A. 609; *People ex rel. Akin v. Kiple*, 41 L. R. A. 775; and *Moore v. Strickling*, 50 L. R. A. 279. As to right to remove summarily from office, see *note* to *Trainor v. County Auditors*, 15 L. R. A. 95.
65 L. R. A.

of 1897 (Pub. Laws, chap. 434, p. 621) the provisions of said act were extended 3 miles beyond the present limits of Raleigh township, in each direction. At the regular meeting of the board of commissioners of Wake county held in December, 1902, one Bryant Harrison was appointed by the said board to be supervisor of roads of Raleigh township for a term of two years, commencing January 1, 1903. The said board fixed his salary at \$70 per month, and the said Harrison duly qualified and entered upon the discharge of his duties as such officer. At the February meeting of said board of commissioners the said Harrison resigned the said office, to take effect on March 1, 1903, and thereupon the board accepted said resignation, and called a special meeting, to be held on February 21, 1903, to appoint a successor. At said special meeting the relator, A. T. Mial, was duly appointed to fill out the said unexpired term, and his salary fixed at \$70 per month. He subsequently gave the required bond, took the oath of office, and was duly inducted therein, and entered upon the discharge of his duties as such officer. At the session of 1903 the general assembly enacted chapter 551, p. 931,—an act entitled "An Act to Improve the Public Roads of Wake County." By said act it was provided that the board of county commissioners of Wake, in order to provide for the proper construction, improvement, and maintenance of the public roads of the county, "shall on or before January 1, 1904, elect a superintendent of roads for the county, who shall hold office until December, 1904, and until his successor has been elected and qualified; and at their regular meeting in December, 1904, and biennially thereafter, they shall elect a successor to said office. The superintendent of roads shall be paid such compensation as shall be fixed by said board out of the county road fund, and hold office for two years and until his successor has been elected and qualified. . . . It shall be the duty of said superintendent of roads, subject to the approval of the board of county commissioners, to supervise, direct, and have charge of the maintenance and building of all public roads in the county, and he shall submit to the county board of commissioners a monthly report concerning the work in progress and the moneys expended, and he shall submit a quarterly report on the condition of the public roads and bridges and plans for their improvement. That the board of commissioners shall divide the county into three road districts, to be known as the Raleigh, the Northern and the Southern road districts, respectively. The boundary of the Raleigh road district shall be the circum-

65 L. R. A.

ference of a circle, the radius of which shall extend 8 miles from the capitol building, in the city of Raleigh, in every direction; and the boundaries of the other districts shall be fixed by the board of county commissioners, and said board shall have power to create new road districts whenever in their opinion there is necessity for the same, and to alter the boundaries of any district, except the Raleigh road district, when they may consider it advisable. For each of the road districts the county commissioners shall elect, at the time herein prescribed for the election of the road superintendent, a district supervisor, who shall hold office for the same term and in the same manner that he holds, and until their successors are elected and qualified. . . . At the regular meeting of said board of commissioners held in April, 1903, the said board caused public notice to be given that at the regular May meeting of the said board a superintendent of roads for Wake county, and three supervisors for the respective road districts of said county, would be elected by the said board, under said chapter 551, p. 931, Laws 1903, and, in pursuance of said notice, at said May meeting the board of commissioners elected the defendant J. C. Ellington superintendent of roads for Wake county, and the defendant Alfred Jones supervisor for the Raleigh road district, and I. N. Bailey and A. R. Holloway supervisors for the Northern and Southern road districts of Wake county, respectively. The relator, A. T. Mial, was not a candidate or applicant for either of these positions. The defendants J. C. Ellington and Alfred Jones prior to the commencing of this action gave the bond and took the oath of office, and did all other acts required of them by the said act of March 6, 1903. Thereafter, on the 12th day of May, 1903, acting under the order of the defendants the board of county commissioners of Wake county, the said J. C. Ellington took possession of the teams and other property and effects belonging to Raleigh township, and then in the custody of the relator, A. T. Mial, by virtue of his office aforesaid, in the absence of said Mial and without his consent; and on the said 12th day of May the defendants the board of county commissioners of Wake county withdrew all the convicts, guards, and officers in their custody, and which worked upon the roads of Raleigh township, and over whom the relator, A. T. Mial, had supervision, and placed them under the charge and supervision of the defendant J. C. Ellington. Thereafter, on said May 12, 1903, the relator, A. T. Mial, demanded the return to him of all of the said property and effects, and that they give to him control of the convicts, guards, and

officers, and that the same was refused by the defendants. At the said May meeting, 1903, the board of commissioners of Wake county, in pursuance of the said act of March 6, 1903, fixed the boundaries of the Northern and Southern road districts of Wake county (the boundaries of the Raleigh road district having been fixed by the act), and included the territory formerly within the Raleigh township, under the said act of 1889, and all the acts amendatory thereof, and also included certain territory in addition thereto.

The court rendered judgment for the defendants, and the relator appealed.

Messrs. Battle & Mordecai and Womack & Hayes, for appellant:

The office held by Mial has been taken from him and vested in others contrary to the Constitution of this state.

Hoke v. Henderson, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677; *Walser ex rel. Wilson v. Jordan*, 124 N. C. 709, 33 S. E. 139; *State Prison v. Day*, 124 N. C. 362, 46 L. R. A. 295, 32 S. E. 748; *State ex rel. Abbott v. Beddingfield*, 125 N. C. 263, 34 S. E. 412; *State ex rel. Dalby v. Hancock*, 125 N. C. 327, 34 S. E. 516; *State ex rel. White v. Hill*, 125 N. C. 194, 34 S. E. 432.

The law does not favor repeals by implication.

Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178; *State v. Williams*, 117 N. C. 754, 23 S. E. 355; *State v. Snow*, 117 N. C. 774, 23 S. E. 322.

Mr. Bart. M. Gatling for appellees.

Connor, J., delivered the opinion of the court:

We have no disposition, in the decision of this case, to place the conclusion to which we have arrived upon the ground that the position of supervisor of the roads, the title to which is in controversy, is not a public office. Adopting the settled definition of a public officer, we hold that the position comes clearly within such definition. Nor are we disposed to enter into a discussion of the many fine and delicate distinctions which have been made between the validity of an act which distributes the duties of an office, and one which abolishes the office. We prefer, rather, to discuss and decide the question which is fairly presented by this record,—whether an officer appointed for a definite time to a legislative office has any vested property interest or contract right to such office, of which the legislature cannot deprive him. The contention of the relator is based upon the proposition which was decided by this court in *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677, which is thus stated by Ruffin, Ch. J.: "The sole inquiry 65 L. R. A.

that remains is whether the office of which the act deprives Mr. Henderson is property. It is scarcely possible to make the proposition clearer to a plain mind, accustomed to regard things according to practical results and realities, than by barely stating it. For what is property; that is, what do we understand by the term? It means, in reference to the thing, whatever a person can possess and enjoy by right; and, in reference to the person, he who has that right to the exclusion of others is said to have the property. That an office is the subject of property, thus explained, is well understood by everyone, as well as distinctly stated in the law books from the earliest times. An office is enumerated by commentators on the law among incorporeal hereditaments, and is defined to be the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. . . . A public office has been well described to be this: When one man is specially set by law, and is compellable to do another's business against his will and without his leave, and can demand therefor such compensation by way of salary or fees as by law is assigned, to the doing of which business no other person but the officer, or one deputed by him, is legally competent." This proposition was stated by the great chief justice and maintained in an elaborate opinion at the December term, 1833, of this court. That it has frequently been cited with approval, and, with some exceptions, followed, by this court, cannot be denied; nor can it be successfully denied that there have always been a number of the ablest members of the bar in North Carolina who have questioned its soundness. The contrary view is thus stated by Sandford, J., in *Conner v. New York*, 2 Sandf. 370: "We think it must be assumed that there is no contract, express or implied, between a public officer and the government, whose agent he is. The latter enters into no agreement that he shall receive any particular compensation for the time he shall hold office, nor, in the case of a statutory office, that the office itself shall continue any definite period. Where the Constitution limits the compensation, it is beyond legislative control, but that makes no contract. The people have the control, in their sovereign capacity, as the legislature has in statutory offices. It is not the question whether fees or salary earned may be divested. The right to receive such fees may be conceded as perfect, without affecting the present inquiry." In *Taylor v. Beckham*, 178 U. S. 577, 44 L. ed. 1187, 20 Sup. Ct. Rep. 900, 1009, Fuller, Ch. J., thus states the law as held and enforced by that court: "The decisions are numerous to the effect that public offices

are mere agencies or trusts, and not property, as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. Nor does the fact that a constitution may forbid the legislature from abolishing a public office, or diminishing the salary thereof, during the term of the incumbent, change its character, or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right."

We have thus presented the two views upon this most important question, and we are confronted with the necessity of either overruling and rejecting the theory upon which *Hoke v. Henderson* is based, or that which is stated in the cases cited as what may be called the American doctrine in respect to the relation which the public officer bears to the state. It will save any possible confusion or misunderstanding to say that nothing said by us in regard to the power of the legislature applies to offices provided for by the Constitution. These are beyond the power of the legislature to affect, either in respect to the term, or, except within the limitations fixed, the salary. This not because there is any property right in the office, but because the people, in their Constitution, have made provision for and regulated their terms and salaries.

The proposition involved in this appeal on behalf of the plaintiff is that neither an office, nor the duties thereof, created by an act of the legislature fixing the term and compensation, can be transferred to some other person or affected during the term for which the incumbent has been elected; that such office is property, within the protection of the constitutional provision that no person shall be deprived of his property except by due process of law, and that no state shall pass any law impairing the obligation of a contract, which, of course, excludes the power of the legislature to take property from one man and give it to another.

We recognize the gravity of the proposition that we shall reverse a decision of this court delivered by Chief Justice Ruffin, with the approval of Justices Daniel and Gaston, which, we concede, has received the unanimous approval of this court in a number of cases, and a majority thereof in many others. If this were a question involving the title to property, upon the decision of which property rights have been acquired, settlements have been made, and the security and peace of families were de-

pendent, we should feel it our duty to leave it to the legislative department of the government to bring the law into harmony with sound principle and the best thought and experience of the age in which we live. Being, however, a question of public constitutional law, involving the sovereignty of the state, if it is made to appear that the principle upon which *Hoke v. Henderson* is founded stands without support in reason, and is opposed to the uniform, unbroken current of authority in both state and Federal courts, it becomes our duty to overrule it, and place our jurisprudence in line with that of the other states and the Federal government.

It is said by Douglas, J., in *State ex rel. Caldwell v. Wilson*, 121 N. C. 467, 28 S. E. 561, that, "with the exception of this state, it is the well-settled doctrine in the United States that an office is not regarded as held under a grant or contract, within the general constitutional provision protecting contracts; but, unless the Constitution otherwise expressly provides, the legislature has power to increase or vary the duties or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges, before the end of the term, or to alter or abridge the term, or to abolish the office itself. . . . Except in North Carolina, it is well settled that there is no contract, either express or implied, between a public officer and the government, whose agent he is; nor can a public office be regarded as the property of the incumbent."

We deem it proper, in view of the conclusion to which we have arrived, to review at some length the elementary principles involved, and the authorities in the United States.

It is stated by Mr. Freeman, in his note to *Hoke v. Henderson*, 25 Am. Dec. 704, that, "with all deference to the North Carolina courts, the conclusion may yet be drawn, with Mr. Pomeroy, that 'it may therefore be considered as a settled point of constitutional law—settled both by the national and state courts—that a public office bears no resemblance to a contract, and that legislatures have full power over the public offices of a commonwealth, except so far as they may be restrained by the local constitutions. The clause of the United States Constitution which prohibits state laws impairing the obligation of contracts has no application whatever to this subject.'"

Chief Justice Marshall, in *Dartmouth College v. Woodward*, 4 Wheat. 627, 4 L. ed. 629, said: Public offices are not within the inhibition of the Constitution of the United States against laws impairing the

obligation of contracts. That the inhibition does not extend to offices within a state for state purposes. That the legislature must necessarily control such offices, and may change and modify the laws concerning them as circumstances may require. That grants of political power, to be employed in the administration of the government, are to be regulated by the legislature of each state according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States. In the same case Mr. Justice Story said: "The state legislatures have power to enlarge, repeal, and limit the authorities of public officers in their official capacities in all cases where the Constitutions of the states, respectively, do not prohibit them; and this, among others, for the very reason that there is no express or implied contract that they shall always, during their continuance in office, exercise such authorities. They are to exercise them only during the good pleasure of the legislature." In *Butler v. Pennsylvania*, 10 How. 402, 13 L. ed. 472, Mr. Justice Daniel says: "The contracts designed to be protected by the 10th section of the 1st article of that instrument are contracts by which perfect rights—certain definite, fixed, private rights—of property are vested. There are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all and, from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers who are nothing more than agents for the effectuating of such public purposes is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. . . . We have already shown that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term 'contracts,' or in other words, the vested, private, personal rights thereby intended to be protected." Mr. Justice Lamar, in *Crenshaw v. United States*, 134 U. S. 99, 104, 33 L. ed. 825, 827, 10 Sup. Ct. Rep. 431, 432, says: "The question is, whether an officer appointed

for a definite time, or during good behavior, had any vested interest or contract right in his office, of which Congress could not deprive him. The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right." In *Newton v. Mahoning County*, 100 U. S. 559, 25 L. ed. 710, Mr. Justice Swayne says: "The legislative power of a state, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. . . . In all these cases there can be no contract and no irrepealable law, because they are 'governmental subjects,' and hence within the category before stated. . . . A different result would be fraught with evil."

We do not find a suggestion from the Federal judiciary which in the slightest degree questions the authority of the cases cited. The only case to which our attention has been directed in which *Hoke v. Henderson* is referred to by the Supreme Court of the United States in connection with an office, is *Ex parte Hennen*, 13 Pet. 230, 10 L. ed. 138. That was a rule upon a district judge to show cause why he should not reinstate a clerk who had been removed by him. There was no constitutional principle involved. It was simply a question whether the judge, under the statute, had the power of removal. The court said: "The tenure of ancient common-law offices, and the rules and principles by which they are governed, have no application . . . [to this case]. The tenure in those cases depends in a great measure upon ancient usage. But . . . [with us] there is no ancient usage which can apply to and govern the tenure of offices created by our Constitution and laws. They are of recent origin, and must depend entirely upon a just construction of our Constitution and laws." The court proceeds to say: "The case of *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677, decided in the supreme court of North Carolina, is not at all in conflict with the doctrine contained in the cases referred to. That case, like the others, turned upon the Constitution and laws of North Carolina; and by the express terms of the law the tenure of the office was during good behavior, and was, of course, governed by very different considerations from those which apply to the case now before the court." The rule was discharged. There was no suggestion of a property right in the office.

Returning to the state courts, we find in

Conner v. New York, 2 Sandf. 374, after discussing the opinion in *Hoke v. Henderson*, the learned justice says: "It appears to us, with much respect for the learned tribunal which pronounced this judgment, that it was unduly influenced by the common-law rule derived from prescriptive offices, and operating in a government whose genius and spirit are perhaps in no more respect unlike ours than in this very subject,—the source and nature of the rights and interests acquired by public officers. In enumerating the qualities of an office, considered as property, the court admitted that it was inalienable, and in many instances incapable of being managed by a substitute, and, in the only point giving it the semblance of value, subject entirely to legislative control. If to these be added the consideration that it is a political agency, and not like a private contract of hiring for a definite period, we think there will remain no incident of property, in its correct signification." This cause being before the court of appeals in 5 N. Y. 301, Ruggles, Ch. J., concludes the opinion of the court as follows: "Mr. Justice Sandford has referred to so fully, and reviewed so judiciously, the authorities on the proposition under consideration, that it appears unnecessary to re-examine them. My judgment accords with his conclusion, viz., that 'these authorities, with the nature of the duties and employment of a public officer, seem conclusively to show that such an officer has no property in the prospective compensation attached to his office, whether it be in the shape of a salary or fees.'"

In 1834 Nicoll, J., in the case of *State ex rel. Savannah v. Deys*, R. M. Charl. (Ga.) 397, in discussing the same question, uses the following language: "That a public office is the property of him to whom the execution of its duties is intrusted is repugnant to the institutions of our country, and is at issue with that universal understanding of the community which is the result of those institutions. Public officers are, in this country, but the agents of the body politic, constituted to discharge services for the benefit of the people, under laws which the people have prescribed. So far from holding a proprietary interest in their offices, they are but naked agents, without an interest. As public agents, they are intrusted with the exercise of a portion of the sovereignty of the people—the *jus publicum*—which is not the subject of grant, and can be neither alienated nor annihilated; and it would be a repugnant absurdity, as incomprehensible as it would be revolting, that they can have a private property in that sovereignty. Unlike those officers in England whose offices or places are treated 65 L. R. A.

as property, they do not hold under grant, but their authority or function to discharge the duties of their offices is delegated to them by commission. In those instances in which, in England, the right to offices has been regarded as property, the instrument of conveyance has been technically a grant,—a conveyance by which an estate is passed or purchased, and employing the technical terms of a grant, *dedi et concessi*. But from the organization of the first republican government of this state, officers have been appointed by commission,—a term which, whether regarded according to its ordinary meaning or its legal sense, imports a delegation of authority. . . . And our earliest books draw a distinction between a grant of an office and a commission, and inform us that the former, as its name implies, is not revocable, but that the latter, which is only the delegation of an authority, is. . . . The title exhibited by the defendant himself in his return and by which only he can vindicate his possession, . . . is that he has been duly elected sheriff, and has been duly commissioned and qualified. He claims, therefore, not by grant, but under commission, and that commission commits to him only an authority, without an interest. The title of the defendant is not by a grant which passes an estate, but by a commission, which is a delegation or warrant of authority, and which, so far from passing an estate, is founded upon and is an affirmation of the fact that the estate is not in him, but in those from whom the power proceeds. It confers upon him title to exercise the authority, but the subject of that authority is in the principal, and under his control, and the very authority of the agent is evidence of it. Every authority implies a perfect right in the grantor to the extent of that authority.—at least as between him and the agent; and it is perfectly insensible that, because of such agency, the agent becomes armed with a control over the exercise of that right." It will be observed that Judge Ruffin says: "An office is enumerated by commentators on the law among incorporeal hereditaments." Judge Nicoll, dealing with that phase of the question, says: "As property, offices are classed under the head of incorporeal hereditaments, and must be held under a conveyance to a man and his heirs, or at least a freehold interest must be held in them. Nor can an action be maintained for an injury resulting from a disturbance or interference with an office, unless it be an incorporeal hereditament or a freehold." It is well settled that in the United States a public office is not, and cannot, in the very nature of our govern-

ment, be, an incorporeal hereditament. 3 Kent, Com. 13th ed. 454.

This question came before the supreme court of South Carolina in *Alexander v. McKenzie*, 2 S. C. N. S. 81, when Willard, J., delivered an exhaustive opinion. He says: "*Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677, holds the contrary doctrine, but is without the support of reason or authority. Misapprehension of the English doctrine on this subject has frequently given rise to erroneous views of the powers of political bodies." The court adopted the view of the New York court in *Conner v. New York*, 2 Sandf. 370.

In *Standeford v. Wingate*, 2 Duv. (Ky.) 440, the supreme court of Kentucky thus states the conclusion reached upon the question: "An office established and held for the public good is not a contract, nor is its tenure secured by any binding contract." Robertson, J., in the opinion of the court, at page 448, says: "Within the range of our researches, the only adjudged case which could give any countenance to such an unreasonable doctrine is that of *Hoke v. Henderson*, in which, as reported in 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677, the supreme court of North Carolina decided that the term of a legislative office could not be reduced below that which was prescribed when the incumbent was elected. That anomalous decision, on a Constitution not in all respects identical with ours, as bearing on the same question, is not, in our opinion, sustained by consistent argument."

The supreme court of Maine, in *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325, says: "All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the legislature. There is, with the above exception, no vested right in an office or its salary."

In *Kendall v. Canton*, 53 Miss. 528, Chalmers, J., in the opinion of the court, says: "Counsel for the plaintiff are correct in saying that while an election or appointment to office is not a contract, in its broadest sense, it does so far partake of the attributes of a contract as to entitle the incumbent to recover all salary accruing during his incumbency. But there is no demand here for salary earned and in arrear. The action sounds wholly in damages, and proceeds upon the idea of a vested right to hold for the full term for which the plaintiff had been elected. Nothing is better settled than the legislative power to terminate at pleasure the incumbency of a statutory office, either by an abolition of the office itself, or by a change in the tenure or the mode of appointment."

Cole, J., in *State v. Douglas*, 26 Wis. 428, 65 L. R. A.

7 Am. Rep. 87, says: "It was not claimed that the plaintiff had any vested right in his office which the legislature could not abrogate or destroy. Such a position would be clearly untenable upon the authorities, and, as a principle, utterly inadmissible under our form of government."

In *State ex rel. Atty. Gen. v. Davis*, 44 Mo. 129, the court, speaking of the plaintiff's case, says: "It proceeds upon the theory that a person in the possession of a public office created by the legislature has a vested interest—a private right of property—in it. This is not true of offices of this description in this country. They are held neither by grant nor by contract. A mere legislative office is always subject to be controlled, modified, or repealed by the body creating it. In England, offices are considered incorporeal hereditaments, grantable by the Crown, and a subject of vested or private interests. Not so in the American states. They are not held by grant or contract, nor has any person a private property or vested interest in them, and they are, therefore, liable to such modifications and changes as the lawmaking power may deem it advisable to enact."

In *Robinson v. White*, 26 Ark. 139, the supreme court of that state has decided that "the office of assessor is a statutory office, and the legislature has absolute control over all statutory offices, and may abolish them at pleasure: and in so doing no vested right is invaded."

In *People ex rel. Robertson v. Van Gaskin*, 5 Mont. 352, 6 Pac. 30, the conclusion to which the court arrived is stated to be that, "in the absence of constitutional restrictions, a legislature, having power to create a particular office and to regulate the manner in which it should be filled, and the term and duties of the incumbent, has the power to lengthen or abridge such term, or to declare the office vacant and appoint another to fill the vacancy. The exercise of such power by the legislature would not be in violation of § 10, art. 1, of the United States Constitution prohibiting a state from passing any law impairing the obligations of contracts or of the 5th Amendment thereof, providing that no one shall be deprived of property without due process of law."

The supreme court of Nevada, in *Denver v. Hobart*, 10 Nev. 28, says: "The legislature having by the act of March 4, 1865, vested certain duties upon the lieutenant governor, and allowed him a salary for his services, it was within the power of the legislature to take those duties and the salary away from him before the expiration of his term of office, and confer them upon another."

Shaw, Ch. J., in *Taft v. Adams*, 3 Gray, 126, 130, says: "Where an office is created by law, and one not contemplated nor its tenure declared by the Constitution, but created by the law solely for the public benefit, it may be regulated, limited, enlarged, or terminated by law as public exigency or policy may require."

In *Wyandotte v. Drennan*, 46 Mich. 478, 9 N. W. 500, Cooley, J., says: "This is a position, that has frequently been taken, and almost as often overruled. Nothing seems better settled than that an appointment or election to public office does not establish contract relation between the person appointed or elected and the public. . . . Offices are created for the public good, at the will of the legislative power, with such powers, privileges, and emoluments attached as are believed to be necessary or important to make them accomplish the purposes designed. But, except as it may be restrained by the Constitution, the legislature has the same inherent authority to modify or abolish that it has to create, and it will exercise it with the like considerations in view."

In *Atty. Gen. ex rel. Rich v. Jochim*, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606, 58 N. W. 611, the court uses the following language: "The legislature may remove officers not only by abolishing the office, but by an act declaring it vacant. . . . And it may lodge the power to remove from statutory offices in boards or other officers subject to statutory regulations. And, while it cannot remove the incumbent of constitutional offices, it is not because of an inherent difference in the qualities of the office, but because the power to remove is limited to the power that creates. The constitutional officer is an agent of the government. There is the same lack of the ingredients of contract, and the same power to abolish the office or remove the officer by amendment of the Constitution." In this case the 14th Amendment was invoked, and expressly held not applicable. "A public office cannot be called 'property,' within the meaning of these constitutional provisions. If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. Public offices are created for the purpose of government." *Ibid.*

Andrews, J., in *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347, says: "It is true that in this country offices are not hereditaments, nor are they held by grant. The right to hold an office, and to receive the emoluments belonging to it, does not grow out of any contract with the state; nor is an office property in the same

sense that cattle or land are the property of the owner." *Kreitz v. Behrensmeyer*, 149 Ill. 496, 24 L. R. A. 59, 36 N. E. 983; *Jones v. Shaw*, 15 Tex. 577.

"An appointment to office is neither a contract, nor is the office or its prospective emoluments the property of the incumbent. Upon general principles of law, the office itself and its emoluments are within the control of the government; and the legislative branch of the government, whenever, in its judgment, public policy requires it, may declare the office vacant, or transfer its duties to another officer, . . . before the expiration of the term for which he was appointed." *State ex rel. Kenny, Prosecutor, v. Hudspeth*, 59 N. J. L. 320, 36 Atl. 662.

In *Foster v. Jones*, 79 Va. 642, 52 Am. Rep. 637, the court uses the following language: "We think it may fairly be assumed in the outset to be an undeniable proposition that the two branches of the legislature, as the direct representatives of the people, have the right, when no restrictions have been imposed upon them, either in express terms or by necessary implication, by the Constitution to create and abolish offices accordingly as they may regard them as necessary or superfluous. And that they may also, under like circumstances, deprive the officers of their salaries, either directly, by removing them from office, or indirectly, by so changing the organization of the departments to which they are attached as to leave them without a place." *Mechem, Pub. Off.* §§ 463 *et seq.*; *Throop, Pub. Off.* § 1719; 23 Am. & Eng. Enc. Law, p. 328.

In the case of *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 109, 5 N. E. 233, Minshall, J., says: "The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him by the public trust, to be exercised for the benefit of the public. Such salary as may be attached to it is not given because of any duty on the part of the public to do so, but to enable the incumbent the better to perform the duties of his office, by the more exclusive devotion of his time thereto."

In the case of *Donahue v. Will County*, 100 Ill. 94, it is said: "It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public, benefit. It would be a misnomer and a perversion of terms to say

that an incumbent owned an office, or had any title to it."

"Some of the decisions have adopted the theory that an office is property, under a mistaken view that the common-law doctrine that an office is a hereditament applied to the offices of this country, which is undoubtedly fallacious. . . . Public offices belong to the people, and are to be both conferred and taken away according to their will and appointment, and a person who accepts a public office does so subject to all the constitutional and legislative provisions in relation thereto." *Moore v. Strickling*, 46 W. Va. 515, 50 L. R. A. 279, 33 S. E. 274. The court in this case refers to *Hoke v. Henderson*, and expressly rejects the doctrine enunciated therein. A careful research fully sustains the remark of Mr. Justice Douglas, *supra*.

Mr. Irving Browne, in his note to *Grant v. Secretary of State*, 8 English Ruling Cases, 266, states the doctrine as held in the cases cited by us, with this conclusion: "Both the office itself and the compensation, upon general principles of law, are entirely within the control of the government, to diminish, increase, or abolish. . . . This is the general doctrine as to statutory offices in this country. . . . [An] appointment to office was not a contract, the impairment of the obligation of which is forbidden by the Federal Constitution." He notes the single exception in the North Carolina court, and says: "In all the other states the legislature may do what it pleases with such offices, unless expressly restrained by the Constitution, an office not being regarded as property, nor the subject of contract, in any sense."

It will be observed that Chief Justice Ruffin cites no authority for the proposition maintained by him. He contented himself with the statement that "an office is enumerated by commentators on the law among the incorporeal hereditaments." And while, therefore, they are property, he says that "most of the rules regulating them have a reference to the discharge of the duties and the promotion of the public convenience; they are *pro commodo populi*. Hence they are not the subjects of property, in the sense of that full and absolute dominion which is recognized in many other things. They are only the subjects of property as far as they can be so in safety to the general interest involved in the discharge of their duties." He concedes that the office may be abolished. "With these limitations and the like," says he, a public office is the subject of property, as everything corporeal and incorporeal from which man can earn a livelihood and make a gain. And to the extent of his salary, it is private property, as 65 L. R. A.

much as the land which he tills, or the horse which he rides, or the debt that is owing to him. We must confess our inability to see how the right to the salary can have any higher or stronger ground upon which to rest than the right to the office. The salary is but an incident to the office. The chief justice does not express himself with his usual force and clearness when he says that offices are not the subject of property in the sense of that absolute dominion which is recognized in many other things, and yet, to the extent of his salary, it is private property, as much as the land he tills, or the horse which he rides, or the debt which is owing to him. When he concedes that the office may be abolished, such concession very greatly weakens the force of his conclusion.

In *Mills v. Williams*, 33 N. C. (11 Ired. L.) 558, Pearson, J., in his usual clear and concise style, thus states the distinction between legislation which is contractual and that which is not. In discussing the power of the legislature to repeal an act establishing a county, he says: "The substantial distinction is this: Some corporations are created by the mere will of the legislature, there being no other party interested or concerned. To this body a portion of the power of the legislature is delegated, to be exercised for the public good, and subject at all times to be modified, changed, or annulled. Other corporations are the result of contract" (referring to private corporations). The same distinction was made and the same principle clearly enunciated by Ruffin, Ch. J., in *University v. Maulsby*, 43 N. C. (8 Ired. Eq.) 257. He says: "But the court is further of the opinion that the university is a public institution and body politic, and hence subject to legislative control; . . . and therefore the corporation was not only originally the creature of the legislature, but it is absolutely dependent on its will for its continuing existence."

"A grant of land by a state is a contract, because in making it the state deals with the purchaser precisely as any other vendor might; and, if its mode of conveyance is any different, it is only because, by virtue of its sovereignty, it has power to convey by other modes than those which the general law opens to private individuals. But many things done by the state may seem to hold out promises to individuals, which, after all, cannot be treated as contracts without hampering the legislative power of the state in a manner that would soon leave it without the means of performing its essential functions. The state creates offices, and appoints persons to fill them; it establishes municipal corporations, with large and valuable privileges for its citizens; by its general laws it holds out inducements to immi-

gration; it passes exemption laws, and laws for the encouragement of trade and agriculture; and under all these laws a greater or less number of citizens expect to derive profit and emoluments. But can these laws be regarded as contracts between the state and the officers and corporations who are, or the citizens of the state who expect to be, benefited by their passage, so as to preclude their being repealed? On these points it would seem that there could be no difficulty. When the state employs officers or creates municipal corporations as the mere agencies of government, it must have the power to discontinue the agency whenever it comes to be regarded as no longer important. 'The framers of the Constitution did not intend to restrain the state in the regulation of their civil institutions adopted for internal government.' They may therefore discontinue offices, or change the salary or other compensation or abolish or change the organization of municipal corporations, at any time, according to the existing legislative view of state policy, unless forbidden by their own Constitution from doing so." Cooley, Const. Lim. 7th ed. 387.

We do not think it would be profitable to enter into a discussion of the various phases in which the question has come before this court. It is a part of the judicial history of the state. It is evident that the effort to carry it to its logical conclusion has rendered it necessary to make many delicate distinctions as to the respect in which and to what extent the word "property" applies to an office, its duties, its emoluments, and when and how an office may be abolished, or the office retained and its duties either transferred to another, or distributed among other governmental agencies. We have no disposition to review these cases, but prefer to adopt what may appropriately be called the American doctrine upon the subject, so clearly set forth in a number of the many decisions which we have quoted. Certainly in one eventful period of the history of the state it did not occur to anyone to carry the doctrine of *Hoke v. Henderson* to its logical conclusion. Without entering into any discussion of the subject, we may, for the purpose of this argument, assume that the state of North Carolina has never at any time from its earliest existence lost or forfeited its statehood, its political integrity, nor has the allegiance of its citizens or the officers of the state been changed to any other government, except in so far as the state occupied relations to other governments. The tenure of judicial offices in North Carolina prior to 1868 was for life or good behavior. At the end of the Civil War a convention was held, and certain amendments made to the Constitution; retaining, 65 L. R. A.

however, this provision. The Constitution thus amended was ratified by the people, and a state government duly organized thereunder. Judges were elected and qualified, and were thereby entitled to hold such offices for life. In 1868 a second convention was held, the mode of election changed, the tenure changed from life to a term of eight years, and this court, then composed of Pearson, Ch. J., and Justices Reade and Battle, and the superior court bench, upon which were several of the ablest lawyers in the state, without question, recognized the right of the people by constitutional amendment to deprive them of their offices. It did not occur to either of these judges that they held their office under any contract, or that they had any property interest therein. So far as the record of our judicial history shows, no question was made of the right of the people, by amendment of their Constitution, to change the tenure and mode of election of their judges without in any respect abolishing or changing the duties of the office. The supreme court and superior courts of North Carolina, with few exceptions, were given the same jurisdiction by the Constitution of 1868 which they have under the old Constitution. Whatever status the state may have occupied in its Federal relations from 1861 to 1868, its judges held their office for life or good behavior, and never by any action on their part forfeited such office to the state; hence, when the state resumed its Federal relations with the United States government, it did so in respect to its original statehood, and not by virtue of any new source of political life; and, if *Hoke v. Henderson* had been the controlling principle, they were entitled and it was their duty to continue to hold their office and discharge its duties in accordance with the tenure by which they were originally conferred. Of course, we refer to this portion of our history without reference to the actual conditions existing, and upon the theory that the state, in its sovereign capacity, having withdrawn its allegiance from, in the same capacity resumed it to, the Federal government. *Texas v. White*, 7 Wall. 700, 19 L. ed. 227, 6 Rose's Notes, 1066. It has never been seriously contended that the judges in North Carolina were not from 1866 to 1868 rightfully in the discharge of their duties, or that the title to their offices was in any respect invalidated. It is a part of the history of this country that in a large majority of the original thirteen states forming the Union the judicial tenure was, as in North Carolina, for life or good behavior. A large number of those states have, since the adoption of the Federal Constitution, amended their Constitutions, making the judicial tenure for a

term of years; and in no instance, so far as our research informs us, was the contention made that the offices were the property of the judges, held by grant. The only reference to the question which we find (and that was a mere suggestion) is in *Com. ex rel. Hepburn v. Mann*, 5 Watts & S. 418, and it is disposed of by the court in the following language: "The point that it is a contract, or partakes of the nature of a contract, will not bear the test of examination."

While we are not insensible to the responsibility which we assume in overruling a case which has been recognized as a controlling authority upon this subject for more than half a century, we feel that we are discharging a duty which the court of last resort owes when it has become apparent that the case brought into question is not supported by sound reason, and is in conflict with the uniform and unbroken current of authority in the Federal and state jurisdictions. In so far as *Hoke v. Henderson* is based upon a construction of the Federal Constitution, it is our duty to recognize and enforce the construction put upon that Constitution by the Supreme Court of the United States. We assume that, if by any lawful procedure the question could come before the Supreme Court of the United States, whether an office created by the legislature of North Carolina was property, within the 10th section of article 1, and the 14th Amendment to the Constitution, that court would not hesitate to follow its decisions, rather than those of this state. But it is said that we should not disturb a decision so long acquiesced in and so often followed. "If a decision is based upon reasoning that can be shown to be erroneous (that is to say, contrary to the spirit and analogies of the law), it will be disregarded in other jurisdictions, and may even be overruled in the same jurisdiction." "Wambaugh, Study of Cases, 53. In *Doe ex dem. Myers v. Craig*, 44 N. C. (Busbee L.) 169, this court, referring to a well-considered opinion theretofore rendered, speaking through Pearson, J., says: "It is clear *Spruill v. Leary*, 35 N. C. (13 Ired. L.) 225, is not sustained by *Den ex dem. Flynn v. Williams*, 23 N. C. (1 Ired. L.) 509, and, after much research, no authority has been found to support the 'artificial and hard rule, the practical operation of which at this day would be to enable one man to sell another man's land without compensation.'" This was regarded as sufficient reason for overruling a well-settled authority in this state in respect to the title to land. In speaking of the sanctity of judicial precedents, a great jurist uses the following language: "On the other hand, I hold it to 65 L. R. A.

be the duty of this court, as well as every other, to revise its own decisions, and, when satisfied that it has fallen into a mistake, to correct the error by overruling its own decisions." Another justice says: "It is going quite too far to say that a single decision of any court is absolutely conclusive as a precedent. It is an elementary principle that an erroneous decision is not bad law; it is no law at all." It may be final upon the parties before the court, but it does not conclude other parties having rights depending upon the same question. "It is, no doubt, true that even a single adjudication of this court upon a question properly before it is not to be questioned or disregarded except for the most cogent reasons, and then only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question. But the doctrine of *stare decisis*, like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question. Chancellor Kent, commenting upon the rule of *stare decisis*, said that more than a thousand cases could then be pointed out in the English and American reports which had been overruled, doubted, or limited in their application." *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618, 28 Am. St. Rep. 600, 30 N. E. 654.

If it is true that a public office is private property, the state, instead of being sovereign, finds herself, in her effort to perform her governmental functions, bereft of her sovereignty, her hands tied, her progress obstructed, for that those whom she has commissioned to be her servants have, by grants of parts and parcels of her sovereignty, become her masters, and, converting her commissions into grants, forbid her to proceed or go forward. That this is not fancy, or an imaginary result of enforcing the principle which we are asked to perpetuate, the reports of decided cases in this court amply show. When it was sought to change the mode of governing the asylums and other state institutions as the general assembly deemed best for the public good, it was claimed and held that the state was powerless, because the directors had a grant based upon contract, by which they were entitled to manage its institutions for a number of years. *State ex rel. Walser v. Bellamy*, 120 N. C. 212, 27 S. E. 113; *Lusk v. Saucyer*, 120 N. C. 225, 27 S. E. 1007. It was held in *Day's Case*, 124 N. C. 369, 46 L. R. A.

295, 32 S. E. 750, that "although a new method of distributing the powers and duties of the government and conduct of the state's prison may be desirable, and the method undertaken to be adopted in the act of 1899 may be the best, and yet such changes cannot be made until the expiration of the contract with the incumbent." The system of criminal courts created by legislative enactment could not be changed, or the counties in the districts adjusted to suit the needs of the people, because solicitors had contracts with the state, and held, under grants, public offices. *Walser ex rel. Wilson v. Jordan*, 124 N. C. 683, 33 S. E. 139; *State ex rel. McCall v. Webb*, 125 N. C. 243, 34 S. E. 430. The right of the state to control, as in the judgment of the representatives of the people it thought best, its property interest in a railroad, was perverted because the directors had, by grant, property in the office for a term of two years. *State ex rel. Bryan v. Patrick*, 124 N. C. 651, 33 S. E. 151. The power to repeal an act, abolish the office of railroad commissioner, and establish a new commission—an agency of purely legislative creation—was denied for the same reason. *State ex rel. Abbott v. Beddingfield*, 125 N. C. 256, 34 S. E. 412. What the representatives of the people deemed an improvement in the public school system was prevented because, with the grant of a public office in his hand, a school committee man asserted his property right to the office. *State ex rel. Greene v. Owen*, 125 N. C. 212, 34 S. E. 424; *State ex rel. Dalby v. Hancock*, 125 N. C. 325, 34 S. E. 516; *State ex rel. Gattis v. Griffin*, 125 N. C. 333, 34 S. E. 429. We do not cite these cases for the purpose of criticising them. For the purpose of the discussion, we regard them as the logical deduction to be drawn from the principle that a person may have a contractual right to or property in public office.

The facts in this case strikingly illustrate the wisdom of holding that a public office is not private property, thus preventing the state and its agencies from performing its functions in respect to its internal government. It became evident to the legislature that it would be wise to inaugurate a system of working the public roads of Raleigh township by the use of the convicts. For the purpose of doing so, a scheme was devised and enacted into law. Officers were provided for, and their mode of election and term of office fixed. In process of time, it became necessary to enlarge the operations to other parts of the county. The plan which had been adopted was found to be wise, and it was desired to enlarge its sphere. It thus became necessary to have other officers; to distribute the duties and

subdivide their work. For this purpose the law of 1903 was enacted. The whole scheme looked to and had for its object the public good,—the improvement of the public roads,—not the creation of offices to be granted to the mere agents employed for this purpose. The relator finds no place in the new scheme for working the roads. He has no duties or powers, and no salary is provided for him. If his contention be correct, the working of the public roads must be stopped until his term of office expires. This is the logical result of his contention that he has a property right in the office; that he has risen above his source; that, instead of being a mere servant or agent commissioned to discharge certain public duties, he has become the owner of part of the sovereignty of the state, and at his will a great work of public improvement must stop. This does violence to our conception of the relations which public servants bear to the people or their government. The following language used by Judge Nicoll in *State ex rel. Savannah v. Deus*, R. M. Charl. (Ga.) 404, so clearly sets forth the reason upon which the true principle is founded, that we quote at some length: "The appointment of him, as well as other officers, is not a grant in derogation of the rights of the public, but the constituting by the people, in the exercise of their sovereignty, of an agent to carry their sovereignty into effect. In creating an office the body public does not restrict its sovereignty, or the power of the legislature through whom that sovereignty is expressed and exercised. The purpose is to extend the sphere of its action, or at least to give it operation. But if it be true that the officer has a property in his office, that that property embraces its duties as they were prescribed by law at the moment he was commissioned and qualified, and that those duties cannot be changed without a forbidden disturbance of private property, the consequence is that by his appointment the officer becomes placed above the sovereignty of the people during the term for which he is elected."

While it is our duty to search for, and, if happily we find the law, to apply it to the case, we think it not improper, in view of the range which the discussion of the principle involved in this case has taken in our Reports, to say, in response to the argument that, if the legislature be permitted to change, modify, abolish, or otherwise deal with public office and its incumbents, uncertainty in security and constant disturbance in the administration of the domestic affairs of the state will follow, that ours is a government "of the people, by the people, and for the people;" that, except in so far as they have, in their organic law, limited

their power to speak and act through their representatives, sovereignty rests with them. We, who are commissioned to perform judicial functions, may not claim to be wiser than they, or find any other guide for our conduct than the Constitution which they have ordained. If the people have not authorized their legislative department to parcel out their sovereignty by grants of public offices as private property, we dare not do so. The legislature, having been intrusted with the power of either electing or providing for the election of officers of legislative creation, must, as the representatives of the people, be intrusted to make such changes in the tenure, duties, and emoluments of such offices as, in its judgment, the public interest demands. This power having been vested in that department of the government, it is our duty to obey and enforce the law as the "state's collected will."

To conclude the matter, the doctrine of *Hoke v. Henderson* is based upon the proposition that public office is private property, with all the results that logically flow therefrom. In so far as that case holds this proposition to be law, we expressly overrule it, and declare that no officer can have a property in the sovereignty of the state; that, in respect to offices created and provided for by the Constitution, the people, in convention assembled, alone can alter, change their tenure, duties, or emoluments, or abolish them; that, in respect to legislative offices, it is entirely within the power of the legislature to deal with them as public policy may suggest and public interest may demand.

The judgment of the court below is affirmed.

Clark, Ch. J., concurring:

The court that decided *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677, did not deem themselves infallible, for they overruled divers of their own opinions as erroneous, and succeeding courts have overruled other opinions of that court. There is no peculiar sacredness attached to *Hoke v. Henderson*. No other court whatever, anywhere or at any time, has followed it as authority. All have concurred in disregarding it, and not a few have sharply criticised it, a few of which criticisms have been collected. 127 N. C., at pages 252, 253, 37 S. E. 263. "Even Homer sometimes nods," according to the Latin maxim. If Mr. Reverdy Johnson paid the decision the scant compliment of mentioning it in his argument in *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366, the opinion of the court did not treat it with as much consideration. It is not referred to.

Nor has the case always been followed 65 L. R. A.

even by this court. It owes its prominence, not to the original decision in 1833, which was not followed for nearly forty years, but to its revival and wider application after the political changes in 1870 and 1898. Its fundamental doctrine, that office is not an agency, but property obtained by contract and therefore protected by the contract clause of the Federal Constitution, was most effectually denied by every judge when he took his seat on the supreme or the superior court bench in 1868, since he did so in disregard of that holding. The convention of 1868 could no more abrogate a contract (if office was a contract) than it could any other contract made in 1865-68. The court has often ignored it, notably in *Mills v. Williams*, 33 N. C. (11 Ired. L.) 558; *State ex rel. Bunting v. Gales*, 77 N. C. 283, and *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417; and there are other cases in which it has been only partially upheld. Having discussed these cases in numerous dissenting opinions from *Day's Case*, 124 N. C. 362, 46 L. R. A. 295, 32 S. E. 748, down to *Taylor v. Vann*, 127 N. C., at pages 243-253, 37 S. E. 263, in which last many of the opinions sustaining the legislative power over offices created by legislation are again collected, it is not necessary that I should now discuss them.

As the essence of the decision in *Hoke v. Henderson* is that office is property based on contract, and hence protected by the United States Constitution (for there is no such clause in the state Constitution), the general assembly could not, if that view was correct, make any rule nor pass any law to disregard it. If they could, then all future contracts of any kind whatsoever could be taken out of the protection of the Federal Constitution by a simple statute that all future contracts shall not have that protection. So far from the legislature acquiescing, every case, from *Hoke v. Henderson* itself down to *Mial v. Ellington*, the present case, was necessarily presented by legislative action taken in disregard of *Hoke v. Henderson*. As long as the court held to the doctrine of that case, the legislature could make no rule to the contrary, beyond persistently disregarding it, as it has often done, as evidenced by numerous decisions. There is no way to get rid of the decision except by the court which made it repudiating it, for the reasons given in the very able opinion filed in this case by Mr. Justice Connor.

The legislature shapes the administrative and political policy of the state, and its members are elected at short intervals for the purpose of conforming the direction of public affairs to the changing sentiment of the people and the progress of events. This

policy must be put into operation through officers who are simply agents of the government. If a legislature elected for two years can put in its agents for life or long terms, and keep them in by the court's holding that office is a contract and incumbents are irremovable, such temporary legislature can dominate the people for any period it may see fit to fix for the duration of offices filled or created by it. This is a denial of the foundation principle of all American government,—the sovereignty of the people. The fact that the Constitution fixes the term of certain officers, and forbids a diminution of their salaries, is of itself conclusive that all other officers and their salaries are not thus protected, but are subject to change and control by the people, acting through subsequent legislatures.

It must be remembered that, when *Hoke v. Henderson* was decided, the United States Supreme Court had not then held, as it soon afterwards did in *Butler v. Pennsylvania*, 10 How. 402, 416, 13 L. ed. 472, 478, that an office was not a contract, and not protected by the contract clause of the Federal Constitution. This doctrine that court has uniformly maintained ever since, notably in *Newton v. Mahoning County*, 100 U. S. 548, 25 L. ed. 710; *Blake v. United States*, 103 U. S. 227, 26 L. ed. 462; *Crenshaw v. United States*, 134 U. S. 99, 33 L. ed. 825, 10 Sup. Ct. Rep. 431, and many other cases, including the late decision in *Taylor v. Beckham*, 178 U. S. 577, 44 L. ed. 1187, 20 Sup. Ct. Rep. 1009. Had those decisions, or any one of them, been rendered in 1833, it is quite certain *Hoke v. Henderson* would have been decided the other way, for the construction placed by the United States Supreme Court upon any clause of the Federal Constitution is conclusive upon all other courts.

For well-nigh forty years *Hoke v. Henderson* was applied to no controversy over an office. In *Mills v. Williams*, 33 N. C. (11 Ired. L.) 558, it was not cited, but disregarded and practically overruled, both in the reasoning of the opinion and its effect, which was to hold that all the duties and emoluments of the office of sheriff of Polk county were transferred intact to the sheriff of Rutherford county. In *Cotten v. Ellis*, 52 N. C. (7 Jones, L.) 548, it is true *Hoke v. Henderson* was cited, but the decision rested on a different point,—that the state could not vacate a Federal office. The legislature of 1865 disregarded *Hoke v. Henderson* by vacating legislative offices, and even filling such judgeships as it saw fit with new men. In 1868 the convention again did the same thing by the judges which *Hoke v. Henderson* held could not be done by the clerks, i. e., changed the appointive life tenure into an elective term of years. This

could not have been done if office were a contract, for the Federal Constitution forbids any "state to pass any law to impair the obligation of a contract." The restriction was upon the state, not merely upon its legislature. The prohibition applies to a convention as well as to the legislature. *Louisiana v. Taylor*, 105 U. S. 454, 26 L. ed. 1133, and other cases cited; *State ex rel. Abbott v. Beddingsfield*, 125 N. C., at page 285, 34 S. E. 412. As already stated, every judge who took his seat upon the bench in 1868, took it in defiance of *Hoke v. Henderson*. The officers turned out in 1868 held, not by virtue of any authority recognized in 1861-65, but they had all been inducted in 1865, after the war closed, or later.

After being thus silent and practically disregarded without a single application of it, for nearly forty years, *Hoke v. Henderson* was resurrected after the change in the political majority of the general assembly in consequence of the elections of 1870 and 1872. Its invocation and somewhat more extended application thwarted the effort of the people, through their new representatives, to control the policy of the state by changing the incumbents of offices created by the legislature with men of views in accord with the change expressed at the ballot box. Later on, however, *Hoke v. Henderson* was practically ignored, or much limited, in *State ex rel. Bunting v. Gales*, 77 N. C. 283; *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417, and other cases.

In *State ex rel. Walser v. Bellamy*, 120 N. C. 212, 27 S. E. 113, there was an application of *Hoke v. Henderson* in a case where new incumbents were placed in offices as to which there had been no change of duties, but a change of names only. This decision was within the limits of the original decision. It was the subsequent cases, beginning with *Day's Case*, in 124 N. C. 362, 46 L. R. A. 295, 32 S. E. 748, which carried it further, causing it to be denied, and its ultimate and inevitable overthrow. In *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993, attention was for the first time called to the fact that the decision in *Hoke v. Henderson* had been denied in all other states, and, while admitting that it had been recognized in this state, it was held that Ward was not protected by it. In *State ex rel. Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554, in a very able opinion, it was again shown (at pages 467, 468, 121 N. C., pages 560, 561, 28 S. E.), that *Hoke v. Henderson* was contrary to all precedents elsewhere, and the opinion was expressed that the doctrine had been "carried to its fullest legitimate extent" here, and Wilson, like Ward, was held not protected by it in his office.

With the subsequent expansion of the doctrine to new territory and wider fields, it can serve no purpose now to deal. Those matters have been fully discussed in the opinions and dissenting and concurring opinions filed in the various "officeholding cases" from *Day's Case*, 124 N. C. 362, 46 L. R. A. 295, 32 S. E. 748, in which the legislature was denied power to control the penitentiary, down through various offices to *Taylor v. Vann*, 127 N. C. 249, 37 S. E. 263, which was as to the costs in an action to recover a \$2 per annum office (member of county board of education) when the term of the officer had expired before judgment. Thus expanded, the doctrine necessarily destroyed itself. The people of the state could not and would not be prohibited and controlled in the management of their own institutions and their public policies by judge-made law, which was denied by all other courts, including the highest at Washington. The doctrine has existed nowhere else. The conflict between the court and general assembly could not continue. No act of the legislature could terminate it. Every time the question has been presented in all these years, it has been raised upon an act of the legislature which had been passed in disregard of *Hoke v. Henderson*. Its assertion could be renounced only by the court. This it has now done, explicitly, clearly, and the doctrine of private property in public office, started on its course by the decision in *Hoke v. Henderson*, will, like the ghost in Hamlet, "no longer walk the earth" to disquiet the peace.

Montgomery, J., dissenting:

Mr. Justice Connor, in writing for the court its opinion in this case, states clearly and forcibly what is called the "American doctrine" in reference to the nature and tenure of public office, and makes copious extracts from the decisions of the courts of many of the states of the Union, and from two of the Supreme Court of the United States, in affirmation of the view of the majority of the court; and it may be taken as true that the supreme court of North Carolina is the only court, state or Federal, which has held that a legislative office is property, that it is held by contract between the state and the officer, and that the officer can be deprived of his office by judicial determination only. I was aware of this particular isolation of the North Carolina court when I wrote for the court, at its February term, 1897, the opinion in the case of *State ex rel. Walser v. Bellamy*, 120 N. C. 212, 27 S. E. 113. Why, then, did I not, at that time, take the opposite view, and use my voice to ally the decisions of this court, on the subject under 65 L. R. A.

discussion, with the universal judicial sentiment of the country? There were two reasons why I could not do so. The first was that for almost three score and ten years the law as it was written in *State ex rel. Walser v. Bellamy*, 120 N. C. 212, 27 S. E. 113, had been the law under decisions of this court, and those decisions made by judges holding personally different political views, and many of them known to be of marked judicial temperament, and ranking in the very highest order of legal learning and general scholarship; and, second, those decisions, and especially the one of *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677, delivered in 1833, and written by Chief Justice Ruffin, seemed to me to be conclusive on the subject. The judges at that time were Ruffin (Chief Justice), Daniel, and Gaston, a court of which any nation in any age might be proud. The opinion is a model of judicial style, notable for its strong and pure English and for the vigor and force of its reasoning. No synopsis of it can do the author justice. Among the conclusions was this: That an office was property, a vested right, existing under contract between the state and the officer, and that an act of the legislature which sought to deprive the officer of his property in the office was unconstitutional and void. And that proposition was not doubted by this court until sixty-six years had elapsed, when the dissenting opinion in *Day's Case*, 124 N. C. 362, 46 L. R. A. 295, 32 S. E. 748, was filed by Justice Clark, the present chief justice. Within less than two years before the dissenting opinion in *Day's Case* was filed, the same justice had written the unanimous opinion of this Court in the case of *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 994, upholding the doctrine of *Hoke v. Henderson*, in the following language: "The only restriction upon the legislative power is that after the officer has accepted office upon the terms specified in the act creating the office, this being a contract between him and the state, the legislature cannot turn him out by an act purporting to abolish the office, but which in effect continues the same office in existence. This is on the ground that an office is a contract between the officer and the state, as was held in *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677, and has ever since been followed in North Carolina down to and including *State ex rel. Walser v. Bellamy*, 120 N. C. 212, 27 S. E. 113, though this is the only one of the forty-five states of the Union which sustains that doctrine."

In writing of that celebrated opinion (*Hoke v. Henderson*) nearly forty years afterwards, Pearson, Ch. J., in *State ex rel. Clark v. Stanley*, 66 N. C. 67, 8 Am. Rep.

488, referred to it as "that mine from which so much rich ore has been dug." I cannot think it out of place to quote, from the address of the late Honorable William A. Graham on the life of Chief Justice Ruffin, his remarks in reference to that great case,—*Hoke v. Henderson*. The speaker said: "Judge Ruffin's conversancy with political ethics, public law, and English and American history seems to have assigned to him the task of delivering the opinions on constitutional questions which have attracted most general attention. That delivered by him in the case of *Hoke v. Henderson*, in which it was held that the legislature could not, by a sentence of its own in the form of an enactment, devest a citizen of property, even in a public office, because the proceeding was an exercise of judicial power, received the encomium of Kent and other authors on constitutional law, and I happened personally to witness that it was the main authority relied on by Mr. Reverdy Johnson in the argument for the second time in *Ex parte Garland*, which involved the power of Congress, by a test oath, to exclude lawyers from the practice in the Supreme Court of the United States for having participated in Civil War against the government, and in which its reasoning on the negative side of the question was sustained by that august tribunal." The same question was before this court again in the case of *Cotten v. Ellis*, 52 N. C. (7 Jones, L.) 545. The court there said, through Pearson, Ch. J.: "The legal effect of the appointment was to give the office to the applicant, and he became entitled to it as a 'vested right' for the term of three years, from which he could only be removed in the manner prescribed by law, and of which the legislature had no power to deprive him. This is settled. *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677." And again the question was presented for decision in the case of *King v. Hunter*, 65 N. C. 603, 6 Am. Rep. 754. The opinion in the case was delivered by Judge Reade, who said: "Nothing is better settled than that an office is property. The incumbent has the same right to it that he has to any other property. There is a contract between him and the state that he will discharge the duties of the office (and he is pledged by his bond and his oath), and that he shall have the emoluments (and the state is pledged by its honor). When the contract is struck, it is as complete and binding as a contract between individuals, and it cannot be abrogated or impaired except by the consent of both parties." Again the question was presented in the case of *Bailey v. Caldwell*, 68 N. C. 472, and decided in the same way. Upon the reasoning and the authority of the foregoing cases, 65 L. R. A.

the numerous decisions involving the same question, and heard in this court, beginning with *State ex rel. Walser v. Bellamy*, down to this time have been made.

It may not be inappropriate to say that the thorough and elaborate arguments of counsel and the dissenting opinions in the cases that followed *State ex rel. Walser v. Bellamy* very much weakened my view of the correctness of the decision in *Hoke v. Henderson* as applicable to the genius of our institutions and the thought of the age, and I am free to say that if it had been a new question I would have adopted what is called by the court "the American doctrine." But I cannot get my consent to join in overruling the decisions of this court, beginning with *Hoke v. Henderson* and at intervals down almost to the present day: First, because the law as settled in those decisions has been too long the law of this state to be overthrown by the judicial decree of judges who may not see the law more clearly than did that great court which made the decision in that celebrated case of *Hoke v. Henderson*, not to mention succeeding judges who followed the precedent. And, again, the general assembly has met in session more than thirty times since the decision of *Hoke v. Henderson*. Its members knew, at any and all of its sessions, that so far as legislative offices—that is, offices not ordained by the Constitution with fixed terms—were concerned, they could alter the effect of the rule laid down in that case by the enactment of a statute, not "retrospective" in its action, thereby interfering with vested rights, but prescribing a rule of property in said office, and modifying the extent of interest and tenure therein "prospectively." *State ex rel. Caldwell v. Wilson*, 121 N. C. at page 469, 28 S. E. 554. By that means, such officers elected or appointed after the going into effect of the act would hold under the statute and subject to its provisions. No such statute has been enacted. The legislative department has acquiesced in *Hoke v. Henderson*, with full knowledge that it had the power to change the effect of the doctrine announced in *Hoke v. Henderson* in the manner and to the extent above specified. A bill for that purpose was introduced at the session of 1901, and received the unanimous report of the committee which had it in charge, but for reasons satisfactory to them it was not enacted into law. Under such an act the officer would take his office with the knowledge and understanding, when he accepted it, that he held it subject to removal under the terms of the act, and no such question could arise as was decided in *Hoke v. Henderson*, where the right to the office was unqualified. In case of removal of any such

officer, no constitutional provision, either Federal or state, could be invoked to protect his rights of property in case of his removal from office, as he agreed that that might be done when he accepted it. It was the Constitution of North Carolina of 1776, adopted at Halifax, which was referred to in the case of *Hoke v. Henderson* as the instrument which was violated by the act of assembly, and the provision was § 12 in the Declaration of Rights, which was in these words: "That no freeman ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land." That section is now § 17 of article 1 of the Constitution of North Carolina.

There was some discussion in the opinion of the court, and also in the concurring opinion, of the views and conduct of the judges elected under the state Constitution of 1868. There had never been a decision of the United States Supreme Court holding that an office was property resting in contract. Those judges must have known that fact. In *Hoke v. Henderson* such a holding had been made by our own court, and no doubt the judges elected under the state Constitution of 1868 believed that a convention of the people had the full right to abolish offices or remove officers, and that in the exercise of that power they had changed the terms of the judges' offices and also removed the incumbents. The doctrine of *Hoke v. Henderson* was that the legislature could not deprive one of his office, because it was property and rested in contract, but there is not a hint in the case that the people in convention did not have that power.

I am pleased with the spirit and language of Mr. Justice Connor, manifested throughout the decision of the case, and especially that part of it in which reference to the decisions of this court, which are said by some to be an extension of the doctrine of *Hoke v. Henderson*, is made. I quote it: "We do not think it would be profitable to enter into a discussion of the various phases in which the question has come before this court. It is a part of the judicial history of the state. It is evident that the effort to carry it to its logical conclusion has rendered it necessary to make many delicate distinctions as to the respect in which, and to what extent, the word 'property' applies to an office, its duties, its emoluments, and when and how an office may be abolished, or the office retained and its duties either transferred to another or distributed among other governmental agencies. We have no disposition to review these cases, but prefer

to adopt what may appropriately be called the 'American doctrine' upon the subject, so clearly set forth in a number of the many decisions which we have quoted." As to the correctness of the decisions referred to in the above quotation, with the premise admitted that the law of *Hoke v. Henderson* was the recognized law at that time in North Carolina, I am content, as, indeed, I must be, to abide the judgment of the profession, with the hope and in the belief that the judgment of future and of calmer times, if an adverse one, may be expressed more charitably than was that of the opponents of the decisions at the time they were made.

Douglas, J., dissenting:

When the opinion of the court was filed in this case I was so seriously ill as to be helpless, and hence I take advantage of the kindly consent of my associates to now file my dissenting opinion, I would gladly drop the matter, but for the feeling that such action on my part might be misunderstood. In the light of an unforgotten past, it seems proper that I should briefly state the facts that constitute my justification in consistently following in my judicial career the principle laid down in *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 877. Excuse or apology I have none to offer. I understand that the opinion of the court goes to the extent of deciding that no one can have any property in the tenure of an office, and "that in respect to legislative offices it is entirely within the power of the legislature to deal with them as public policy may suggest and public interest may demand." This cuts up by the roots the dominating principle of *Hoke v. Henderson*, and of all subsequent cases based thereon. No distinction whatever is made between the different cases involving the application of the principle. It is the principle itself that is denounced as intrinsically vicious, and therefore calling for judicial extirpation. It necessarily follows that in the light of this decision we were just as wrong in 1897 in rendering our unanimous decision in *State ex rel. Walser v. Bellamy*, 120 N. C. 212, 27 S. E. 113; *Lusk v. Sawyer*, 120 N. C. 225, 27 S. E. 1007, and *Person v. South-erland*, 120 N. C. 225, 27 S. E. 1007, as we were in any of those subsequent decisions which became the subject of so much controversy.

There has been no change in the law, and, if the court is right now, it was wrong then in refusing to the dominant power in the legislature the disposition of the offices to which they were legally entitled. It irresistibly follows that if the court in 1897 had been constituted as it is now, in the light of its present decision, it would have of-

ferred no bar to the will of the legislature, and would have turned over the asylums and other state institutions to those whom we excluded. This seems the very irony of fate.

I will not undertake to defend the principle underlying the decision in *Hoke v. Henderson*, as I can add nothing to what has already been said. My personal views have been fully expressed when speaking for the court in *State ex rel. Greene v. Owen*, 125 N. C. 212, 34 S. E. 424, and *Taylor v. Vann*, 127 N. C. 243, 37 S. E. 263, and in my concurring opinion in *Walser ex rel. Wilson v. Jordan*, 124 N. C. 707, 33 S. E. 139. I will now confine myself to the reasons actuating me in accepting the principle as settled law when I came upon the bench, and consistently following it thereafter. The court quotes with approval from my opinion, speaking for the court, in *State ex rel. Caldwell v. Wilson*, 121 N. C. 467, 28 S. E. 561, as follows: "With the exception of this state, it is the well-settled doctrine in the United States that an office is not regarded as held under a grant or contract, within the general constitutional provision protecting contracts; but, unless the Constitution otherwise expressly provides, the legislature has power to increase or vary the duties or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges, before the end of the term, or to alter or abridge the term, or to abolish the office itself. . . . Except in North Carolina, it is well settled that there is no contract, either express or implied, between a public officer and the government, whose agent he is; nor can a public office be regarded as the property of the incumbent." That is true, but the same opinion went on to say: "But our decision in the case at bar does not conflict with that in *Hoke v. Henderson*. The statute now under consideration is not retrospective, and does not interfere with any vested right. Being a part of the act originally creating the office of railroad commissioner, it 'prescribed' a rule of property in said office, and modifies the extent of interest and tenure therein 'prospectively.' The defendant, taking under the act, holds subject to the act, and, relying upon his contract is bound by all its provisions. One of its express provisions was the reserved right of the legislature to remove, and the power and duty of the governor to suspend, under a given state of facts. This power of suspension, together with the necessary method of its enforcement, was assented to by the defendant in his acceptance of the office; . . . that the only property he could have in the office was that given to him by the statute, which must be construed in all

its parts. His commission, which is his title deed, appears to us with the fateful words of the created act written across its face by the hand of the law." In that case I also said, for a unanimous court: "We realize the responsibilities of this court in settling the line of demarcation between the legislative, executive, and supreme judicial powers, which by constitutional obligation must be kept forever separate and distinct. This vital line must be drawn by us alone, and we will endeavor to draw it with a firm and even hand free alike from the palsied touch of interest or subservency and the itching grasp of power. Should the legislative or executive departments of the state cross that line, we will put them back where they belong; but upon us rests the equal obligation of keeping upon our own side. This is a question, not of discretion, but of law; a matter not of expediency, but of right."

From the course of judicial conduct thus explicitly declared, I have never knowingly departed. At the same term it was said by a unanimous court, in *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993, that "this is on the ground that an office is a contract between the officer and the state, as was held in *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677, and has ever since been followed in North Carolina down to and including *State ex rel. Walser v. Bellamy*, 120 N. C. 212, 27 S. E. 113, though this state is the only one of the forty-five states of the Union which sustains that doctrine." (The italics are mine.) This language is quoted to show that, whatever differences of opinion may subsequently have arisen as to its application, the existence of the principle itself as the settled law of North Carolina was universally admitted. It was so recognized by the Supreme Court of the United States in *Re Hennen*, 13 Pet. 230, 10 L. ed. 138, where the court says, on page 261; "The case of *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677, decided in the supreme court of North Carolina, is not at all in conflict with the doctrine contained in the cases referred to. That case, like the others, turned upon the Constitution and laws of North Carolina."

The only argument in the opinion of the court that had not been previously advanced and considered is the change in the personnel of the supreme and superior courts following the adoption of the Constitution of 1868, and the relation of the seceding states to the Federal Union. I will not reopen the questions involved in the Civil War and the tangled web of reconstruction. The issues of the war were settled by embattled freemen, who on both sides, believing that their cause was sacred, freely gave to it the last tribute of a loyal heart. All that we need

do is to cherish the memory of their heroic deeds and guard their last resting place, feeling that every flower growing on a soldier's grave nestles its roots in a hero's breast, and expands its fairest flowers in a glad sunshine of liberty and peace in a re-united land.

When I first came upon this bench, its only new member, and in every way its junior, I was at once confronted with the class of cases represented by *State ex rel. Walser v. Bellamy*. After the most careful consideration, and certainly with no possible personal bias in that direction, I concurred with a unanimous court in the decision of those cases, thus giving to the great principle enunciated in *Hoke v. Henderson* the deliberate assent of my judgment and my conscience. Even if I had not approved of the decision in principle, I would have hesitated to place myself upon the lonely pedestal of solitary infallibility, assuming that I was wiser than the aggregated wisdom of the court for more than sixty years. I do not look upon the system of jurisprudence as a mere heterogeneous conglomeration of disjointed opinions, but as a harmonious whole, in which every case fits accurately upon those that have preceded it, and in turn becomes the foundation for others. Thus is reared the noble structure with all the beauty, simplicity, and grandeur of a Grecian temple. So feeling. I did not seek to signalize my advent upon the bench by prizing out the foundation stones of the law, but rather by building up, satisfied if I could add to the structure but one stone, small and roughhewn though it be.

The opinion in *Hoke v. Henderson* was delivered at the December term, 1833, of this court by Chief Justice Ruffin, and concurred in by his associates, Judges Daniel and Gaston. This great court sat together unchanged for more than ten years, and has no superior here or elsewhere, either in the ability and integrity of judicial conduct or the purity of private life. No finer combination of judicial and individual character has ever existed upon any bench. Chief Justice Ruffin stands at the head of the profession in this state, with no possible rival, unless it be Chief Justice Pearson, who paid him the high compliment of saying that while Chief Justice Taylor was the most learned man that had ever been upon this bench, and Chief Justice Henderson its most reflective mind, Ruffin combined both qualities in a higher degree than anyone else. Judge Daniel's opinions are models of brevity, strength, and clearness. Judge Gaston was the beau ideal of North Carolinians, whose character contained the flower and fragrance of every virtue. I have often thought

that the splendor of his intellectual qualities was overshadowed by the sublimity of his moral character. It may well be said of him that, among the great men of his generation, few have left a more splendid and none a more stainless name. It is the deliberate judgment of his countrymen that throughout a long and distinguished life he ever bore the trenchant blade of heroic manhood with the spotless shield of Christian chivalry. But it has been intimated that that opinion was not carefully considered, and that those eminent judges, like Homer, might sometimes nod. The opinion itself shows no evidence of haste or want of deliberation. On the contrary, it is regarded as a model by the best of judges, and has repeatedly received the warmest commendation from the highest sources. I know it is said that even Homer sometimes nods; but I never heard of his going to sleep, and continuing in a profound slumber for seventy years. It remained for the courts of North Carolina to take this more than Rip Van Winkle nap, and as we wake up we may well ask, where are Ruffin and Daniel and Gaston and Pearson? Gone! And we who sit in the ever-widening shadow of their fame are asked to say that they knew not whereof they spoke. Let this be said by those who may; it shall not come from me.

Having given to the principles of that opinion the deliberate assent of my judgment and my conscience, in *State ex rel. Walser v. Bellamy* and the kindred cases decided at that term, I deemed it my duty to carry them to their legitimate conclusion. If it was the law when *State ex rel. Walser v. Bellamy* was decided in 1897, it remained the law, in the absence of constitutional or statutory provisions; and those who subsequently invoked those identical principles were entitled to their equal protection. If they were sacred enough in 1897 to keep Bellamy in office, they retained equal sanctity in 1899, when invoked in favor of Day. It may be that the application of those principles was carried too far in some subsequent cases, but I did the best I knew. I admit that sometimes my opinions when once formed may be too firmly fixed. Be that as it may, they are the result of reflection and conviction, and take their texture more from the granite of my native hills than the shifting sand dunes of a storm-swept coast. In these cases I but followed the injunction of this court in *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 968, wherein it says, on page 508, 116 N. C., page 969, 21 S. E., that "it is best to stand *super antiquas vias*." I am painfully aware of the frequent appearance of the personal pro-

noun in this opinion, and deeply regret its apparent necessity.

An examination of the constitutional history of the state, I think, will clearly show that the principles so clearly enunciated in *Hoke v. Henderson* have not only received the practically unanimous approval of succeeding judges, but have by direct implication been repeatedly ratified by the people themselves. This decision was rendered at the December term, 1833, reported in 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 877. Since that time there have been five separate and distinct constitutional conventions, all of which might, but none of which have, abrogated or modified the principles of that opinion. In 1835 a constitutional convention met on June 4th, and framed amendments to the Constitution of 1776, which were ratified by the people. In 1861 a convention met, and on May 20th passed the Ordinance of Secession, with some other amendments, none of which were submitted to the people. In 1865 a convention met on October 9th, repealed the Ordinance of Secession, and passed an ordinance prohibiting slavery. This convention reassembled in May, 1866, and further amended the Constitution; but with the exception of the above ordinances relating to secession and slavery, the amendments were rejected upon submission to the people. A convention called by General Canby, under the reconstruction acts of Congress, assembled on January 14, 1868, and framed the Constitution of 1868, which was ratified by the people. In 1875 a convention assembled on September 6th, and amended the Constitution in several particulars, their action being ratified by the people at the election in 1876. In addition to these conventions, several amendments have been made by legislative action and popular ratification, such as the celebrated "Free Suffrage" amendment of 1854, and those prohibiting the payment of the special tax bonds, relating to the election of trustees of the University, increasing the number of justices of the Supreme Court, and some relating to other particulars set out principally in chapters 81-88, pp. 111-118, of the Laws of 1872-73. To these may be added the recent amendment restricting the suffrage. The various amendments made many changes of far-reaching importance, including the successive repudiation of the governments of the United States and of the Confederate states, and the enfranchisement and practical disfranchisement of the negro; but the underlying principle of *Hoke v. Henderson* remained unchanged.

Moreover, in the seventy years that have elapsed, thirty-five different legislatures

have met in the aggregate more than forty times, and yet no bill to do away with the effect of these decisions has ever got beyond the calendar. Under the decisions of this court, have I not a right to assume that this long and unbroken legislative acquiescence in this decision is an indorsement of its essential principles? The Supreme Court of the United States in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, says, on page 372, 149 U. S., page 772, 37 L. ed., and page 915, 13 Sup. Ct. Rep.: "Notwithstanding the interpretation placed by this decision upon the 34th section of the judiciary act of 1789, Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative, as well as to the judicial, branch of the government." In *State v. Cole*, 132 N. C. 1069, 44 S. E. 391, in an able and learned opinion, this court says on page 1079, 132 N. C., page 395, 44 S. E.: "To the suggestion that the construction put upon the statute in *Fuller's Case*, 114 N. C. 885, 19 S. E. 797, decided in 1894, is 'unfortunate,' we note that the personnel of this court has since that time undergone many changes, and the case has at almost every term been cited with approval, and conceded to be the controlling authority for this court. It is also worthy of note that the legislature has met at five different sessions, and the law in this respect has not been changed. We have no other means of ascertaining what the law is." In *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644, another well-considered opinion, this court says, on page 360, 133 N. C., page 647, 45 S. E.: "We have seen that no change has been made by legislation in the law as repeatedly stated by this court, and it may safely be inferred that the legislature has accepted our construction of the statute as the proper one, and has acquiesced in it as being in accordance with what the law should be."

In addition to this long and uniform legislative acquiescence, we have its express approval by legislative, as well as constitutional action. The convention of 1875, in amending the Constitution, provided, in what is now § 33 of article 4 of the Constitution, that "the amendments made to the Constitution of North Carolina by this convention shall not have the effect to vacate any office or term of office now existing under the Constitution of the state, and filled or held by virtue of any election or appointment under the said Constitution and the laws of the state made in pursuance thereof." Section 3872 of the Code also provides that "all persons who shall hold any office

under any of the acts hereby repealed shall continue to hold the same according to the tenure thereof." Moreover a bill entitled, "A Bill to be Entitled 'An Act to Restore to the General Assembly the Power to Prescribe and Regulate the Tenure of Public Offices and the Duties and Emoluments Thereof,'" was introduced into the legislature of 1901. This bill provided that every office, place, or position created by the general assembly should be held and deemed a mere agency or trust, and not a contract; and that no person thereafter appointed should be deemed to have any property right or vested interest in any such office; but that any such office, place, or position might be abolished, changed, vacated, or transferred at the pleasure of the general assembly. This bill was carefully and elaborately drawn by a most skillful draftsman and was well calculated to effect its purpose. It was valid under the decision of this court in *State ex rel. Caldwell v. Wilson*, and, if then passed, would by this time have practically controlled nearly every legislative office in the state. Its sole purpose, openly avowed and fully understood, was to abolish the office-holding rule enunciated in *Hoke v. Henderson*. What was its fate? It was introduced into the house on February 18, 1901, and was at once referred to the judiciary committee. On the following day it was reported back favorably by that committee, and later, on the same day, was recommitted to the same committee. On March 15th it was indefinitely postponed, without division, and apparently by unanimous vote. Conceding to the legislature that devotion to duty and integrity of purpose which they are entitled to claim, we must assume that, if they had thought the purposes of the bill were in furtherance of the public interests, they would have passed it unanimously. As it is, we are equally forced to assume that their unanimous defeat of the bill was a unanimous approval of the principles of judicial decision which the bill was intended to abrogate.

In view of this long and unbroken acquiescence of the people in constitutional conventions, as well as in the general assembly, I see neither reason nor authority for overruling the uniform decisions of seventy years. Whether this decision, now rendered by a bare majority of the court, will be permanently accepted as the law of the land, remains to be seen. It may be that in the dawn of another day this court may return to "the teachings of the elders." In the meantime, I must rest in my ignorance, if such it be, in union with the deathless dead, content to be no wiser than Ruffin, no purer than Gaston.

65 L. R. A.

Z. V. CLEGG

v.

SOUTHERN RAILWAY COMPANY, *Appt.*

(135 N. C. 148.)

A railroad company which refuses to deliver freight because of refusal to pay an excessive charge for carriage cannot escape liability for the loss thereby caused on the ground that the one making the demand had not obtained possession of the bill of lading, or an order for delivery from the nominal consignee.

(*Walker and Connor, JJ., dissent.*)

(April 19, 1904.)

A PPEAL by defendant from a judgment of the Superior Court for Guilford County in favor of plaintiff in an action brought to recover damages for injury to property while in defendant's possession for transportation. *Affirmed.*

The facts are stated in the opinion.

Messrs. King & Kimball, for appellant:

The motion of nonsuit should have been sustained, as the bill stamped, "Paid November 18th, 1901," the date delivery was made, shows that plaintiff was never, until that date, in a position to demand delivery.

Walther v. Mutual L. Ins. Co. 65 Cal. 417, 4 Pac. 413; *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39; *Parsons, Contr.* p. 292; *Congar v. Galena & C. U. R. Co.* 17 Wis. 485; *Alderman v. Eastern R. Co.* 115 Mass. 234; 1 Benjamin, Sales, § 577, 4th ed. §§ 381-389; *Weyand v. Atchison, T. & S. F. R. Co.* 75 Iowa, 573, 1 L. R. A. 650, 9 Am. St. Rep. 504, 39 N. W. 899; *Hutchinson, Carr.* §§ 129, 130, 334; *Wells, F. & Co. v. Oregon R. & Nav. Co.* 32 Fed. 51; *Norfolk Southern R. Co. v. Barnes*, 104 N. C. 25, 5 L. R. A. 611, 10 S. E. 83; *Douglas v. People's Bank*, 86 Ky. 176, 7 Am. St. Rep. 276, 5 S. W. 420; 2 Dan. Neg. Inst. § 1740; *Hutchinson, Carr.* §§ 130, 133; *Mechem, Sales*, § 779.

If the price for the carriage is not demanded in advance the owner may demand the goods after the carriage, tendering what he believes to be a reasonable compensation, and, upon the carrier's refusal to accept the tender and deliver the goods, he may sue

NOTE.—As to liability of carrier for refusal to deliver freight to consignee, see also, in this series, *Dwyer v. Gulf, C. & S. F. R. Co.* 7 L. R. A. 478, and *Kentucky Wagon Mfg. Co. v. Ohio & M. R. Co.* 36 L. R. A. 850.

As to necessity of production of bill of lading to justify delivery of goods by carrier, see note to *Nebraska Meal Mills v. St. Louis S. W. R. Co.* 38 L. R. A. 359; also *Chicago Packing & Provision Co. v. Savannah, F. & W. R. Co.* 40 L. R. A. 367.

him for them in trover or replevin. Or the consignee, or other party entitled to the goods, may pay the charges exacted as a condition to their delivery, with an accompanying denial of the right of the carrier to exact it, and may, after thus obtaining his goods, bring his action, and recover so much of the payment as has been illegally demanded and paid.

Hutchinson, Carr. 2d ed. § 447.

Messrs. C. M. Stedman and Brooks & Thomson, for appellee:

When the defendant, through his agent, demanded \$148, which was \$42 in excess of the correct freight charge, it thereby waived an actual tender of the currency.

Smith v. Old Dominion Bldg. & L. Asso. 119 N. C. 257, 26 S. E. 40; *Blalock v. Clark*, 133 N. C. 306, 45 S. E. 642.

The refusal to deliver the goods was based upon the ground that the freight charges had not been paid, and upon no other ground. The carrier has a lien for its freight charges, but has no right to demand an excessive amount.

Northern Transp. Co. v. Sellick, 52 Ill. 249; *Bird v. Georgia R. Co.* 72 Ga. 655.

The defendant, having assigned no other reason for its refusal to deliver the goods to the plaintiff than the failure of the plaintiff to pay an excessive freight charge, cannot now complain that he did not produce a bill of lading or an order from the consignee.

Louisville & N. R. Co. v. McGuire, 79 Ala. 395.

The carrier is liable when goods are injured or destroyed when being wrongfully detained.

East Tennessee, V. & G. R. Co. v. Kelly, 91 Tenn. 699, 17 L. R. A. 691, 30 Am. St. Rep. 902, 20 S. W. 312.

The burden is on the defendant to excuse nondelivery.

Chapman v. New Orleans, J. & G. N. R. Co. 21 La. Ann. 224, 99 Am. Dec. 722; *Isenberg v. St. Louis & V. Anchor Line*, 13 Mo. App. 415.

The plaintiff might have paid the excessive charge and brought an action to recover the goods, but this was also a matter of right, and not of duty.

Bird v. Georgia R. Co. 72 Ga. 655.

It was the duty of the defendant, and not of the plaintiff, to protect the goods from freezing.

Beard v. Illinois C. R. Co. 79 Iowa, 518, 7 L. R. A. 280, 18 Am. St. Rep. 381, 44 N. W. 800; *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415; *Fox v. Boston & M. R. Co.* 148 Mass. 220, 1 L. R. A. 702, 19 N. E. 222; *New Brunswick S. B. & Canal Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394; *New York, P. & N.* 65 L. R. A.

R. Co. v. Cromwell, 98 Va. 227, 49 L. R. A. 462, 81 Am. St. Rep. 722, 35 S. E. 444.

When there is a failure to deliver goods after demand, without sufficient excuse, the carrier holds them at its peril.

Louisville & N. R. Co. v. McGuire, 79 Ala. 395; *Goold v. Chapin*, 20 N. Y. 259, 75 Am. Dec. 404.

Montgomery, J., delivered the opinion of the court:

The defendant company received at Greensboro on Sunday afternoon, the 15th of November, 1901, a car load of bananas from Baltimore, consigned to the Greensboro National Bank: "To order. Notify Z. V. Clegg." Clegg was notified by the bank of the arrival of the goods, and on the 16th, 17th, and 18th of November demanded of the freight agent of the defendant at Greensboro the delivery to him of the same. A dispute over the amount of the carriage due upon the shipment having arisen, the fruit was not delivered, and, before the plaintiff got possession of it, it was greatly injured by a spell of freezing weather, by which a loss was inflicted on the plaintiff. The defendant deducted from the freight charges the excess as contended for by the plaintiff, the same being erroneous. The amount demanded by defendant as dues for carriage was \$148. The amount offered by the plaintiff was \$106, which amount was afterwards found to be the amount due. The defendant introduced no evidence. The plaintiff had not received from the bank a transfer of the bill of lading at the several times when he made the demands for the delivery of the fruit, and did not receive it until the 18th of the month. If the defendant had refused to deliver the goods because the plaintiff had not received from the bank the assignment or transfer of the bill of lading, or partly for that reason, the defendant's contention, to wit, that the plaintiff had no right to make the demand for the goods until he presented the bill of lading, would rest on a solid foundation. But it is clear from the evidence of the plaintiff that the defendant made no point over the bill of lading not having been presented by the plaintiff, but rested its refusal on the ground that the plaintiff refused to pay the carriage due. The plaintiff testified that nothing was said to him by the freight agent as to his right to receive the bananas, and that nothing was said about that matter until after they had corrected the freight charges, when he was told that he would have to get an order from the bank. The defendant, having at the times of the several demands assigned no other reason for refusing to deliver the goods than the refusal of the plaintiff to pay

an excessive charge for carriage, ought not to be allowed to defeat the plaintiff's right to recover the amount of his loss on the ground that he did not present the bill of lading or any other order from the bank,—an objection not under consideration, and not thought of. *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395. He was treated by the company as if he was the consignee, and in this connection it is significant that the plaintiff, in his testimony, said he had gotten the figures on the freight from the agent of the defendant in Greensboro before he bought the fruit. So far as it appears from the evidence, the defendant would not have delivered the goods, even if the plaintiff had presented the order from the bank. The defendant's purpose was to collect the bill for the freight, and not so much to see that the plaintiff paid the consignor for the bananas. It was contended for the defendant that the plaintiff should have paid the excess of carriage, received his goods, and then sued the defendant for that excess. That was one of his remedies, but he was not compelled to take that course. He might not have had the money with which to pay the excess of carriage, but, if he had, the defendant, by its wrongful course, could not compel the plaintiff to pay a greater amount than was due. Such a demand would place the law-abiding at the mercy of its violators. The plaintiff recovered from the defendant the difference between the amount of sales of the injured fruit as made by the plaintiff and its value when it was received at Greensboro.

Affirmed.

Walker, J., dissenting:

My understanding of the facts and the law of this case differ so essentially from views expressed in the opinion of the court, that I am constrained to differ with the majority of the judges, not only in their reasoning, but in their conclusion. In its opinion the court says: "The plaintiff had not received from the bank a transfer of the bill of lading at the several times when he made the demands for the delivery of the fruit, and did not receive it until the 18th of the month." The court then proceeds to say that, if the defendant had refused to deliver the fruit because the plaintiff had not received the assignment or transfer of the bill of lading from the bank, or partly for that reason, the defendant's contention that the plaintiff had no right to make the demand for the fruit until he presented the bill of lading would rest on a solid foundation. It seems to me that the court's deduction from the evidence that the defendant made no point about the bill of lading, but refused to deliver the goods

solely upon the ground that the plaintiff would not pay the freight charges, is not a correct one. The plaintiff demanded the goods at the freight office at a time when he had no title to them, and when, consequently, he had no shadow of right to make the demand. There is no evidence fit to be submitted to a jury that the plaintiff, at the time he demanded the delivery of the goods, on Monday, the 15th of November, 1902, had paid the draft or account held by the bank, and to which the bill of lading was attached, and certainly no evidence that he had received the bill of lading, or that the same had been assigned or indorsed to him (which I will presently show was necessary to vest him with the title), until Thursday, the 18th of November. The evidence is all the other way. Plaintiff was the only witness examined in regard to this matter, and he was not able to say how much money he had in the bank, and did not venture to testify that he had enough to pay the draft. He telephoned the bank that he would accept the fruit, but there is no proof reasonably sufficient to show that the bank actually charged the amount of the draft or account accompanying the bill of lading, and which it held for collection, to his account, or that it agreed to do so, and to extend credit to him for the difference between the amount of the draft and the amount, if any, already to his credit in the bank. There is affirmative evidence that he never paid the draft and got the bill of lading until the 18th, the day the goods were delivered to him, after they had been damaged by the freeze, for on the bill and draft was this indorsement: "Paid, November 18, 1901." The plaintiff admits, as the court states in its opinion, that he did not actually get the possession of the papers from the bank until the 18th. The fact, therefore, is established by the plaintiff's own evidence that when he made the demand on the 15th and 16th of November he did not have the bill of lading to produce. How has the defendant waived the production of the same? Is the mere fact that the plaintiff and the defendant's freight agent had a parley about the amount of the freight charges, during which nothing was said about the bill of lading, to be construed as a waiver? Surely not. The agent had the right to presume that the plaintiff had the bill of lading ready for delivery to him whenever they adjusted the difference in regard to the freight charges. He did not have the right to make the demand unless he had the bill of lading and was the rightful owner of the property; and, was the agent therefore to suppose that he did not have the bill? The plaintiff knew whether he had the bill or not, and, if he chose to make a demand when he did

not own the property, and had not provided himself with the bill of lading, duly indorsed or assigned, it was his own folly and his own fault; and is the defendant to suffer because its agent reasonably relied upon the plaintiff's implied representation that he had the right to make the demand? This would be a complete reversal of all legal presumptions. The agent had the right, up to the very last moment before he actually delivered the goods, or before they passed out of his possession or control, to demand the bill of lading. Even if there can be any such a thing as a waiver, upon the facts of this case, was not the plaintiff clearly negligent in not informing the agent as to the true situation? He knew that he did not have the papers, and had not paid the draft; the agent did not know this fact, and he had the right to think that no person would demand the goods who did not have the right to do so; and, in this state of the case, it was his right and his duty to hold the goods for the true owner, and to demand the bill of lading, when he acquired knowledge of the facts.

But how can a waiver, in a case like this one, confer title upon him who had no title? The doctrine of waiver is based upon the idea of estoppel. The general rule is that there can be no binding waiver of a right when there is no estoppel, and no valuable consideration received. 28 Am. & Eng. Enc. Law, p. 531; *Wool v. Edenton*, 117 N. C. 6, 23 S. E. 40. "To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party, . . . amounting to an estoppel on his part." *Ross v. Swan*, 7 Lea, 467; *Diehl v. Adams County Mut. Ins. Co.* 58 Pa. 452, 98 Am. Dec. 302. How can the plaintiff rely upon an estoppel, when all the facts were known to him, and none of them to the agent, and when the duty rested upon him to disclose those facts? Does anyone suppose that the defendant's agent would have even discussed the question of freight charges with the plaintiff if he had known that plaintiff had not paid the draft, and did not have the bill of lading? Waiver cannot be predicated of the agent's conduct towards the plaintiff, who at the time had no right, so as by its mere operation to give the latter a title which he did not previously have. Such a thing would be an anomaly in the law. Who was entitled to the goods on the morning of the 18th, before the plaintiff got the bill of lading? The bank, of course. If the bank had demanded the goods of the defendant, could the latter have refused delivery? It could not, we must admit; and yet, if by the waiver the title passed to the plaintiff, it would follow that he was entitled to the property, and the 65 L. R. A.

bank could not recover that which was its own, and the title to which it had not in the least parted with. Can it be replied that the defendant would be compelled to deliver to the bank, and be liable to the plaintiff for a conversion of the goods? Could there be such a double liability, and this, too, when the defendant acted upon the natural and legal presumption that the plaintiff had the bill of lading when he first made his demand, as he ought to have had it, and when the plaintiff knew at the time that he did not have it, and consequently that he was not entitled to demand the delivery of the goods? How can there be any element of an estoppel, when the party relying on the estoppel has knowledge of a material fact which he does not communicate to the other party, and of which the latter is ignorant?

Mere silence on the part of the defendant's agent did not amount to a waiver, because a waiver is not to be implied from a party's silence when he is under no obligation to say anything. *Texas & St. L. R. Co. v. Rust*, 19 Fed. 245. What obligation did the defendant owe to the plaintiff to demand the bill of lading? He had absolutely no title and no right to the goods; and, besides, if the demand had been made, the plaintiff did not have the ability to comply with it, and this is certainly necessary to be shown in order to constitute in his favor a valid waiver. Why do a vain thing? The plaintiff must have shown that all the time from his first demand for the goods he had the bill of lading ready to be delivered to the defendant upon its request for it. It seems to be an incongruity in the use of legal terms to say that a person can waive a right which he has, so that it can be availed of by a person who at the time has no right at all, when there is no fraud.

There is another objection to the claim of waiver set up by the plaintiff. The facts now alleged as constituting a waiver were not pleaded (*Pioneer Mfg. Co. v. Phoenix Assur. Co.* 110 N. C. 176, 28 Am. St. Rep. 673, 14 S. E. 731; 20 Am. & Eng. Enc. Law, p. 536), nor submitted to the jury, but the case was tried upon the theory, alone, that the plaintiff had actually paid the draft and received the bill of lading from the bank before the 18th. If there was no evidence to support this theory, the plaintiff must fail in the suit,—especially as the defendant moved to nonsuit. Where a party alleges performance of a condition precedent to the exercise of his right, evidence of waiver of the condition is not admissible in support of such averment, because the two are inconsistent. He must amend his pleading, or in some proper way put himself in a position to rely upon the

waiver. *Pioneer Mfg. Co. v. Phoenix Assur. Co.* 110 N. C. 176, 28 Am. St. Rep. 673, 14 S. E. 731; *Baldwin v. Munn*, 2 Wend. 399, 20 Am. Dec. 627. "Waiver is usually a question of intent, and knowledge of the right and an intent to waive it must be made to appear plainly; and this is to be determined usually from the declarations and conduct of the parties." 28 Am. & Eng. Enc. Law, p. 528. It is a mixed question of law and fact, each case necessarily depending much upon its own peculiar circumstances and surroundings. It is a question of intention, and a fact to be determined by the triers of fact. *Okey v. State Ins. Co.* 29 Mo. App. 111.

Passing to the question as to the legal duty of a carrier with respect to the delivery of goods, we find it to be well settled that an obligation to deliver to the party having title under the bill of lading is imposed by law on the carrier, and is absolute and imperative, and a delivery to any other person is a conversion. *Louisville & N. R. Co. v. Barkhouse*, 100 Ala. 543, 13 So. 534. The duty of a common carrier is not only to carry safely, but to make a true delivery to the person to whom the goods are consigned. *Houston & T. C. R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 119. And a delivery to any other is made at the peril of the carrier, unless that person surrenders the bill of lading either made or indorsed to himself. *Gates v. Chicago, B. & Q. R. Co.* 42 Neb. 379, 60 N. W. 583; *Weyand v. Atchison, T. & S. F. R. Co.* 75 Iowa, 573, 1 L. R. A. 650, 9 Am. St. Rep. 504, 30 N. W. 899; *Merchants' Despatch & Transp. Co. v. Merriam*, 111 Ind. 5, 11 N. E. 954; *Commercial Bank v. Chicago, St. P. & K. C. R. Co.* 160 Ill. 401, 43 N. E. 756. One reason for this rule is that the bill of lading is the symbol of ownership of the property, and, though not negotiable, in the ordinary sense, is assignable. *Gates v. Chicago, B. & Q. R. Co.* 42 Neb. 379, 60 N. W. 583. The carrier can require the production or an inspection of the bill of lading at any time before delivery. Porter, Bills of Lading, § 379. The same right belongs to his agent, for his own security and protection, and he may exact production of the bill before he gives up the property. Until the carrier can deliver to the shipper or someone showing authority from him (the bill of lading, duly indorsed and delivered, being evidence of that authority), it is his duty to retain the goods; and, if they are delivered to one not legally entitled, the carrier will be liable to the true owner for their value. He has no right under any circumstances to deliver them to a stranger. *The Thames*, 14 Wall. 98, 20 L. ed. 804. The carrier is bound not to deliver to anyone

who has not the bill or symbol of ownership. § 414. The pledgee of the bill of lading is not divested of his right or title by any delivery to the consignee, though that delivery was obtained upon presentation by the latter of a duplicate bill or invoice which the carrier treats as sufficient authority in him to receive the goods. § 530. "The carrier takes the risk of delivery to the person entitled to the goods by the bill of lading and its indorsements. . . . Too great caution cannot, therefore, be exercised in respect to the right of the person to whom the delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow, in fact, of no excuse for a wrong delivery, except the fault of the shipper himself." Hutchinson, Carr. 2d ed. §§ 130, 340, 344, et seq. It was therefore the duty of the defendant to hold the goods until the rightful owner or the holder of the bill of lading had made demand upon it for them, and the failure to do so subjects it to liability to such owner or holder for any loss or damage sustained by reason of its default. *Bass v. Glover*, 63 Ga. 745; *Indiana Nat. Bank v. Colgate*, 4 Daly, 41; *People's Nat. Bank v. Stewart*, 19 N. B. 268; *Farmers' & M. Nat. Bank v. Hazeltine*, 78 N. Y. 104, 34 Am. Rep. 518; *Dwyer v. Gulf, C. & S. F. R. Co.* 69 Tex. 707, 7 S. W. 504; *Southern Exp. Co. v. Dickson*, 94 U. S. 549, 24 L. ed. 285. If this be law, and it unquestionably is the law, the effect of the decision in this case will be to hold that a carrier will be liable to one in damages if the latter makes a demand for the delivery to him of goods in the carrier's cars or warehouse, when the party making the demand has no claim or title to the goods, and no right, therefore, to make it, provided the amount of freight charges is tendered, and the carrier refuses to deliver the goods, but does not at the time call for the production of the bill of lading, properly indorsed to the consignee. In my opinion, this is an innovation in the law of carriers, and contravenes the well-settled rule that one who acquires title to property after it has been damaged does not acquire also the cause of action for the damage, unless it is expressly assigned to him. *Drake v. Howell*, 133 N. C. 168, 45 S. E. 539; *Liverman v. Roanoke & T. River R. Co.* 114 N. C. 692, 19 S. E. 64.

The defendant is liable to the bank, if to anybody, for any damage to the goods while in the care of the defendant up to Thursday, the 18th. The right to recover upon this liability has never been transferred to the plaintiff, nor did it become his, as we have seen, by virtue of his subsequently acquired ownership of the goods. As said by the

court in *Young v. East Alabama R. Co.* 80 Ala. 100,—a case very much in point: "The defendant's duty not to deal tortiously with the property of an innocent third person [a bank holding a draft with a bill of lading attached] cannot be affected by the failure of the depot agent first to tender back to the plaintiff [assignee or consignee] the amount of freight collected on the goods. The law will not compel the defendant [carrier] to commit a tort by delivering the goods to the plaintiff, because the agent agreed to do so in consideration of the payment of freight," unless he is the holder of the bill of lading. No one shall be rebuked by the law for doing that which he is enjoined by the law to do. Much less will he be made to suffer for his correct conduct. The defendant's agent had the right to rely and act upon the knowledge which the plaintiff should have had,—that according to the usual and ordinary course of business recognized by the law, the goods could not be obtained by him except upon the production of the bill of lading,—and his conduct, therefore, was not, in law or in fact, calculated to mislead the plaintiff, and thus to create an estoppel upon the company, from which a waiver of the right to call for the bill of lading would be presumed, or even inferred. *Forbes v. Boston & L. R. Co.* 133 Mass. 157.

The motion to nonsuit, in my opinion, should have been granted, as the plaintiff showed no just or legal claim to the damages he seeks to recover, and there should at least be a new trial, in any view of the case, as the court charged the jury upon a theory which was not supported by any proof, and the question of waiver, upon which the case is now decided, if there is any evidence of it, was not submitted to the jury.

As the plaintiff is allowed to recover upon a cause of action which I do not think he owns, the defendant is practically in danger of being twice vexed for one and the same cause, or of being compelled to assume a double liability, which surely would be unjust, and the rule of law which produces such a result should be very clearly established. Indeed, if the law is to remain as in this case declared, it will be difficult for common carriers to conduct their business with any degree of safety. If the defendant is liable for any negligence to the bank, which at the time of the injury to the bananas was the true owner, as the holder of the draft and bill of lading, let the recovery be confined to the true right and title, and not go to one who has no right at all.

Connor, J., concurs in the dissenting opinion.
65 L. R. A.

Della DUVAL, *Appt.*,
v.

ATLANTIC COAST LINE RAILROAD
COMPANY.

(.....N. C.)

1. Violation by a railroad company of a provision of a contract with a municipal corporation by which it undertakes to limit the speed of its trains in streets which it is allowed to use is evidence of negligence, in an action against it for injuries to an individual upon the street.
2. One riding in a conveyance controlled by her father is not chargeable with his negligence, which combines with that of persons in charge of another conveyance to bring them into collision to her injury, so as to preclude her recovery from the latter for the injuries received.

(March 8, 1904.)

APPEAL by plaintiff from a judgment of the Superior Court for Jones County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. D. L. Ward and M. DeW. Stevenson for appellant.

Messrs. Simmons & Ward and N. J. Rouse for appellee.

Douglas, J., delivered the opinion of the court:

This is an action for damages for personal injuries. The jury found that the plaintiff was injured by the negligence of the defendant, and that she contributed to her injury by her own negligence. There are but two exceptions that we think it necessary to pass upon in this appeal, both to the charge of the court.

Among other things, the court charged as follows: "The plaintiff introduced a contract wherein it is provided that East Carolina Land & Lumber Company shall not run its locomotive through the streets of New Bern at a speed greater than 3 miles an hour; that the whistle shall be sounded before entering upon said street, and the bell

NOTE.—For other cases as to effect of violation of ordinances in respect to operation of street cars on company's liability for injuries, see *Fath v. Tower Grove & L. R. Co.* 13 L. R. A. 74; *Cincinnati Street R. Co. v. Murray*, 30 L. R. A. 508; and *Holwerson v. St. Louis & S. R. Co.* 50 L. R. A. 850.

As to imputing negligence of driver to person injured while driving with him, see *Nisbet v. Garner*, 1 L. R. A. 152, and *note*; *Becke v. Missouri P. R. Co.* 9 L. R. A. 157, and *note*; *Union P. R. Co. v. Lapsley*, 16 L. R. A. 800; *Mullen v. Owosso*, 23 L. R. A. 693; *Illinois C. R. Co. v. McLeod*, 52 L. R. A. 984; and *Kopitz v. St. Paul*, 58 L. R. A. 74.

upon the engine tolled while passing through the streets, etc. And it is admitted that the defendant has succeeded to the rights and liabilities of the East Carolina Land & Lumber Company. The court charges you that this is a contract between the city and the defendant company, and that there is no evidence that its provisions have been enacted into an ordinance by the city, and the jury cannot consider the provisions of the same as bearing upon the question of the negligence of the defendant." In this we think there was error. The only object the city could have had in limiting the rate of speed at which a train was permitted to run through its streets was the protection of the traveling public. It was similar to an ordinance in purpose and legal effect, at least in civil actions. We do not feel compelled in this case to go to the extent of saying that the violation of such a provision in a contract gives rise to a cause of action; but we hold that, equally with the violation of an ordinance, it is evidence of negligence on the part of the defendant. If the defendant obtained the grant of its right of way by virtue of such a contract, it has no right to complain at the reasonable enforcement of its conditions and limitations. *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L. R. A. 513, 70 Am. St. Rep. 598, 32 S. E. 720.

The court further charged the jury as follows: "If you find from the evidence, by the greater weight or preponderance thereof, that the plaintiff was riding in a buggy driven and controlled by her father, that the plaintiff's father was negligent in approaching the crossing, and that such negligence contributed to the injury of which the plaintiff complains as a proximate cause thereof, then such negligence of the plaintiff's father is imputable to the plaintiff as her own negligence." This also was error. Imputable negligence, or "identification," as it is sometimes called from analogy to the Roman law, has never been recognized in this state, and has received but scant recognition in any part of this country. The question was directly presented and expressly decided in *Crampton v. Ivie Bros.* 126 N. C. 894, 36 S. E. 351, in which this court says: "We may regard it as settled law that the negligence of the driver of a public conveyance is not imputable to a passenger therein, unless the passenger has assumed such control and direction of said vehicle as to be considered practically in exclusive possession thereof. In other words, the possession of the passenger must be such as to supersede for the time being the possession of the owner, to the extent of making the driver the temporary servant of the passenger."

65 L. R. A.

In the case at bar it appears that the plaintiff was not traveling in a public conveyance, but in a buggy driven by her father. We will assume that she was not a passenger for hire, but was riding in her father's buggy as his guest. We do not think this makes any difference, either in principle or in legal liability. She was certainly not in exclusive control of the vehicle, nor could her father be considered in any sense as her servant. We are aware that in a few instances it has been held that, while contributory negligence cannot be imputed to one riding in a hired vehicle, it may be imputed to him if he is a mere guest. The overwhelming weight of authority is against any such distinction, and, in common with nearly all the courts of final jurisdiction, we are utterly unable to see any reasonable basis for such a conclusion.

The only ground for the doctrine of imputable negligence in any of its phases is the assumed identity of the passenger and driver, arising out of an implied agency. It is contended, as he selected his own driver, he made him his agent, not only for the general purposes of his employment, but for all possible contingencies that might happen. Under this doctrine it would seem that, if the driver broke the passenger's neck, he would be acting within the scope of his agency. This may be so, but it does not seem so to us. Of course, if the passenger were injured through the negligence of the driver alone, he must look alone to him or to his master for his recovery; but if he is injured through the concurring negligence of the driver and someone else, he may sue either. This is equally true whether the plaintiff is a passenger for hire or a mere guest. We see no reason why the latter should be placed at any legal disadvantage. In fact, it would seem that, if there were any difference, the passenger for hire, having the legal right to the services of his driver, would be in a position to exercise a greater degree of control than one whose presence was merely permissive. An examination of the origin, growth, and decadence of the doctrine seems to us to show the correctness of our conclusions, aside, even, from the weight of authority.

The doctrine that the negligence of driver was imputable to the passenger is considered to have originated in the English case of *Thorogood v. Bryan*, decided in 1849, and reported in 8 C. B. 115, 18 L. J. C. P. N. S. 336. The action was brought against the owner of an omnibus by which the deceased was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the curb, and before he could get out of the way he was run over by the defend-

ant's omnibus, which was coming along at too rapid a pace to be stopped in time to prevent the injury. The court directed the jury that, "if they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the curb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases, notwithstanding the defendant, by her servant, had been guilty of negligence, their verdict must be for the defendant." This case, after being much criticised, was expressly overruled in 1888 by the House of Lords in the case of *The Bernina*, L. R. 13 App. Cas. 1, 57 L. J. Prob. N. S. 65, 58 L. T. N. S. 423, 36 Week. Rep. 870, 6 Asp. Mar. L. Cas. 257, 52 J. P. 212, in which opinions were delivered by Lords Herschell, Bramwell, and Watson.

Among other things in his opinion, Lord Herschell says: "In support of the proposition that this establishes a defense, they rely upon the case of *Thorogood v. Bryan* (1), which undoubtedly does support their contention. This case was decided as long ago as 1849, and has been followed in some other cases; but, though it was early subjected to adverse criticism, it has never come for revision before a court of appeals until the present occasion. . . . It is necessary to examine carefully the reasoning by which this conclusion was arrived at. Coltman, J., said: 'It appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is traveling that want of care of the driver will be a defense of the driver of the carriage which directly caused the injury.' Maule and Vaughan Williams, J.J., also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expresses himself: 'I incline to think that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased.' Vaughan Williams, J., said: 'I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by.' With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stagecoach, because he avails 65 L. R. A.

himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master, though, if 'negligence of the owner's servants is to be considered negligence of the passenger,' or if he 'must be considered a party' to their negligence, it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defense as against the passenger when suing another wrongdoer. To say that it is a defense because the passenger is identified with the driver appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defense, the validity of which was the very point in issue. Two persons may, no doubt, be so bound together by the legal relation in which they stand to each other that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle, and the driver of it, certainly is not such as to fall within any of the recognized categories in which the act of one man is treated in law as the act of another. I pass now to the other reasons given for the judgment in *Thorogood v. Bryan*. Maule, J., says: 'On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. . . . But, as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust.' I confess I cannot concur in this reasoning. I do not think it well founded either in law or in fact. What kind of control has the passenger over the driver which would make

it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance,—that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him, instead of waiting for another? And when it is attempted to apply this reasoning to passengers traveling in steamships or on railways, the unreasonableness of such doctrine is even more glaring. The only other reason given is contained in the judgment of Creswell, J., in these words: 'If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to an injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position.' Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that, if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood v. Bryan* was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory."

In his opinion Lord Watson says: "It humbly appears to me that the identification upon which the decision in *Thorogood v. Bryan* is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle, except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine driver."

We have quoted at length from this case because it is the distinct and final repudiation of the doctrine by the highest judicial tribunal in England, where it originated, as well as from the further fact that the reasoning upon which the learned and able opin-

ions are founded apply equally to cases where the plaintiff is a mere guest. The same may be said of *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391, which is cited with approval by Lord Herschell in *The Bernina*. Hackett, the plaintiff, was injured by the collision of a railroad train with the carriage in which he was riding. The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage,—of the managers of the train in not giving the usual signals of its approach by ringing a bell and blowing a whistle, and in not having a flagman on duty; and of the driver of the carriage in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defense was contributory negligence in driving on the track, the defendant contending that the driver was thereby negligent, and that his negligence was to be imputed to the plaintiff. The court left the question of the negligence of the parties in charge of the train and of the driver of the carriage to the jury, and no exception was taken to its instructions on this head. But with reference to the alleged imputed negligence of the plaintiff, assuming that the driver was negligent, the court instructed them that, unless the plaintiff interfered with the driver and controlled the manner of his driving, his negligence could not be imputed to the plaintiff. Upon appeal the judgment was affirmed. Justice Field, speaking for a unanimous court, says on page 374, 116 U. S., page 655, 29 L. ed., and page 394, 6 Sup. Ct. Rep.: "Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him, equally with them, responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration. The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal cooperation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The own-

er of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." Again the court says, on page 379, 116 U. S., page 657, 29 L. ed., and page 397, 6 Sup. Ct. Rep.: "There is no distinction in principle, whether the passengers be on a public conveyance, like a railroad train or an omnibus, or be on a hack, hired from a public stand in the street, for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent, so that his negligence can be imputed to them, to prevent their recovery against a third party he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. 'If the law were otherwise,' as said by Mr. Justice Depue in his elaborate opinion in the latest case in New Jersey, 'not only the hirer of the coach, but also all the passengers in it, would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach, taken, it may be, from a coach stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried.'"

The court further cites with approval the case of *Dyer v. Erie R. Co.* 71 N. Y. 228, in which the facts are very similar to those in the case at bar, in the following words: "The plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which

prevented its being seen, had started to back over the crossing without giving the driver of the wagon any warning of its approach. The horses, becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown or jumped from the wagon, and was injured by the train, which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and, although he traveled voluntarily, he was not responsible for the negligence of the driver, where he himself was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses."

In *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86, 38 Am. Rep. 558, the plaintiff below (Kelly) was injured while riding on a street car in collision with a car of the transfer company, and was permitted to recover, although it appeared that the servants of both companies were negligent. The chief justice, in delivering the opinion of the court, said: "It seems to us, therefore, that the negligence of the company or of its servants should not be imputed to the passenger, where such negligence contributes to his injury jointly with the negligence of a third party, any more than it should be so imputed where the negligence of the company or its servants was the sole cause of the injury." "Indeed," the chief justice added, "it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury, caused directly and proximately by the latter's negligence, should be denied on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier whereby an injury was inflicted upon a stranger. And of the last proposition, it is enough to say that it is simply absurd."

In *Robinson v. New York C. & H. R. R. Co.* 66 N. Y. 11, 23 Am. Rep. 1, Church, Ch. J., a distinguished jurist, speaking for an able court, says: "It is therefore the case of a gratuitous ride by a female upon the invitation of the owner of a horse and carriage. The plaintiff had no control of the vehicle, nor of the driver in its management. It is not claimed but that Conlon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that, if by his negligence he had injured a third person, she would not be liable. She was not responsible for his acts, and had no right and no

power to control them. True, she had consented to ride with him, but, as he was in every respect competent and suitable, she was not negligent in doing so. Can she be held, by consenting to ride with him, to guarantee his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of the plaintiff, but it was not an unlawful or negligent act. She was injured by the negligence of a third person, and was free from negligence herself, and I am unable to perceive any reason for imputing Conlon's negligence to her." Again, the court says, on page 13, 66 N. Y., 23 Am. Rep. 3: "I am unable to find any legal principle upon which to impute to the plaintiff the negligence of the driver. The whole argument on behalf of the appellants on this point is contained in the following paragraph from the brief of its counsel: 'So, if the plaintiff had proceeded on this journey upon the invitation of Conlon for the like purpose, she having voluntarily intrusted her safety to his care and prudence, and thus exposed herself to the risk of injury arising from his negligence or want of skill, she would be precluded from recovering, if he thereby contributed to her injury.' If this argument is sound, why should it not apply in all cases to public conveyances, as well as private? The acceptance of an invitation to ride creates no more responsibility for the acts of the driver than the riding in a stage-coach or even a train of cars, providing there was no negligence on account of the character or condition of the driver, or the safety of the vehicle, or otherwise. It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury, for whose acts the plaintiff was not responsible. The rule of contributory negligence is very strict in this state, and should not be extended, nor should the rule of imputable negligence be extended to new cases, where the reason for its adoption is not apparent."

In *Union P. R. Co. v. Lapsley*, 16 L. R. A. 802, 2 C. C. A. 151, 4 U. S. App. 554, 51 Fed. 177, Sanborn, Ch. J., speaking for the court, says: "But where the owner and driver of a team and carriage invites another to ride in his carriage, no relation of principal and agent is created; no relation of master and servant is established, the owner and driver of the team is not controlled by, and is not in any sense the agent of, the invited guest; and to hold him responsible for the negligence of the former, by whose permission alone he rides, is unauthorized by the law and repugnant to reason. That he who suffers injury from another's negligence may recover compensation of the wrongdoer is a principle founded in natural

justice, and sustained by every precedent. That where the negligence of the person injured has contributed to the injury he cannot so recover, because it is impracticable, in the administration of justice, to divide and apportion the compensation in proportion to the varying degrees of concurring negligence, is equally well settled. But that he whose wrongful act or omission has caused the injury and damage, and who, upon every consideration of justice and reason, ought to make compensation for it, shall be permitted to escape because a third person, over whom the injured person had no control, and whose only relation to him was that of a guest to his host, has been guilty of negligence that contributed to the injury, is neither just nor reasonable. According to the verdict of this jury, a loss of \$1,000 was entailed upon the decedent by the negligence of this defendant. The defendant's wrongful omission was the proximate cause of this damage. The decedent in no way caused or contributed, by any act or omission of hers, to this injury. She had no control over her brother, the driver, who may have contributed, by his carelessness, to the damage. Upon what principle, now, can it be justly said that the decedent must bear all this loss, when she neither caused, was responsible for, nor could have prevented it, because this third person assisted to cause the injury, the proximate cause of which was the wrongful act of the defendant company? If there exists in the realm of jurisprudence any sound principle upon which so unrighteous a punishment of the innocent and the discharge of the guilty may be based, we have been unable to discover it."

In *Dean v. Pennsylvania R. Co.* 129 Pa. 514, Clark, J., delivering the opinion of the court, says, on page 524, 6 L. R. A. 143, 15 Am. St. Rep. 733, 18 Atl. 720: "Quotations might be given, from many cases in the different states, illustrating the very firm and emphatic manner in which the doctrine of this celebrated case has been denied. The authorities in England and the great current of authorities of this country are against it. Nor can I see why, upon any rule of public policy, a party injured by the concurrent and contributory negligence of two persons, one of them, his common carrier, should be held, and the other released from liability. As to this, I speak only for myself. In my opinion, there is no principle consonant with common sense, common honesty, or public policy which should hold one not guilty of any negligence, either of omission or commission, for the negligence of another imputed to him under such circumstances. Although, in *Carlisle v. Brisbane* [113 Pa. 544, 57 Am. Rep. 483, 6 Atl.

372], I may appear to have accepted that doctrine, I meant merely to state that the ground upon which this court had rested this rule was better than that taken by the English courts. But if this were not so, Fields was not a common carrier. Dean was riding in the wagon merely by invitation of Fields, who happened to be going in the direction of Dean's home with a load of provisions. He was carried without compensation, merely as an act of kindness on the part of Fields, who had sole control of the team and of the wagon. The case is similar in this respect to *Carlisle v. Brisbane*, 113 Pa. 544, 57 Am. Rep. 483, 6 Atl. 372, and to the case of *Follman v. Mankato*, 35 Minn. 522, 59 Am. Rep. 340, 29 N. W. 317. We are clearly of opinion that, if Dean himself was guilty of no negligence, the negligence of Fields cannot be imputed to him."

This case was expressly approved in *Bunting v. Hogsett*, 139 Pa. 363, where the court uses the following language, on page 376, 12 L. R. A. 268, 23 Am. St. Rep. 192, 21 Atl. 33: "But *Thorogood v. Bryan*, 8 C. B. 115, 18 L. J. C. P. N. S. 336, which is the leading case, has recently been overruled in the English court of appeal. *The Bernina*, L. R. 12 Prob. Div. 58. And the doctrine, although formerly accepted in many of the states, is now generally disapproved. The authorities in England and the great current of authority in this country are against it. The cases are collected in *Dean v. Pennsylvania R. Co.* 129 Pa. 514, 6 L. R. A. 143, 15 Am. St. Rep. 733, 18 Atl. 718. They are numerous, and it is unnecessary to refer to them here. What was there said was given as an individual opinion merely, and was to some extent, perhaps, *obiter dictum*; but we are now unanimously of opinion that the views there expressed, somewhat in advance, contain the proper exposition of the law. The identification of the passenger with the negligent driver, or the owner, or with the carrier, as the case may be, without his co-operation or encouragement, is a gratuitous assumption. As Mr. Justice Field said, in *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391: 'There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world.' The rationale of the rule of *Thorogood v. Bryan* is expressly disavowed in our own case of *Lockhart v. Litchenthaler*, 46 Pa. 151, and it is now rejected as untenable and wholly indefensible. Nor is there any rule or principle of public policy

which will support such a doctrine. If a person is injured by the concurrent and contributory negligence of two persons, one of them being at the time the common carrier of his person, there is no reason, founded in public policy or otherwise, which would release one of them and hold the other. It is true, the carrier may be subjected to a higher degree of care than his co-tortfeasor, but this affords no reason why either or both of them should not be held to that degree of care, respectively, which the law imposes upon them, and to be answerable in damages accordingly. The general rule undoubtedly is, if a person suffers injury from the joint negligence of two parties, and both are negligent in a manner which contributes to the injury, they are liable jointly and severally, and it would seem, in principle, to be a matter of no consequence that one of them is a common carrier. Neither the comparative degrees of care required, nor the comparative degrees of culpability established, can affect the liability of either."

It is unnecessary, as well as impracticable, to cite all the other cases we have examined on this subject, and so we will confine ourselves to a few in which the precise question under consideration is directly presented. That one who is injured by the joint or concurring negligence of a private person, with whom he is riding by invitation as a guest or companion, and a third person, is not chargeable with the negligence of the driver, is held in the following cases: *Masterson v. New York C. & H. R. R. Co.* 84 N. Y. 247, 38 Am. Rep. 510; *Strauss v. Newburgh Electric R. Co.* 6 App. Div. 264, 39 N. Y. Supp. 998; *Kessler v. Brooklyn Heights R. Co.* 3 App. Div. 426, 38 N. Y. Supp. 799; *Metropolitan Street R. Co. v. Powell*, 89 Ga. 601, 16 S. E. 118; *Leavenworth v. Hatch*, 57 Kan. 57, 57 Am. St. Rep. 309, 45 Pac. 65; *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 345, 18 S. W. 2; *Noyes v. Boscauen*, 64 N. H. 361, 10 Am. St. Rep. 410, 10 Atl. 690; *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *St. Clair Street R. Co. v. Eadie*, 43 Ohio St. 91, 54 Am. Rep. 802, 1 N. E. 519; *Carlisle v. Brisbane*, 113 Pa. 544, 57 Am. Rep. 483, 6 Atl. 372; *Philadelphia, W. & B. R. Co. v. Hoge-land*, 66 Md. 149, 59 Am. Rep. 159, 7 Atl. 105; *Baltimore & O. R. Co. v. State*, 79 Md. 335, 47 Am. St. Rep. 415, 29 Atl. 518; *Alabama & V. R. Co. v. Davis*, 69 Miss. 444, 13 So. 693; *Follman v. Mankato*, 35 Minn. 522, 59 Am. Rep. 340, 29 N. W. 317; *Boone County v. Mutchler*, 137 Ind. 140, 36 N. E. 534; 2 Jaggard, Torts, § 276, p. 982; Bishop Non-Contract Law, § 1070.

The rule is thus stated in 7 Am. & Eng. Enc. Law, 2d ed. p. 447: "Occupants of

private conveyances. In the second class of cases there has been, and still is, much conflict among the authorities, but the true principle seems to be that when a person is injured by the negligence of the defendant and the contributory negligence of one with whom the injured person is riding as a guest or companion, such negligence is not imputable to the injured person; while, on the other hand, it may be imputable when the injured person is in a position to exercise authority or control over the driver." Judge Thompson, in his Commentary on the Law of Negligence, vol. 1, § 502, thus lays down the rule: "Negligence of driver not imputed to the passenger on private conveyance riding by invitation. While there are a few untenable decisions to the contrary, nearly all American courts are agreed that the rule under consideration extends so far as to hold that where a person, while riding on a private vehicle by the invitation of the driver or the owner or the custodian of the vehicle, and having no authority or control over the driver, and being under no duty to control his conduct, and having no reason to suspect any want of care, skill, or sobriety on his part, is injured by the concurring negligence of the driver and a third person or corporation, the negligence of the driver is not imputed to him, so as to prevent him from recovering damages from the other tortfeasor."

We cannot better close this discussion than by the following quotation from 1 Shearman & Redfield on Negligence, § 66, and in doing so we deem it proper to say that, while we fully approve of the legal conclusions arrived at by the distinguished authors, we do not wish to be held entirely responsible for the vigor of their language: "Doctrine of identification. As already stated, the fact that the injury was caused by the joint negligence of the defendant and a mere stranger is universally admitted to be no defense. But in the famous case of *Thorogood v. Bryan* an English court invented a new application of the old Roman doctrine of identification, and held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of its managers which contributed to an injury inflicted upon such passenger by the negligence of a stranger. In former editions we devoted much space to the refutation of this doctrine of 'identification.' But it is needless to do so any longer, since the entire doctrine has, since our first edition, been exploded in every court, beginning with New York and ending with Pennsylvania. It was finally overruled in England a few years ago. The only remnant of this doctrine

which remains in sight anywhere is the theory that one who rides in a private conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hairsplitting judges in *Thorogood v. Bryan*, was invented in Wisconsin, and sustained by a process of elaborate reasoning; and this Wisconsin decision, in evident ignorance of all decisions to the contrary, was recently followed, with some similar reasoning, in Montana, and in Nebraska without any reasoning whatever; which last is certainly the best method of reaching a conclusion directly opposed to common sense and to the decisions of twenty other courts. The notion that one is the 'agent' of another, who has not the smallest right to control, or even advise, him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three states mentioned, and it must soon be abandoned even there."

The doctrine of imputable negligence, as far as it relates to a child, has been fully discussed and expressly repudiated by this court in *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784, 41 Am. St. Rep. 799, 19 S. E. 730. Even if this phase of the question were now before us, we could add but little to what was there so fully and so ably said.

There must be a new trial.

COWAN, McCLUNG, & COMPANY, *Appts.*,
v.

W. S. ROBERTS.

(.....N. C.)

1. Notice of acceptance is not necessary to bind one who executes a paper by which he "hereby" guarantees a debt which another now owes, or may owe in the future, to a specified amount, the instrument expressly stating that it is to remain in full force until the debt is fully discharged or the agreement is relinquished in writing.
2. Continued extension of credit to a merchant is a sufficient consideration to support a guaranty by a third person of payment of what has already accrued, as well as what will accrue in the future, where the entire contract is part of one transaction and evidenced by one instrument.
3. Breach by the principal, without the knowledge of the obligee, of a

NOTE.—As to necessity of notice of acceptance of guaranty, see also cases in note to *National Exch. Bank v. Gay*, 4 L. R. A. 347, and the later cases in this series of *Wright v. Grif-fith*, 6 L. R. A. 639; *Nading v. McGregor*, 6 L. R. A. 686; *Lachman v. Block*, 28 L. R. A. 255; and *German Sav. Bank v. Drake Roofing Co.* 51 L. R. A. 758.

condition upon which one agrees to guarantee payment of debts, to the effect that another signer of the instrument will be secured before it is delivered, will not release the one who actually signs from liability.

4. Failure for a period of three months, by one who has signed an instrument guaranteeing payment of another's debts, to notify the obligee that the condition of its delivery has not been complied with, during which time further credit has been extended, will preclude him from taking advantage of the breach of condition.

5. The burden of showing lack of diligence on the part of the obligee in prosecuting the principal debtor so as to release the guarantor from liability for a debt is upon the latter.

(Montgomery, J., dissents in part.)

(March 22, 1904.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Buncombe County in favor of defendant in an action brought to enforce the liability of one who guaranteed payment of another's debt. *Reversed.*

Statement by **Walker, J.:**

This action was brought to recover the sum of \$2,000, alleged to be due by the defendant on a guaranty. The firm of Roberts Brothers on 9th April, 1899, was indebted to the plaintiffs, who were merchants, in the sum of \$1,742.60 for goods theretofore sold and delivered, and was desirous of making further purchases, but the plaintiffs refused to sell any other goods to it unless it would secure by a guaranty its then existing indebtedness and any other amount that might become due for future sales. Roberts Brothers then requested the defendant to give the required guaranty for them, so that they could purchase more goods. The defendant complied with this request by executing a paper writing, of which the following is a copy:

Knoxville, Tenn., April 8, 1899.

I hereby guarantee to Cowan, McClung, & Co. any debts which Roberts Bros. now owe, or may owe in the future, to the extent of two thousand dollars. This obligation to remain in full force until the debt now due Cowan, McClung, & Co. is fully discharged and this agreement annulled in writing.

W. S. Roberts.

The original paper is in the handwriting of one of the plaintiffs, and was delivered to the plaintiffs by Roberts Brothers. On the faith of this guaranty the plaintiffs afterwards sold and delivered to Roberts Brothers several bills of goods amounting in all to \$475.45, which amount they failed to pay

at maturity, whereupon the plaintiffs notified the defendant of their default, and when, after demand, he refused to pay the amount specified in the guaranty they brought this action in September, 1899. The firm of Roberts Brothers became insolvent and in August, 1899, was adjudicated bankrupts. No assets were left after allotting the exemptions and paying the costs and charges of administering their estate. There was evidence tending to establish the foregoing facts, and also to show that one of the plaintiffs' salesmen demanded of the defendant the payment of the amount of the guaranty, and the latter stated to him that he had seen the guaranty, and wished to have it adjusted, and expressed surprise that he was "in for so much." He also stated to the salesman that he had signed the guaranty with the understanding that the members of the firm of Roberts Brothers would have their father, J. J. Roberts, sign the same with him. The defendant and J. J. Roberts agreed to give notes for the amount of the guaranty, but at the last moment J. J. Roberts refused to sign them. It was also in evidence that on the day after the guaranty was signed the defendant asked Roberts Brothers if J. J. Roberts had signed, to which they answered that he had not, as they had concluded not to go to him, but to get Robinson & Baird to sign it, and the defendant then told them to write to the plaintiffs, and have his name taken off the paper. The defendant inquired every week if they had received any answer from the plaintiffs, and, not being able to get a satisfactory answer, wrote himself to the plaintiffs on July 7th, and requested them to erase his name, as he would not indorse for them any longer, because they had deceived him. All the goods had then been sold. The plaintiffs introduced in evidence the following letter from the defendant to them, dated July 24, 1899: "Please send me by return mail a copy of that paper with my name attached to it, sent by Roberts Brothers of this place; also amount purchased by them since the date of that paper, and oblige. . . ." And also a letter from them to the defendant dated July 8, 1899, in reply to his letter of July 7, 1899, as follows: "Your favor of July 7, 1899, is at hand. The credit extended to Roberts Bros. was based on your guaranty to the extent of two thousand dollars, and we cannot relinquish this guaranty of yours until the debt made under said guaranty is paid. They owe us at this time upwards of two thousand dollars, and we will thank you to see to it that our debt is paid, as we are very sorely pressed for money at this time." The defendant, who was introduced as a witness in his own behalf, testi-

fled that he signed the guaranty upon the condition that J. J. Roberts would sign it with him. He was told by Roberts Brothers that they needed the guaranty in order to get more goods to renew their stock. He further stated that Roberts Brothers had told him that they had written to the plaintiffs to erase his name, but that he mistrusted them, and wrote himself after waiting three months. At the close of the testimony the court intimated that it would charge the jury to find the issue for the defendant, in deference to which intimation the plaintiffs, after excepting, submitted to a nonsuit and appealed.

Messrs. Merrimon & Merrimon, for appellants:

Suit against Roberts Brothers was unnecessary, as they were insolvent, and had been adjudicated bankrupts.

Jones v. Ashford, 79 N. C. 172; *Jenkins v. Wilkinson*, 107 N. C. 707, 22 Am. St. Rep. 911, 12 S. E. 630; *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735.

Fraud of the principal will not discharge the guarantor, unless the creditor has notice.

2 Brandt, Suretyship & Guaranty, § 406; 14 Am. & Eng. Enc. Law, 2d ed. p. 1166.

Nor will the guarantor be discharged unless the creditor has notice of the condition upon which the guaranty was signed, where there is nothing to put the creditor on inquiry, and he has been induced to act to his own prejudice upon the faith of the guaranty.

2 Brandt, Suretyship & Guaranty, §§ 407, 408, 409; *Spencer v. McLean*, 67 Am. St. Rep. 271, and note 275, 20 Ind. App. 626, 50 N. E. 769.

It was the duty of defendant to repudiate the guaranty as soon as he discovered the fraud which had been practised upon him.

8 Am. & Eng. Enc. Law, p. 643 (c); *Bigelow*, Fr. pp. 187, 188.

Consideration moving to the principal alone, contemporaneous with or subsequent to the promise of the guarantor, is sufficient.

1 Brandt, Suretyship & Guaranty, § 15 (4).

The consideration may be proved by parol.

Green v. Thornton, 49 N. C. (4 Jones, L.) 230; *Thornburg v. Masten*, 88 N. C. 295; *Davis v. Wells, F. & Co.* 104 U. S. 159, 26 L. ed. 686.

A guaranty may be prospective or retrospective in its operation.

14 Am. & Eng. Enc. Law, 2d ed. p. 1129; 1 Brandt, Suretyship & Guaranty, § 127.

"Guaranty" should be liberally construed, and have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument read in the light of surrounding circumstances, and the purposes for which it was made.

1 Brandt, Suretyship & Guaranty, §§ 92, 105; *Davis v. Wells*, 104 U. S. 169, 26 L. ed. 690, and Rose's notes on this case; *Hooper v. Hooper*, 81 Md. 155, 48 Am. St. Rep. 496, 31 Atl. 508; *Menard v. Scudder*, 7 La. Ann. 385, 56 Am. Dec. 610; *Lawrence v. McCalmont*, 2 How. 426, 11 L. ed. 326; 14 Am. & Eng. Enc. Law, 2d ed. p. 1139.

The guaranty was absolute, and no notice of acceptance was necessary.

14 Am. & Eng. Enc. Law, 2d ed. p. 1145; Brandt, Suretyship & Guaranty, §§ 193-195; *Davis v. Wells, F. & Co.* 104 U. S. 159, 26 L. ed. 686; 2 Parsons, Contr. p. 14; *Jenkins v. Wilkinson*, 107 N. C. 707, 22 Am. St. Rep. 911, 12 S. E. 630; *Hutchins v. Planters' Nat. Bank*, 130 N. C. 287, 41 S. E. 487; *Wright v. Griffith*, 121 Ind. 478, 6 L. R. A. 639, 23 N. E. 281.

It was not necessary that there should be actual notice to the defendant, even if notice were necessary. If the fact of acceptance is seasonably brought to the knowledge of the signer in any other way, and he acquiesces by silence, it is sufficient.

Menard v. Scudder, 7 La. Ann. 385, 56 Am. Dec. 610; *Oaks v. Weller*, 13 Vt. 106, 37 Am. Dec. 583; *Farrow v. Respass*, 33 N. C. (11 Ired. L.) 170; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 282; *Union Bank v. Coster*, 3 N. Y. 203, 53 Am. Dec. 280.

A guarantor cannot avail himself of a want of consideration for his guaranty, whether he knew of the consideration between the principal and the payee or not.

Brewster v. Short, 43 N. Y. S. R. 768, 17 N. Y. Supp. 799.

Consideration may be any loss, trouble, inconvenience, or charge upon the promisee.

9 Am. & Eng. Enc. Law, p. 69; *Gates v. McKee*, 13 N. Y. 232, 64 Am. Dec. 545; *Clune v. Ford*, 55 Hun, 479, 8 N. Y. Supp. 719; *Sullivan v. Arcand*, 165 Mass. 366, 43 N. E. 198; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 278, 45 Am. Rep. 204.

Whether there was notice of acceptance is a mixed question of law and fact, and must be left to the jury under proper instructions.

Lawrence v. McCalmont, 2 How. 426, 11 L. ed. 326; *Louisville Mfg. Co. v. Welch*, 10 How. 461, 13 L. ed. 497; *Barnes Cycle Co. v. Reed*, 33 C. C. A. 646, 63 U. S. App. 279, 91 Fed. 483; *Central Sav. Bank v. Shine*, 48 Mo. 456, 8 Am. Rep. 112; *Douglass v. Reynolds*, 7 Pet. 113, 8 L. ed. 626; *Paige v. Parker*, 8 Gray, 211; *Bishop v. Eaton*, 161 Mass. 496, 42 Am. St. Rep. 437, 37 N. E. 665; *Lee v. Dick*, 10 Pet. 482, 9 L. ed. 503.

When the assent of the creditor is known to the guarantor, it need not be formally communicated.

Hove v. Nickels, 22 Me. 175; *White v. Reed*, 15 Conn. 457.

Knowledge, however gained, is tantamount to notice.

Noyes v. Nichols, 28 Vt. 159; *Straus v. Beardsley*, 79 N. C. 59; *Thompson v. Glover*, 78 Ky. 193, 30 Am. Rep. 220.

An undertaking of a guarantor is primary, and he is entitled to neither demand nor notice, if his contract relates to a debt already due.

Lane v. Levillian, 4 Ark. 76, 37 Am. Dec. 769; *Read v. Cutts*, 7 Me. 186, 22 Am. Dec. 184.

Mr. F. A. Sondley, for appellee:

The first thing which this instrument purports to do is to guarantee payment or collection of a debt due from Roberts Brothers. The defendant received no consideration for this guaranty, and none is purported to be recited in it, and the plaintiffs parted with nothing on the strength of it in so far as it relates to such debt already contracted. The terms upon which, alone, it was to become binding upon the defendant, were never complied with, and the event upon which, only, it was to go into force never happened; the instrument never became binding on the defendant, and is not his guaranty.

Ware v. Allen, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174; *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; *King County v. Perry*, 5 Wash. 536, 19 L. R. A. 500, 34 Am. St. Rep. 880, 32 Pac. 538; *State ex rel. Barnes v. Lewis*, 73 N. C. 141, 21 Am. Rep. 461; *Pauling v. United States*, 4 Cranch, 219, 2 L. ed. 601; *Dair v. United States*, 16 Wall. 5, 21 L. ed. 493.

The second thing which this instrument purports to do, is to operate as a continuing guaranty for credit to be afterwards extended to those whose payment it appeared to assure. The instrument is in the form of a continuing guaranty. As such it was inoperative, because the plaintiffs never notified the defendant that they accepted it.

1 Parsons, Contr. * 478 (509), and note; 2 Dan. Neg. Inst. § 1785; *Louisville Mfg. Co. v. Welch*, 10 How. 475, 13 L. ed. 503; *Lee v. Dick*, 10 Pet. 482, 9 L. ed. 503; *Douglass v. Reynolds*, 7 Pet. 113, 8 L. ed. 626; *Davis Seicing Machine Co. v. Richards*, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; *German Sav. Bank v. Drake Roofing Co.* 112 Iowa, 184, 51 L. R. A. 758, 84 Am. St. Rep. 335, 83 N. W. 960.

The instrument was obtained from the defendant under a promise, on the part of him who so obtained it, that it would not

be used or sent to the plaintiffs unless a certain other signature should be first obtained thereto. This promise was violated. In this a fraud was practised.

In such case the instrument was void in the hands of the plaintiffs, unless they took it without notice of such fraud. The burden of proof in that case was upon the plaintiffs to show that they innocently received and held the instrument.

1 Dan. Neg. Inst. § 769a; *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94; *Lytle v. Lansing*, 147 U. S. 59, 37 L. ed. 78, 13 Sup. Ct. Rep. 254; *Commercial Bank v. Burgwyn*, 108 N. C. 62, 23 Am. St. Rep. 49, 12 S. E. 952.

Walker, J., delivered the opinion of the court:

The defendant's counsel, in his able argument before us, relied upon three grounds of defense: (1) That there was no evidence that the plaintiffs had accepted the guaranty and notified the defendant of their acceptance; (2) that there was no consideration to support the guaranty as to the debt already due by Roberts Brothers to the plaintiffs, amounting to \$1,742.50; (3) that the guaranty was given upon a condition which was never performed, and that it is therefore void, even in the hands of the plaintiffs.

A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance. *Carpenter v. Wall*, 20 N. C. 279 (4 Dev. & B. L. 144). There is a well-defined distinction between a guaranty of payment and a guaranty for the collection of a debt,—the former being an absolute promise to pay the debt at maturity, if not paid by the principal debtor, when the guarantee may bring an action at once against the guarantor; and the latter being a promise to pay the debt upon condition that the guarantee diligently prosecutes the principal debtor for the recovery of the debt without success. *Jones v. Ashford*, 79 N. C. 172; *Jenkins v. Wilkinson*, 107 N. C. 707, 22 Am. St. Rep. 911, 12 S. E. 630. The guaranty may also be absolute in form, or one which binds the guarantor to pay unconditionally, or at all events, upon the default of the principal; or it may be in the form merely of an offer to become bound upon the default of the principal. In the former case—that is, where there is an absolute guaranty or an unconditional promise to indemnify against loss by the principal's default—no notice of acceptance by the guarantee is required, the liability of the guarantor being fixed

and determined by the ordinary rules in the law of contracts. In the latter case, when the transaction takes the form of an offer merely to become responsible for the principal, notice of acceptance of the offer is, of course, necessary, in order to charge the party who makes the offer as guarantor, and this is so because the minds of the parties have not met; there is no *aggregatio mentium* until the offer is accepted. There is a well-recognized distinction, therefore, between an offer or proposal to guarantee and a direct promise of guaranty. The former requires in some cases notice of acceptance, while the latter does not. When the offer to guarantee is absolute, and contains in itself no intimation of a desire for, or expectation of, specific notice of acceptance, it may be supposed that the offeror has a reasonable knowledge that his guaranty will be accepted and acted upon, unless he is informed to the contrary. 2 Parsons, Contr. 8th ed. chap. 2, § 4, and notes, where the subject is fully discussed. It is said that, if the party distinctly and absolutely guarantees a certain line of credit, it presupposes some sort of a request for a guaranty, emanating from the guarantee, and for this reason no formal acceptance by the guarantee is necessary; but if it be only a proposition to guarantee the credits, and not a positive promise to guarantee them, the acceptance of the proposition must in some way, and within a reasonable time, be communicated, before the guarantor can be held liable on it. Tiedeman, Com. Paper, § 420. In our case the guaranty is a direct and unconditional promise to answer for the default of the principal to the amount of \$2,000. The words of the contract are *in presenti*,—"I do hereby guarantee,"—and superadded are the words, "This obligation to remain in full force." Language could not be stronger to express the intention to become liable at once without any expectation of notice that the plaintiffs will accept the guaranty. It was not an offer, nor did it imply an offer merely, but it was in itself a complete and binding promise to guarantee, and needed only the sale of the goods by the plaintiffs to make it otherwise effectual. 1 Parsons, Contr. pp. 466, 467.

We cannot distinguish this case from *Straus v. Beardsley*, 79 N. C. 59, where the court says: "If the undertaking be to guarantee the contract which may be made, the obligation is not collateral and contingent, but absolute and unconditional, and no notice is necessary. . . . The undertaking is to pay a certain sum, and by the terms of the condition it is discharged only, when the goods have been delivered under its provisions, by actual payment of the purchase price. If the goods are delivered, 65 L. R. A.

the contract is to pay for them, and a compliance with this condition is the only means of discharging the obligation. It thus became the duty of the intestate and his associates to ascertain for themselves if the plaintiffs furnished goods, to Parel, and that they were paid for, and no notice or demand was necessary to charge them with the debt." See also *Walker v. Brinkley*, 131 N. C. 17, 42 S. E. 333. In *Williams v. Collins*, 4 N. C. (2 Car. Law Repos.) 583-586, this court drew the distinction between a guaranty that a certain person will be able to comply with the proposed contract and one wherein the promise is that he shall comply. In the latter case—which is ours—the court held that the guarantor, "to all legal consequences, became pledged absolutely to the same extent as . . . [the principal debtor] was bound as soon as the plaintiff [guarantee] parted with his property." In *Shevell v. Know*, 12 N. C. (1 Dev. L.) 405, all the judges agreed that, if the guaranty is absolute, and addressed to an individual, no notice of acceptance is necessary; and one of the judges held that it was not necessary when a letter of credit was given under the circumstances of that case. The general principle as to when notice of acceptance of an offer to contract becomes necessary is considered in the cases of *Crook v. Cowan*, 64 N. C. 743, and *Ober v. Smith*, 78 N. C. 313. The question as to notice of acceptance in cases of guaranty is very ably and exhaustively discussed, with a full review of the English and American authorities, in the case of *Wilcox v. Draper*, 12 Neb. 138, 41 Am. Rep. 763, 10 N. W. 579, and the conclusion is reached that, when there is a direct promise of guaranty, no notice of acceptance is required. *Allen v. Pike*, 3 Cush. at page 242; *Powers v. Bumcratz*, 12 Ohio St. 273; *Union Bank v. Coster*, 3 N. Y. 212, 53 Am. Dec. 280; *City Nat. Bank v. Phelps*, 86 N. Y. 484; 2 Addison, Contr. 8th ed. p. 84, *651. The case of *Gregory v. Bullock*, 120 N. C. 260, 26 S. E. 820, does not apply, as the court held that there was no contract at all in that case, and what is said about the guaranty was with reference to the particular facts under consideration, from which it appeared that there was only "a proposal based upon an uncertain event." The guaranty in this case as to both the past and future indebtedness is evidenced by one and the same instrument, and is supported by one and the same consideration, and we do not, therefore, see why the law applicable to the one should not also determine the liability in the case of the other.

We are of the opinion that the testimony of the defendant as to his interviews and communications with the principals, Rob-

erts Brothers, and his subsequent promise to pay for the goods after the guaranty had been executed by him, furnishes some evidence to show that he knew the guaranty had been delivered to the plaintiffs, and that they were acting upon it, or intended to do so.

There was a sufficient consideration to support the guaranty as to the debt already due. The agreement as to the existing and the future indebtedness was indivisible, and was based upon one and the same consideration, which was that the plaintiffs should sell more goods to the principals, to enable them to replenish their stock, which he did. It is not necessary that the consideration should be full or adequate, as in the case of bona fide purchasers for value. If there was any legal consideration, it is sufficient. The promise of the guarantees to furnish the goods was such a consideration, and supports the contract of guaranty. 1 Parsons, Contr. pp. 466, 467.

The third ground of defense is not tenable. If the written guaranty was given to the principals upon condition that it should not be delivered to the plaintiffs until it was signed by J. J. Roberts, and they delivered it in violation of the condition, and thus, as is said in the "case," practised a fraud upon the defendant, the defendant is bound, as the plaintiffs did not participate in this alleged fraud; nor is it shown that they had notice of it. The liability of the defendant is founded upon the principle that, where one of two persons must suffer loss by the misconduct or fraud of a third person, or by his breach of confidence,—as in our case,—the loss should fall upon him who first reposed the confidence, or who, by his negligence, made it possible for the loss to occur, rather than on an innocent third person. The liability of the defendant in this respect is fully established by the case of *Vass v. Riddick*, 89 N. C. 6. See also *Farmers' Bank v. Hunt*, 124 N. C. 171, 32 S. E. 546; *State ex rel. Barnes v. Lewis*, 73 N. C. 141, 21 Am. Rep. 461. The plaintiffs agreed to sell the goods to the principals, not upon the single consideration that the defendant would guarantee the payment of the price, but upon the further and additional consideration that he would guarantee also the payment of the existing indebtedness. He would not have sold but for the last consideration, and therefore, by reason of the guaranty, he has been induced to change his position, and, should the guaranty, as to that indebtedness, be declared invalid, he will be prejudiced, as he no doubt would have taken immediate steps to collect his claim if the guaranty had not been given. It will be impossible for him now to save himself, for

65 L. R. A.

the reason that the principals have become insolvent, and have been adjudged bankrupts. We have said this much, though we do not concede that, in order to charge the defendant on the guaranty, it is necessary to show a change in the guarantee's position by which he may be prejudiced if the guaranty is held to be void.

We have not commented upon the evidence in this case, from which it appears that the defendant knew, on the day after the guaranty was given, that it had been sent to the plaintiffs, and had not been signed by J. J. Roberts, and, knowing this fact, and "mistrusting" the principals, as he did, according to his own testimony, he delayed for nearly three months to notify the plaintiffs of the alleged condition annexed to the guaranty, and in the meantime they had sold the goods. When they refused to surrender their security, he finally agreed to pay the bill for the goods sold after the date of the guaranty. This was a clear case of negligence on his part, and the consequences of this negligence must be visited upon him, and must not be borne by the plaintiffs, who are innocent parties. As said in *State ex rel. Barnes v. Lewis*, 73 N. C. 141, 21 Am. Rep. 461, the defendant acted upon the assurance that another would do an act which he knew might be defeated or prevented by various accidents, and he must therefore take the risk of such assurance being fulfilled. He confided in the principals, Roberts Brothers, and the condition that J. J. Roberts should sign with him was communicated to them alone. He failed to use ordinary precaution either to protect himself or to protect the guarantees. If the defendant, in any phase of the testimony, can be regarded as an innocent person in this transaction, it yet remains as an inflexible rule of the law that, where one of two innocent persons must suffer, he who has enabled a third person to occasion the loss must sustain it. This is said to be a doctrine of general application, and is a most just and reasonable one. *State ex rel. Barnes v. Lewis*, 73 N. C. 141, 21 Am. Rep. 461. To permit the defendant to avail himself of his defense to this action would also contravene that other just and inflexible maxim of the law that no man shall take any advantage of his own wrong.

No question arises in this case as to diligence on the part of the guarantee in collecting the debt from the principals, as this is a guaranty of payment, and not for collection; and, besides, the burden of proof in this respect would be on the defendant. The case shows that notice of the default of the principal was given, and demand made upon the guarantor before the suit was commenced.

Our conclusion is that there was error in the intimation of opinion by the court adverse to the plaintiffs, by which they were driven to a nonsuit.

The judgment must therefore be set aside, and a new trial awarded.

Montgomery, J., dissenting in part:

Roberts Brothers, of Buncombe county, North Carolina, were in 1899 indebted to the plaintiffs, of Knoxville, Tennessee, in the sum of \$1,742.62 for goods sold to them, and, being unable to make further purchases on credit without security, procured their uncle, the defendant, to sign and deliver a guaranty in the following words:

Knoxville, Tenn., Apr. 8, 1899.

I hereby guarantee to Cowan, McClung, & Co. any debts which Roberts Bros. now owe, or may owe in the future to the extent of two thousand dollars. This obligation to remain in full force until the debt now due Cowan, McClung, & Co. is fully discharged and this agreement annulled in writing.

Afterwards the plaintiffs sold and delivered to Roberts Brothers at different times goods and wares to the value of \$475.45. This action was brought to recover the \$2,000, the amount named in the guaranty. No notice was given by the plaintiffs to the defendant of their acceptance of the guaranty. The guaranty, upon its face, is divisible into two parts. One branch seems to be an obligation for the payment of a debt already existing and due by the principals to the guarantees, the plaintiffs, and the other branch is in the nature of a security for a debt to be contracted in the future by the principals with the plaintiff. By the terms of the guaranty in respect to the debt already due, the obligation appears to be an absolute guaranty, and, if there was a consideration to support it, the defendant is liable for its payment. There was in fact such a consideration, for the plaintiffs, after the execution of the guaranty, sold and delivered to the principals goods and merchandise of the value of \$475.45, and the defendant testified on the trial that the guaranty was made in order that the debt already due might be secured, and that further fresh purchases of goods might be added to the stock of the principals then on hand. It was not necessary that the defendant should have been benefited in order to raise a consideration for the guaranty on the part of the guarantor. Any advantage accruing to, or any consideration moving toward, the principals from the plaintiffs was sufficient in law to make the defendant liable on the first branch of his guaranty.

65 L. R. A.

As to the second branch of the guaranty,—that is, the guaranty of the amount of the debt to be contracted in the future by the principals,—a notice of acceptance by the guarantees, the plaintiffs, was necessary. That branch of the guaranty was not absolute, and in *Gregory v. Bullock*, 120 N. C. 260, 26 S. E. 820, the court said: "The answer is that the alleged guarantee gave no notice of his acceptance within a reasonable time. In *Adams v. Jones*, 12 Pet. 213, 9 L. ed. 1060, Mr. Justice Story said: 'Notice is necessary to be given the guarantor that the person giving credit has accepted or acted upon the guaranty and given credit on the faith of it. This is no longer an open question in this court.'" In the case of *Clune v. Ford*, 55 Hun, 479, 8 N. Y. Supp. 719, cited in the argument here, the guaranty was in these words: "Dear Sir: We hereby agree to guarantee the expenses of the members of the Gaelic Athletic Association to the sum of \$650 (Six hundred and fifty dollars) or the amount due under that figure." The guarantee was the proprietor of a hotel in New York city at which the members of the association were boarding and were in arrears for board for the sum of \$475. After the delivery of the guaranty they incurred the further expense of \$175. The question of notice of acceptance by the guarantee was not raised, the matter of consideration was the only point in the case and the court held that the incurring of the \$175 expense for the board after the guaranty was given was a sufficient consideration for the amount due in the past. In the case of *Paige v. Parker*, 8 Gray, 211, cited on the argument here, the court held that the guaranty was an absolute one, and therefore that notice was not necessary. The paper writing in that case guaranteed the prompt payment at maturity of any amount that might be due by the principal for goods, wares, and merchandise to be sold by the guarantee to the amount of \$500. The court in that case said that: "However this may be, we are of opinion that the defendant in this case had notice that his guaranty was accepted. An absolute guaranty was written by Blodgett & Co. in their store, and for their benefit. The defendant signed it there, and left it with them as a completed contract, and they retained it. This was an acceptance by them of which he must be held to have notice." In the case before us the plaintiffs contended that the guaranty was made at the request of the guarantees, and therefore that no notice of acceptance was necessary. But there was no evidence of that fact. The guaranty, it is true, was in the handwriting of the plaintiffs, but it was brought to the defendant by one of the firm

of Roberts Brothers; but he made no statement at the time, or at any other time, that the plaintiffs expected that the defendant singly and particularly would sign it. And, besides, the defendant did not deliver it to the plaintiffs in person, and leave it in their possession as a contract, completed, as was the case in *Paige v. Parker*, 8 Gray, 211. There was evidence offered on the trial going to show that the defendant executed the guaranty through a fraud practised on him by one of the principals. But it was not shown that the plaintiffs had any notice of the fraud. Notwithstanding the fraud practised on the defendant, he is liable on the first branch of the guaranty, for the reason that the plaintiffs did not participate in the fraud, or have knowledge of it. Baylies, Sureties & Guarantors, p. 215.

VOORHEES, MILLER, & COMPANY,
Appts.,
v.

J. A. PORTER, Individually and as Trustee
for Creditors of J. D. Blanton, *et al.*

(134 N. C. 591.)

1. A plaintiff who has stated facts in his complaint entitling him to relief will not be restricted to the relief demanded in his prayer for judgment.
2. Creditors of a vendor of a stock of goods have a right of action against the grantee upon his agreement with the vendor to pay such creditors out of the purchase money.
3. Arguments of counsel in setting forth the relief to which he claims his client is entitled in a particular case are in no sense an estoppel which will prevent the court from granting other or additional relief.
4. A general assignee for benefit of creditors of one who purchased a stock of goods upon the agreement to pay the debts of the vendor out of the purchase price does not take any of the property impressed with a trust in favor of the creditors of such vendor, which they can enforce in priority to claims of other creditors of the assignor; but, as creditors of the assignor, they may compel the assignee to show whether any assets came into his hands which are applicable to their claim.
5. If the purchaser of a stock of goods, who undertakes to pay the debts of the seller out of the purchase price, makes a general assignment for benefit of his creditors to one who has guaranteed

performance of his undertaking, creditors of the original vendor may bring suit against the assignee, either as such, or as guarantor, or in both capacities, and compel him to show what funds came to his hands which are applicable to payment of their claims.

(April 5, 1904.)

APPEAL by plaintiffs from a judgment of the Superior Court for Buncombe County dismissing their complaint in an action brought to compel payment of their claims against J. D. Blanton by defendants, either as guarantors, or as holders of funds applicable to such payment. *Reversed.*

Statement by Walker, J.:

Action to recover a debt due to the plaintiffs by J. D. Blanton, and, for that purpose (1) to set aside an assignment by him to J. D. Brevard alleged to be fraudulent, (2) to enforce a trust as to certain funds in the possession of Brevard under a contract with Blanton that he would pay the same to Blanton's creditors, and (3) to recover against J. A. Porter and J. B. Bostic the amount of plaintiffs' debt upon their covenant given to Blanton by which they guaranteed a performance of said contract by Brevard and the payment of the money by him to the creditors. In November, 1892, Blanton was indebted to the plaintiffs in the sum of \$3,445.50 for goods sold and delivered, and for which Blanton gave the plaintiffs his two several promissory notes, with Cobb, Bostic, and W. M. Blanton as sureties. Plaintiffs obtained judgment on these notes in the Federal court, but were unable to collect any part of the amount due upon the judgment, because of the insolvency of the defendants. On December 30, 1903, Blanton executed to J. D. Brevard an instrument in writing, by which he sold and conveyed to him his stock of goods, wares, and merchandise at their cost, less 12½ per cent, and, in consideration thereof, Brevard agreed that, after retaining \$3,000 to pay a debt due to him from Blanton, he would hold the purchase money, and apply the same to the payment of (1) all debts due by Blanton on which Brevard is surety or indorser, and (2) all the other debts owing by Blanton upon which Bostic or Cobb is surety. It was then provided that the surplus, if any, should be paid to Blanton. On the same day Bostic and Porter executed their guaranty, by which they

NOTE.—For other cases in this series as to right of third party to sue on contract made for his benefit, see *Jefferson v. Asch*, 25 L. R. A. 257, and *note*; *Schmidt v. Louisville & N. R. Co.* 38 L. R. A. 809; *Baxter v. Camp*, 42 L. R. A. 514; *Buchanan v. Tilden*, 44 L. R. A. 170; *Embler v. Hartford Steam Boiler Inspect-*
65 L. R. A.

tion & Ins. Co. 44 L. R. A. 512; *Ferris v. American Brewing Co.* 52 L. R. A. 305; *Electric Appliance Co. v. United States Fidelity & G. Co.* 53 L. R. A. 609; *Ransdel v. Moore*, 53 L. R. A. 753; *Tweeddale v. Tweeddale*, 61 L. R. A. 509; and *Charles Simon's Sons Co. v. Maryland Teleph. & Teleg. Co.* 63 L. R. A. 727.

agreed that Brevard should "faithfully keep and perform all the covenants and agreements to be by him kept, done, and performed according to the terms of the foregoing contract, dated this day, between him and Blanton," and "that he will pay faithfully the price of the goods sold to him by said contract according to the terms thereof and as therein stated," and they did "jointly and severally guarantee such performance and payment." There was a provision in the contract between Blanton and Brevard that the goods sold and conveyed to Brevard should be inventoried so as to describe and identify the goods more definitely, and so as to ascertain the exact amount of the purchase price to be held by Brevard for the creditors and to be paid to them. An inventory was accordingly made, and the net amount of the purchase money ascertained to be \$18,158.47. On March 3, 1904, J. D. Brevard made a general assignment to J. A. Porter of all his property for the benefit of his creditors. There was evidence tending to show the execution of the several instruments above mentioned, and also to show that Cobb, Bostic, J. D. Blanton, and W. N. Blanton are insolvent. The plaintiffs allege that Porter had received the property assigned to him by Brevard, and sold it, and had failed to execute his trust by paying the proceeds of the sale or the price of the goods to the creditors of Brevard as required to do by the assignment, and "that neither the said Brevard, the said Bostic, nor the said Porter has ever paid anything to the plaintiffs, although the plaintiffs were entitled to be paid by virtue of the terms of said contract, and although they have repeatedly demanded payment," and that, while the assets received by Porter under the assignment amounted to \$30,000, he has not paid out exceeding \$5,000 to the creditors of Brevard, nor has he accounted for the proceeds of sale received by him, as it was his duty as assignee to do. The defendants in this suit are Bostic, Cobb, and Brevard, and J. R. Porter, individually and as assignee of J. D. Brevard. The prayer of the complaint is as follows: "(1) That the deed of assignment from the defendant J. D. Brevard to the defendant J. A. Porter be declared to be fraudulent and void, and that the said Brevard and Porter account for the said assets and proceeds thereof. (2) For judgment against the said Porter and the defendant J. B. Bostic upon the contract mentioned in paragraph 7 of the complaint. (3) For such other and further relief," etc. At the close of the plaintiffs' evidence, the defendant Porter, individually and as assignee of Brevard, moved to dismiss the complaint, and for judgment as in case of nonsuit. Motion granted, and plain-

tiffs excepted and appealed from the judgment.

Mr. James H. Merrimon, for appellants:

The contract between Blanton and Brevard constituted the latter a trustee of the purchase price of the stock of goods for all creditors embraced in the classes designated. The plaintiffs are *cestuis que trust*, and have the right to enforce the trust, and to require the trustee's assignee to account, whether the assignment be fraudulent or not.

The contract was made for the benefit of certain creditors, and plaintiffs are among those for whose benefit it was made, and have the right to enforce it by an action in their own names.

Gorrell v. Greensboro Water Supply Co. 124 N. C. 328, 46 L. R. A. 513, 70 Am. St. Rep. 598, 32 S. E. 720; *Shoaf v. Palatine Ins. Co.* 127 N. C. 308, 80 Am. St. Rep. 804, 37 S. E. 451; *Woodcock v. Bostic*, 128 N. C. 243, 38 S. E. 881; *Gastonia v. McEntee-Peterson Engineering Co.* 131 N. C. 363, 42 S. E. 858.

But if the contract was an indemnity given to sureties, the plaintiffs may avail themselves of it, and have the primary equity, and do not have to depend upon the doctrine of subrogation.

Wiswall v. Potts, 58 N. C. (5 Jones, Eq.) 184; *Harrison v. Styres*, 74 N. C. 290; *Mast v. Raper*, 81 N. C. 335; *Mattheus v. Joyce*, 85 N. C. 258; *Long v. Miller*, 93 N. C. 227; 2 Brandt, Suretyship & Guaranty, §§ 324, 325.

Any indemnity given by the principal to his sureties inures to the benefit of the creditor, and is a security for his debt, which he may enforce whether the surety is or is not damnified.

Sherrod v. Dixon, 120 N. C. 63, 26 S. E. 770; *Blanton v. Bostic*, 126 N. C. 421, 35 S. E. 1035; *Cooper v. Middleton*, 94 N. C. 86; *James v. Gaither*, 93 N. C. 358.

Where an indemnity is given to one of several sureties, it inures to the benefit of all, and also to the creditor.

Leary v. Cheshire, 56 N. C. (3 Jones, Eq.) 170; *Gregory v. Murrell*, 37 N. C. (2 Ired. Eq.) 233; *Hall v. Robinson*, 30 N. C. (8 Ired. L.) 56; *Fagan v. Jacobs*, 15 N. C. (4 Dev. L.) 263; *Eason v. Cherry*, 59 N. C. (6 Jones, Eq.) 261.

It is charged in the complaint that Brevard made the assignment to Porter in fraud of creditors. Brevard files no answer, and as to him the allegation must be taken as true. If this allegation be true as against Brevard, it would not be necessary to show that Porter knew of the fraud, or participated in it.

Mitchell v. Eure, 126 N. C. 80, 35 S. E. 190; *Bobbitt v. Rodwell*, 105 N. C. 243, 11 S. E. 245; *Woodruff v. Bowles*, 104 N. C. 212, 10 S. E. 482; *Eigenbrun v. Smith*, 98 N. C. 207, 4 S. E. 122; *Savage v. Knight*, 92 N. C. 497, 53 Am. Rep. 423.

The fact that the assignment was fraudulent does not exempt Porter from the duty and liability to account.

Rouse v. Bowers, 108 N. C. 183, 12 S. E. 985; *Sharpe v. Eliason*, 116 N. C. 665, 21 S. E. 401.

Each creditor may maintain an action.

Hoover v. Berryhill, 84 N. C. 132.

Porter is liable as guarantor.

Jenkins v. Wilkinson, 107 N. C. 707, 22 Am. St. Rep. 911, 12 S. E. 630; *Hutchins v. Planters' Nat. Bank*, 130 N. C. 285, 41 S. E. 487.

Messrs. F. A. Sondley and Tucker & Murphy for appellees.

Walker, J., delivered the opinion of the court:

It appears in the record that the court below was of the opinion the plaintiffs could not recover because they were not in privity with the parties to the contract of December 30, 1902, by which Blanton conveyed his stock of goods to Brevard, and the plaintiffs therefore could not sue upon the contract, but were excluded from doing so by the rule laid down in *Morehead v. Wriston*, 73 N. C. 398, and *Peacock v. Williams*, 98 N. C. 324, 4 S. E. 550, and much of the argument in this court was addressed to this feature of the case. It is also stated in the record that, in the argument of the motion to nonsuit in the lower court, the plaintiffs' counsel admitted that there was no cause of action for subrogation, nor was any such equity claimed by the plaintiffs under the contract between Blanton and Brevard of December 30th; and that counsel further argued that, while said contract was a bill of sale, it constituted Brevard a trustee of the purchase price for the purpose of paying it to the creditors of Blanton, and that the plaintiffs had a primary equity to have it so applied, and that to enforce that equity they could sue Brevard and Porter directly, and also sue Porter on his guaranty hereinafter mentioned. It was argued by the defendants' counsel in this court that "there is no allegation in the complaint of any contract between Blanton and Brevard to any extent for the benefit of the plaintiffs," and that the plaintiffs in their pleading simply assert the right to follow the goods in the hands of Brevard as trustee, and do not aver that Brevard is individually the debtor of the plaintiffs.

We simply mention these matters for the purpose of stating that we are not bound 65 L. R. A.

here by any argument that counsel made below. We hear the case upon the facts alleged in the pleadings, and if the plaintiffs have set forth in their complaint such facts as entitle them to relief they will not be restricted to the relief demanded in their prayer for judgment, but may have any additional and different relief which is not inconsistent with the facts so alleged in their complaint, it being the pleadings and the facts proved which determine the measure of relief to be administered. *Knight v. Houghtalling*, 85 N. C. 17. In this case, it makes no difference, if such is the fact, that the plaintiff does not distinctly claim that the contract between Blanton and Brevard was for the benefit of the plaintiffs, and that he does claim only that Brevard held the goods in trust, and makes no claim against Brevard individually. He simply sets forth the facts of the case according to his version of them, which is the proper way to do, and upon those facts he prays for an accounting from Brevard and Porter "for the said assets and the proceeds thereof," meaning the assets received under the contract and assignment, and for judgment against Porter and Bostic as guarantors of the performance by Brevard of the contract, and for such other and further relief as they may be entitled to have in the premises. We cannot, therefore, agree with the learned counsel for the defendants that the plaintiffs are not entitled to call for a showing from Brevard and Porter as to the administration of their several and respective trusts under the contract and assignment, if the facts justify such relief, even though the plaintiffs may not have made any special or particular claim for that relief; but it is our opinion that the facts are sufficiently set forth in the complaint to entitle them to such relief, and, if Brevard and Porter have committed a breach of their trusts, they are further entitled to judgment against them respectively for any damages they have sustained by reason thereof.

The case, in one aspect of it, turns upon the question whether the plaintiffs can sue Brevard for failing to pay over to them their share of the price he agreed to pay for the property sold to him by Blanton, and we are unable to see why he cannot do so. The case is not like *Morehead v. Wriston*, 73 N. C. 398. In that case the substance of the agreement was that Wriston, the incoming partner, would indemnify the old firm against the payment of its debts, and this view of the case is fully explained and made clear by Smith, Ch. J., in *Peacock v. Williams*, 98 N. C. 324, 4 S. E. 550, in which he says: "The agreement is, in substance, one for the indemnity of the owner of the property against its being subjected to the

asserted lien, and is solely between the parties to it, with whom the plaintiff is not in privity. . . . Here there is no promise to pay the plaintiff, and the defendant has no funds with which to make the payment." It will be observed that the distinction between the cases arises out of the particular nature of the contract,—whether it be one strictly of indemnity, or one in which there is a direct and express promise to pay to the creditor the amount of his claim out of the funds placed in the hands of the party who is sought to be charged, or which are held by him for that specific purpose. This doctrine, that the creditor may himself sue directly the party so holding the funds which have been dedicated by the debtor to the payment of the claims of his creditors, is recognized in *Woodcock v. Bostic*, 118 N. C. 322, 24 S. E. 362, as is also the creditor's right to proceed in equity to have the fund applied, according to the intention of the debtor and the agreement of the party who holds it, to the uses for which it was created, whether the right can be enforced at law or not. It is true the court held in that case that the action was in form *ex contractu*, and that, as the guaranty of Ray to Settle and Bostic was not assignable, even to the plaintiff, Mrs. Woodcock, the plaintiff could not recover; but there is a strong intimation that she could have recovered if she had properly pleaded her equity, or set forth facts upon which equitable relief could be based. When the court said in that case, "she cannot have equitable relief, because she has prayed for none," it simply meant that there was no sufficient allegation of an equity upon which a prayer for such relief could be predicated, for we find it to be well settled by the decisions of this court that, if the plaintiff in his complaint states facts sufficient to entitle him to any relief, this court will grant it, though there may be no formal prayer corresponding with the allegation, and even though relief of another kind may be demanded. *Knight v. Houghtaling*, 85 N. C. 17; *Gillam v. Life Ins. Co.* 121 N. C. 369, 28 S. E. 470. In the case last cited, Clark, J., for the court, says: "Under the Code the demand for relief in a complaint is immaterial, and the court will give any judgment justified by the pleadings and proof,"—citing numerous cases. Clark's Code, 3d ed. p. 584, and notes to § 425.

In the case at bar, all the facts which in our opinion are necessary to constitute a good cause of action, even in equity, are set forth, and, besides the prayer for special relief, there is a prayer for general relief, or, to be more accurate, for other and further relief than that specially demanded. If the plaintiffs, by their pleadings and proof, are

entitled to recover against the defendants Brevard and Porter, even by way of subrogation, we would direct that relief to be administered, notwithstanding that in the argument below the particular equity was not claimed, but disclaimed; because we act, in the adjudication of rights, not upon arguments, but upon the pleadings and evidence, when there has been an involuntary nonsuit as in this case, or upon the pleadings and findings of the jury when there has been a verdict, the arguments of counsel being only intended to aid us in understanding the case, and not being in any sense an estoppel upon counsel or the party whom he may represent. Parties are bound by admission of facts, but not by arguments or admissions as to the law. Arguments of counsel are exceedingly valuable in enabling us to ascertain the true principles of law upon which the decision of the cause in its last analysis must rest, and especially so when they are as searching, able, and exhaustive as they were in the case at bar, and exhibit such a complete mastery by counsel of the facts and law of the case; but parties must not be concluded or prejudiced by any mistaken view of the law presented during the course of the argument in the lower court, or in this court. A contrary course would result in our deciding the case, not according to the law, but according to the argument. We do not intend to imply, for we do not think, that any admission has been made in this case in *arguendo* calculated to prejudice the plaintiffs, whose counsel may have chosen wisely and well among the several grounds of action open to him, and who may have selected the strongest one upon which to base his claim for relief.

It is not necessary that the plaintiffs should show in this case any right to equitable relief by way of subrogation. They contend that their equity, or, more properly speaking, their cause of action, whether legal or equitable, is a primary, and not a secondary, one; that Brevard, as the consideration for the purchase of the goods, promised and agreed, not merely to indemnify Blanton against any and all claims of his creditors, but to pay directly and immediately to his creditors who are named in the contract, and in the order and according to the classification therein stated, all of the said claims. This, the plaintiffs' counsel argued, impresses a trust upon the purchase price of the goods in the hands of Brevard. Conceding this to be so, we do not see how the condition of the plaintiffs is improved by reason of it. If Blanton had placed in the hands of Brevard a fund for the payment of his debts, or if Brevard, when he purchased the goods, had set apart a certain fund in payment of the purchase price of

the goods and for the purpose of paying Blanton's creditors, and if either of the funds, being capable of identification, had gone into the hands of Porter as assignee, the plaintiffs, or any other creditor of Blanton mentioned in the contract with Brevard, could follow the fund in the hands of Porter, and subject it to the payment of his claim. But such is not the case here. The purchase price of the goods consisted merely in the promise of Brevard to pay the claims of creditors, which he failed to do; and, while he is liable to Blanton, or to his creditors, for this breach of his contract, he did not assign to Porter any part of his property which can be said to represent a trust fund, and which can be applied to the claims of Blanton's creditors in preference to the claims of other creditors secured by Brevard's assignment. In other words, the law will not compel the assignee to set aside, for the benefit of Blanton or his creditors, an amount equal to the inventoried value of the goods received by Brevard under the contract in payment of the purchase price of the goods.

But the plaintiffs are entitled to relief in another aspect of the case. In the first place, they are creditors of Blanton, and are entitled to receive payment of their claims from Brevard under the provisions of the contract by which the latter purchased the goods and agreed to pay Blanton's debts, and being thus secured, and Brevard having failed to pay them the share to which they are entitled under the contract, they have the right to call on Brevard for an account of the debts and liabilities of Blanton secured by the contract, and of the amount of the purchase price applicable thereto, so as to ascertain the amount due from Brevard to them; and this amount they can recover from the assignee of Brevard if he has received any assets which should be applied to the payment of this debt. They acquired no priority by reason of the peculiar nature of Brevard's liability to them; but they occupied the same position that they would have held if they had been general creditors of Brevard at the time of the assignment. They are entitled, though, to have the assignee of Brevard account with them, so that it can be ascertained whether there are any assets in his hands which should be devoted to the payment of their claims against Brevard.

The plaintiffs are also entitled to recover from Porter, as guarantor, the amount due them from Brevard under the contract with Blanton, and Porter may absolve himself from this liability if he has sufficient assets for that purpose, or reduce the amount thereof, if he sees fit to do so, by voluntarily paying the plaintiffs whatever is due them

under the assignment; and, if the plaintiffs cannot make the full amount due them under the Brevard contract out of Porter, they can recover the balance out of any assets in the hands of Porter, as assignee, which are applicable to the payment of their claims; and, conversely, if the assets in the hands of the assignee are not sufficient to pay their claims, then Porter, as guarantor, will be liable for the balance. But the plaintiffs may proceed against Porter in the first instance for the recovery of the entire amount, or against the assignee for an account and settlement of his trust and the payment of the amount due to them; or they may proceed against both, as they may be advised. See *Brown v. Merchants' & F. Bank*, 79 N. C. 244, as explained and distinguished in *First Nat. Bank v. Alexander*, 85 N. C. 352, 39 Am. Rep. 702. As Porter covenanted that Brevard should faithfully perform the stipulations of his contract with Blanton, and "faithfully pay the price of the goods sold to him by said contract according to the terms thereof," he is an absolute guarantor of payment as distinguished from a guarantor of collection: and the plaintiffs have the right to sue him immediately upon his default, without first proceeding against and exhausting the principal. *Jones v. Ashford*, 79 N. C. 172; *Jenkins v. Wilkinson*, 107 N. C. 707, 22 Am. St. Rep. 911, 12 S. E. 630; *Hutchins v. Planters' Nat. Bank*, 130 N. C. 285, 41 S. E. 487; *Cowan v. Roberts* (at this term) 46 S. E. 979.

We have stated the general principles which we think are applicable to this case, and which, as we will now proceed to show, are sustained by recent decisions of this court.

In *Shoaf v. Palatine Ins. Co.* 127 N. C. 308, 80 Am. St. Rep. 804, 37 S. E. 451, it appeared that the plaintiff had received a policy of fire insurance from the Merchants' Insurance Company, and while the policy was in force the defendant, the Palatine Insurance Company, reinsured all the outstanding risks of the Merchants' Company. By the contract of reinsurance it was provided that no holder of a policy in the Merchants' Company should be entitled to enforce the contract against the Palatine company, but that they should sue the Merchants' Company alone; and the Palatine company agreed to pay all claims legally arising and duly proved against the Merchants' Company, and all costs and expenses of litigation. In that case the court held that the plaintiff, whose property had been destroyed by fire, and who had complied with the terms and conditions of his policy, was entitled to recover against the Palatine company. The court thus states the reason for its decision: "The plaintiffs were

neither a party to, nor in privity with, said contracts. The question is, Have they an interest in, or arising out of, the contract? The defendant is bound to indemnify the reinsured for all risks and loss, and the reinsured at the same time is bound to indemnify the plaintiffs for risks and loss. Does the defendant's liability inure to the benefit of the plaintiffs, and, if so, can the plaintiffs directly enforce their claim for loss against the defendant? The unearned premium at the date of the contract was a part of the consideration passing to the defendant for its risk and liability assumed. In this unearned premium the plaintiffs had an interest at the time of the reinsurance. The principle sanctioned by several respectable authorities is this: "If A, on receipt of a good and sufficient consideration, agrees with B to assume and pay a debt of the latter to C, then C may maintain an action directly on such contract against A, although C is not privy to the consideration received by A. The case before us seems to come within the same principle. Our Code (§ 177) provides that every action must be prosecuted in the name of the real party in interest. In all the cases close attention is given to the language of the agreement. In the present case the defendant expressly assumes the liability in case of loss, but agrees to pay to the Merchants' Company only after claims have been duly proved in an action against the Merchants' Company. . . . We can see no reason why the plaintiffs may not do directly that which it must be admitted they can do indirectly, nor do we see how the defendant is prejudiced thereby. The defendant suggests no such danger, but relies solely on the ground that it has no contract with the plaintiffs."

Our case is stronger than the one just cited, for Brevard expressly promised to pay to the creditors of Blanton, and his promise was based upon a good and sufficient consideration.

In *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L. R. A. 513, 70 Am. St. Rep. 598, 32 S. E. 720, the plaintiff sued the defendant, the water supply company, for damages to property alleged to have been caused by the negligent failure of the defendant to furnish water and a sufficient pressure at its hydrants for the purpose of extinguishing a fire which destroyed her property, the defendant having previously entered into a contract with the city of Greensboro, where the property was situated, to supply said city with water for extinguishing fires and for other purposes. In passing upon a demurrer to the complaint, this court, through the present chief justice, said: "One not a party or privy to a contract, but who is a beneficiary thereof, 65 L. R. A.

is entitled to maintain an action for its breach. This has been sustained by many decisions elsewhere,"—citing numerous cases from other states. 124 N. C., at page 333, 40 L. R. A., at page 516, 70 Am. St. Rep. 598, 32 S. E. 720.

But still more to the point is the case of *Gastonia v. McEntee-Peterson Engineering Co.* 131 N. C. 363, 42 S. E. 858, in which it appeared that one of the defendants, the engineering company, undertook to construct for the plaintiff, the town of Gastonia, "a waterworks, sewerage, and lighting system," and the other defendant, the American Surety Company, by a bond given for the purpose, guaranteed the performance of the contract by its codefendant. The plaintiffs, other than the town of Gastonia, sued the defendants for work and labor performed for and materials furnished to the engineering company in the construction of the works under their contract. The court held that the contract of the engineering company was made for the benefit of the persons who performed the labor and furnished the material; and, as there was an express provision for the payment of their claims, they were the beneficiaries of the contract; and that they, either singly or collectively, could sue the engineering company and its surety, and recover the amounts due to them respectively. The court distinguishes the case of *Morehead v. Wriston* from the case then under review, by the fact that in the former case there was no indication of any intent of the parties that the creditors of the old firm should have any benefit under the contract, the contract in that case being one strictly of indemnity. See also *Lacy v. Webb*, 130 N. C. 545, 41 S. E. 549, in which it is said: "If the state had been nothing more than the beneficiary of the bond, it could maintain this action;" and it is further said that "it is not a case, either of subrogation, or substitution," nor is it because the party for whose benefit the contract is made, and especially when the money due under it is to be paid directly to him, sues in his own right, and not in another's right to which he is subrogated by any principle of equity.

But we think the case of *Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 612, is directly in point. The doctrine there stated is that, if a third person promises the debtor to pay his antecedent debts in consideration of property placed in the hands of the promisor by the debtor for the purpose, which is afterwards converted into money, the creditors may recover on the promise, or for money had and received; "for although," says the court, "the promise is in words to pay the debt of another, and the performance of it discharges that debt, still the con-

sideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action;" and it is immaterial, as is further said by the court, whether the liability of the original debtor is continued or not, the promise being an independent and original one, founded upon a new consideration, and binding upon the promisor. In our case, though the property was not received for the purpose of being converted into money in order to pay the debt out of the proceeds, the promise to purchase it at a fixed price, and to pay the amount of that price to the creditors of the vendor, amounts to the same thing, and brings our case within the principle of the third class mentioned in *Mason v. Wilson* (which authorizes the creditor to sue directly), namely, "where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties." In such a case the creditors may sue the promisor, whether his debtor remains liable to him or not. *Threadgill v. McLendon*, 76 N. C. 24; *Stanly v. Hendricks*, 35 N. C. (13 Ired. L.) 86. In *Draughan v. Bunting*, 31 N. C. (9 Ired. L.) at page 13, Pearson, J., for the court, says that a new and distinct cause of action of the creditors against the third person, who receives money or the proceeds of property from the debtor to pay his debt, arises out of the promise, which is implied by law from the receipt of the money or the proceeds of the property to pay the debt; and that the creditor may sue directly on this promise. In our case, Brevard bought the property, and expressly promised, as the consideration of the purchase, to pay the debts of Blanton; and the two cases are, therefore, in principle the same. In *Threadgill v. McLendon*, 76 N. C. 24, Pearson, J., for the court, says substantially that, when a party receives property for another upon

a promise to pay that other's debt, the creditor can sue and recover, not on any promise implied from the receipt of the property, but on the direct and express promise to pay the amount of the debt. The promise is binding, and inures directly to the benefit of the creditor, because the promisor has received the consideration, and in justice should be made to perform his undertaking.

It was suggested on the argument by the plaintiffs' counsel that the goods bought by Brevard from Blanton were charged with a trust in the hands of Brevard in favor of Blanton's creditors, and it seems that some courts have so held the law to be. *Kaiser v. Waggoner*, 59 Iowa, 40, 12 N. W. 754; *Hamilton v. Barricklow*, 96 Ind. 398. We do not know to what extent the courts, in making those decisions, were influenced by the doctrine of the vendor's lien, which is an equity not recognized by this court.

Again, it may be that, if Brevard was insolvent when the sale to him was made, it would be void as against Blanton's creditors; and his assignee in that case would have to account for the goods to such of Blanton's creditors as are mentioned in the contract, if the goods went into his hands. But there is no evidence of Brevard's insolvency at that time. It is not necessary, though, that we should pass upon those two questions even if they were distinctly raised in the record, as the plaintiffs may be able to recover the amount of their claims from Porter upon the principles already stated, and the other matters may not be presented if the case should come back to us again.

We are of the opinion, upon a review of the whole case, that the plaintiffs have stated in their complaint a good cause of action against Brevard and Porter, and that there was evidence to sustain it. The court erred in its ruling.

The judgment of nonsuit must be set aside, and a new trial awarded.

NEW HAMPSHIRE SUPREME COURT.

Mary C. THOMAS

v.

James J. HARRINGTON et al.

(72 N. H. 45.)

A property owner cannot relieve himself from liability for injuries to a

NORM.—Liability of employer for acts of independent contractor where injury is direct result of work contracted for.

I. Scope of note, 743.

II. In general, 743.

III. Liability where stipulated work is illegal, 740.

65 L. R. A.

traveler upon the highway by reason of the negligent failure to guard and light, after dark, a trench opened in the highway to connect his dwelling with the street water main, by employing an independent contractor to perform the work.

(February 3, 1903.)

IV. Liability where performance of work will involve commission of trespass, 748.

V. Liability where performance of work will necessarily cause injury.

a. In general, 750.

b. Commission of nuisance, 751.

c. Blasting operations, 753.

TRANSFER by the Superior Court for Trafton County for the opinion of the Supreme Court, after verdict directed in defendants' favor, of an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Judgment for plaintiff.*

Defendants contracted with George W. McFadden to construct houses on their property, and the contract obligated McFadden to connect the premises with the street water main by a pipe laid 6 feet under ground. In performing that portion of his contract, McFadden opened a trench in the highway, which he left unguarded and unlighted on the evening of October 29, 1901. Plaintiff, while riding along the street, was injured by her horse falling into the trench.

Further facts appear in the opinion.

VI. *Liability where work is done according to plans furnished by employer, 754.*

VII. *Liability where work is done according to methods prescribed by employer, 755.*

I. Scope of note.

In the note to *Sallotte v. King Bridge Co.*, ante, 620, the authorities establishing and determining the limits of the rule relieving employers from liability for acts of independent contractors are presented, together with the decisions applying the rule to particular torts or acts.

As was pointed out in that note, there are certain exceptions to the rule referred to. It is proposed to present here the decisions in which the courts have applied one of these exceptions. The cases are arranged in such a manner as to facilitate comparison with similar cases, in which the courts have either applied the general rule, as shown in the note above referred to, or have applied one of the other exceptions, as will appear in the following notes: Note to *Jacobs v. Fuller & Co.*, post, —, on *Liability of employer for injuries caused by the performance of work by independent contractor, which is dangerous unless certain precautions are observed*; note to *Anderson v. Fleming*, 68 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer*; note to *Louisville & N. R. Co. v. Low*, 66 L. R. A. —, on *Liability of employer for injuries occurring in performance of work by independent contractor where employer's own act is a proximate cause of the injury*.

The authorities as to who are independent contractors are presented in note to *Richmond v. Sitterding*, ante, 445, on *Persons deemed to be independent contractors within meaning of rule relieving employer from liability*.

II. In general.

It is well settled that the rule as to the non-liability of an employer for the negligence of an independent contractor is "inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do." *Pickard v. Smith* (1861) 10 C. B. N. S. 470, 4 L. T. N. S. 470, per Williams, J. This passage was quoted with approval by Vaughan Williams 45 L. R. A.

Messrs. Everett C. Howe and Scott Sloan, for plaintiff:

The doctrine that one who lets work to an independent contractor is not liable to third persons for injuries resulting from the negligence of the contractor or his servants is subject to several important exceptions.

Wright v. Holbrook, 52 N. H. 120, 13 Am. Rep. 12; *Carter v. Berlin Mills Co.* 58 N. H. 52, 42 Am. Rep. 572; *Bailey v. Troy & B. R. Co.* 57 Vt. 252, 52 Am. Rep. 129; *Oovington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618.

The following exceptions to the general rule are supported by the weight of the authorities: (1) Where the act to be done is unlawful; (2) where the act to be done is intrinsically dangerous, or the injury resulted necessarily from the nature of the

L. J., in *Penny v. Wimbledon Urban Dist. Council* [1899] 2 Q. B. 72, 77, 68 L. J. Q. B. N. S. 704, 80 L. T. N. S. 615, 47 Week. Rep. 565, 63 J. P. 406.

"I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself." *Ellis v. Sheffield Gas Consumers' Co.* (1853) 2 El. & Bl. 767, 770, 2 C. L. Rep. 249, 23 L. J. Q. B. N. S. 42, 18 Jur. 146, 2 Week. Rep. 19, per Lord Campbell.

One of the grounds on which a person may be held responsible for an act of negligence which he did not himself commit is that he "authorized" that act. *Hardaker v. Idle Dist. Council* [1890] 1 Q. B. 335, 65 L. J. Q. B. N. S. 303, 74 L. T. N. S. 60, 44 Week. Rep. 323, 60 J. P. 196, per Smith, L. J.

A person who employs a contractor to do a particular act is liable for the injurious acts of the contractor which "flow out of the fulfilment of the contract." *Pitts v. Kingsbridge Highway Board* (1871) 10 Week. Rep. 884, 25 L. T. N. S. 195.

"The distinction appears to me to be that, when work is being done under a contract. If an accident happens, and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act, and is responsible for it." *Hole v. Sitteringbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 497, 30 L. J. Exch. N. S. 81, 3 L. T. N. S. 750, 9 Week. Rep. 274, per Wilde, B.

In the same case *Pollock, C. B.*, remarked that, "when the contractor is employed to do a particular act, the doing of which produces mischief," the doctrine by which the employer is exempted from liability is not applicable.

In his well-known opinion, delivered to the House of Lords, in *Mersey Docks & Harbour Board v. Gibbs* (1864) L. R. 1 H. L. 93, 114, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872, Blackburn, J., drew attention to the necessity of bearing in mind the "distinction between the responsibility of a person who causes

work, and not from the lack of care or skill on the part of those executing it; (3) where there is a personal and immediate duty on the part of the contractee to prevent or use due care to prevent the act or condition from which the injury arose.

The case at bar comes within all three of these exceptions.

16 Am. & Eng. Enc. Law, 2d ed. p. 201; *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Hardaker v. Idle District* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234; *Woodman v. Metropolitan R. Co.* 149 Mass. 340, 4 L. R. A. 213, 14 Am. St. Rep. 427, 21 N. E. 482; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Circleville v. Neuding*, 41 Ohio St. 468; *Covington & C.*

Bridge Co. v. Steinbrock, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269.

If the injury results from acts which are called for or rendered necessary by the contract, and not from acts which are merely collateral to it, the employer is liable.

Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; *Robbins v. Chicago*, 4 Wall. 678, 18 L. ed. 432; *St. Paul Water Co. v. Ware*, 16 Wall. 576, 21 L. ed. 488.

When a person or corporation, in prosecuting any work for his or its private benefit or gain, obstructs a highway, such private person or corporation is bound to see that the public easement is not impaired or endangered.

Chicago v. Robbins, 2 Black, 418, 17 L. ed.

something to be done which is wrongful, . . . and the liability for the negligence of those who are employed in the work," and observed that "liability for doing an improper act depends upon the order to do that thing," and that, in the cases to which this principle is applicable, "It is quite immaterial whether the actual actors are servants or not."

"If a contractor faithfully performs his contract, and a third person is injured by the contractor in the course of its due performance or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury." Seymour, J., in *Lawrence v. Shipman* (1873) 39 Conn. 586. Quoted with approval in *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32.

"If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible." Eaton v. *European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430.

"One who authorizes a work which is necessarily dangerous, and the natural consequence of which is an injury to the person or property of another, is justly to be regarded as the author of the resulting injury." *Jefferson v. Chapman* (1889) 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33.

The rule exempting employers from liability for negligence of independent contractors does not apply "where the performance of such contract in the ordinary mode of doing the work necessarily or naturally results in producing the defect or nuisance which caused the injury." *Carlson v. Stocking* (1895) 91 Wis. 432, 65 N. W. 58.

The antithesis between injuries arising from the manner in which the work is done and those arising from the fact that it is done is frequently traceable in the language of judges. See, for example, *Boswell v. Laird* (1857) 8 Cal. 409, 68 Am. Dec. 345 (Heath, J., *arguendo*); *Omaha v. Jensen* (1892) 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833.

In a case where it is sought to hold a lessor liable "for the tortious conduct of a lessee, if the terms of the lease led to the wrong complained of, the authorities show that in that case the lessor would be liable. . . . But if the subject be let for a lawful purpose, and the lease does not expressly or by implication per-

mit any injurious act to be done, the lessor would not be liable." *Duncan v. Magistrates of Aberdeen* (1877; Ct. of Sess.) 14 Scot. L. R. 803, per Lord Ormildale.

One of the cases in which the Georgia Civil Code of 1895, § 3819, declares the employer to be liable, is when the work is wrongful in itself, or, if done in the ordinary manner, would result in a nuisance.

The fact that the injury did not arise from the thing itself which the contractor agreed to do is the diagnostic mark of those "collateral" torts to which the term "collateral," or one of its equivalents, is applied. See subd. VII. a, of the note to *Sallotte v. King Bridge Co. ante*, 620, on *General rule as to absence of liability of employer for torts of independent contractor*.

In any case where the evidence renders such an instruction appropriate, a jury is correctly charged to the effect that, "If the necessary or probable effect of the performance of the work would be to injure third persons, or create a nuisance, then the defendant is not relieved from liability because the work was done by a contractor over which it had no control in the mode and manner of doing it." *Southern Ohio R. Co. v. Morey* (1890) 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269.

The exception to the independent contractor rule, involved in this note, is commonly referred to the conception that, under the circumstances, the employer is a joint tortfeasor with the contractor.

"It is not necessary that the relation of principal and agent, in the sense of one commanding and the other obeying, should subsist, in order to make one responsible for the tortious act of another; it is enough if it be shown to have been by his procurement and with his assent. The cases where the liability of one for the wrongful act of another has turned upon the relation of principal and agent are quite consistent with the party's liability irrespective of any such relation; as, if I agree with a builder to build me a house according to a certain plan, he would be an independent contractor, and I should not be liable to strangers for any wrongful act unnecessarily done by him in the performance of his work; but clearly I would be jointly liable with him for a trespass on the land, if it turned out that I had no right to build upon it." *Upton v. Townend* (1835)

298; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234.

A person or corporation on whom positive duties are imposed by law cannot avoid liability for injuries resulting from failure to perform such duties, by employing a contractor for the purpose.

16 Am. & Eng. Enc. Law, 2d ed. p. 197; *Pickard v. Smith*, 10 C. B. N. S. 470, 4 L. T. N. S. 470; *Woodman v. Metropolitan R. Co.* 149 Mass. 340, 4 L. R. A. 213, 14 Am. St. Rep. 427, 21 N. E. 482; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269.

Messrs. Batchellor & Mitchell and Smith & Smith, for defendants:

If the contractor needed any consent of

the selectmen to dig up a part of the highway, it was his business to obtain it, and there is nothing to show that he did not obtain it.

Ketcham v. Newman, 141 N. Y. 205, 24 L. R. A. 102, 38 N. E. 197.

The contract did not call upon the contractor to do any unlawful work, or to do work in an unlawful manner.

There is nothing in the case to show that the work to be done was necessarily dangerous, or that the injury resulted necessarily from the nature of the work.

Sanford v. Pawtucket Street R. Co. 19 R. I. 537, 33 L. R. A. 564, 35 Atl. 67; *Negus v. Becker*, 143 N. Y. 303, 25 L. R. A. 667, 42 Am. St. Rep. 724, 38 N. E. 290.

There was no duty resting upon the defendants in regard to laying the water pipe.

17 C. B. 30, 71, 25 L. J. C. P. N. S. 44, 1 Jur. N. S. 1089, 4 Week. Rep. 56, per Willes, J.

"There can be no such thing as an innocent agency in the commission of a tort; and doing an illegal or tortious act by another is doing it by one's self." *Alabama Midland R. Co. v. Coskry* (1890) 92 Ala. 254, 9 So. 202.

"Where the act contracted to be done is itself a wrong, the employer is liable to the injured party, as though he himself had done the injury. This liability does not, as when the wrongful act is done by his servant, rest upon the principle of *respondent superior*, but upon the fact that the employer is liable as a cotrespander with the independent contractor." *Crisler v. Ott* (1894) 72 Miss. 166, 16 So. 416.

"In none of these exceptional cases does the question of negligence arise. There the action is based upon the wrongful act of the party, and may be maintained against the author or the person performing or continuing it." *Berg v. Parsons* (1898) 156 N. Y. 109, 41 L. R. A. 391, 66 Am. St. Rep. 542, 50 N. E. 957.

"Before a case can be made calling for an application of that principle [*i. e.*, *respondent superior*] it must appear, not only that the relation of master and servant existed, but that the servant, without the assent of the master, has done some act, or omitted some duty, while executing the lawful commands of the master, to the injury of a third person. . . . But when the servant has done only that which the master commanded or permitted, the latter is chargeable as a joint participator in the wrong, and made liable for his own unlawful conduct, in the same manner as though no such relation had existed." *Carman v. Steubenville & I. R. Co.* (1854) 4 Ohio St. 399.

The following of the statement of the law by Willes, J., in *Holliday v. National Teleph. Co.* [1899] 1 Q. B. 221, 68 L. J. Q. B. N. S. 302, was not impugned in any way by the court of appeal, although the decision itself was reversed in [1899] 2 Q. B. 392, 68 L. J. Q. B. N. S. 1016, 81 L. T. N. S. 252, 47 Week. Rep. 658. It is quoted at length for the reason that it explains very clearly the rationale of the doctrine which, in the present point of view, determines the extent of the employer's liability. "If a person orders a thing to be done which, when done, or as done, is an interference with the safety or rights of another who, at the time he is injured, is in the exercise of his lawful rights, it 65 L. R. A.

is no answer to say that the person for whom the offending thing has been done has procured it to be done by virtue of a contract with someone independent of his interference or control,—'independent contractor' of the books. A man has a hole dug for him, into which a person lawfully passing near or over the spot falls without fault of his own, and is injured; a man has a piece of pavement laid down for him in a public highway, and leaves part of it projecting so that a passer-by, though exercising due care, trips against it, and is injured by the fall; a man has works constructed for him, not unlawful in themselves, but which, when done, by reason of their being badly or carelessly done, narrow an ancient highway, or infringe the provisions of an act of Parliament which says that a certain space must be left between the ground and the under side of a bridge, and, in consequence, an accident occurs causing injury to another,—in all these cases the person ordering the work to be done is liable. He has interfered with the *status quo*, having no right, as against his neighbor, to do so; and his neighbor has suffered injury in consequence. So if a man puts up a sign projecting over a highway, and it falls by reason of imperfect construction, and someone is injured. The person to whom the thing which does the mischief belongs, or who has caused it to be put, or who has maintained it, where it does the mischief, is liable, no matter whom he has employed to do it. The principle which underlies all these illustrations is that the person for whom the work has been done has failed to see to the doing of something which it was his duty to do, either by himself or by someone for him. The man who disturbs, or who fails to create, a state of things which other people have a legal right to expect at his hands, is liable for such disturbance or failure. The man who maintains an insecure weight hanging over the heads of passers-by fails in taking care that it shall not expose them to danger. The man who contracts a right of way, vertically or laterally, which the public have a right to enjoy in all its own height or width, and the man who digs a hole in a place where others have a right to expect no hole, disturb a state of things to which they have a legal right, and do it at their peril if an accident happens by reason of what has been done. In the same way, if the hole deprives a neighboring house of support to which it is entitled, the

unless the work was a nuisance *per se*, and unlawful; which is not found in the case, and which the court cannot assume as matter of law.

Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 267, 24 L. R. A. 109, 37 Am. St. Rep. 552, 35 N. E. 592.

It must affirmatively appear that the work contracted for was unlawful, or that it was necessarily dangerous, of which the defendants had actual or presumed notice, or that it was a nuisance *per se*, and the defendants knew it.

Carter v. Berlin Mills Co. 58 N. H. 52, 42 Am. Rep. 572; *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep. 113; *Bailey v. Troy & B. R. Co.* 57 Vt. 252, 52 Am. Rep. 129; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Berg v. Parsons*, 156 N. Y. 109, 41 L. R. A. 391, 66 Am. St. Rep. 542, 50 N. E. 957.

disturbance of the *status quo* is at risk of him who brings it about. But there is a broad and well-established distinction between such cases and those in which an accident has happened, not because the thing which has been ordered has been done badly, and in its bad state interferes with the rights of others, but because some process which may be natural or necessary in the course of effecting the result to be produced, forming, as it were, a mere incident in the train of operations, and leaving no trace upon the completed work, has been carelessly done by the contractor's servant. This is what Lindley, L. J., has termed (adopting language previously used) 'casual or collateral negligence,' and, as he has pointed out, the difficulty lies rather in the application than in the enunciation of the principle." *Holliday v. National Teleph. Co.* [1899] 1 Q. B. 221, 228, 68 L. J. Q. B. N. S. 302 (Wills, J.).

That the liability of the employer under such circumstances "rests upon the idea that he is a trespasser, by reason of his directing and participating in the work done, and not on the principle of *respondent superior*," was also laid down in *Kellogg v. Payne* (1866) 21 Iowa. 575. *Atlanta & F. R. Co. v. Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277.

In a logical point of view the above explanation seems to be decidedly preferable to that which is based upon the notion that, in cases of this type, "It cannot properly be said that the company reserves no control over the work, and the relation of master and servant does not exist;" that the contract controls and directs the action which causes the injury; and that "the contractor, in following the contract, becomes the agent or servant" of the employer. *McDonnell v. Rifle Boom Co.* (1888) 71 Mich. 61, 38 N. W. 681.

A plaintiff who seeks to hold the employer liable on the ground that the injury resulted from the act which the contractor agreed to do has the burden of proving that that act was inherently wrongful, and that it was authorized by the employer.

Where it is fairly inferable that the work "could have been done in a lawful manner, . . . It is to be presumed that the contractor was employed to do the work in a lawful, and not in a negligent or unlawful, manner." *Harrison v. Kiser* (1887) 79 Ga. 588, 4 S. E. 320. 65 L. R. A.

Walker, J., delivered the opinion of the court:

It is not necessary to decide whether McFadden was an independent contractor in the work of putting in the water pipe, or merely an agent of the defendants; for in either case the evidence was legally competent to support a verdict in favor of the plaintiff. From the written contract it appears that the defendants employed McFadden to build two houses upon their premises. One of the specifications of the contract was "to put in the water pipe from the main road, 6 feet under ground." The evident purpose of this provision was to secure a connection with the water main, which would require the digging of a ditch into the public highway. That the parties had in mind the excavation of a ditch in the highway is not open to doubt upon a rea-

III. Liability where stipulated work is illegal.

Where the necessary authority to undertake the specified work has not been obtained, or where it cannot be performed without violating an express legislative enactment, the mere fact that it is intrusted to an independent contractor will not relieve the person for whose benefit it is done from liability for such injuries as its execution may produce.

"If the thing complained of—that is, the work which the defendants procured to be done—could not be done otherwise than in an unlawful manner, no doubt they would be responsible for the consequences." *Peachey v. Rowland* (1853) 13 C. B. 182, 22 L. J. C. P. N. S. 81, 17 Jur. 704, per Maule, J.

In *Ellis v. Sheffield Gas Consumers' Co.* (1853) 2 K. & B. 707, 2 Ch. Rep. 249, 23 L. J. Q. B. N. S. 42, 18 Jur. 146, 2 Week. Rep. 19, the plaintiff, while passing along a street, fell over a heap of stones which had been left on the footway by the servants of a firm which had contracted to open trenches in order that the defendant might lay gas pipes. The trenches had been opened without any authority, and constituted a public nuisance. It was objected, for the defendants, that the cause of the accident was the negligence of the servants of the contractors, for which the defendants were not responsible. It was answered that the contract was to do an illegal act, *vis.*, to commit a nuisance; and, that being so, that the defendants were responsible. Discussing the contention of defendants' counsel, Lord Campbell said: "Mr. Jones argues for a proposition absolutely untenable, namely, that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. I perfectly approve of the cases which have been cited. In those cases the contractor was employed to do a thing perfectly lawful. The relation of master and servant did not subsist between the employer and those actually doing the work; and therefore the employer was not liable for their negligence. He was not answerable for anything beyond what he employed the contractor to do, and, that being lawful, he was not liable at all. But in the present case the

sonable construction of the contract. It was a necessary and anticipated part of the work which the defendants employed McFadden to do. Such an excavation in a street is a nuisance, because it renders public travel dangerous, and makes extra precautions necessary for the protection of travelers. Hence it became the duty of the defendants, who authorized and caused the ditch to be dug, to protect the public from the danger occasioned thereby. They knew the work could not be done, in its reasonable and proper prosecution, without increasing the danger of public travel in the highway at that point. The danger arose directly from the work which they required to be done, and not from the negligent manner of its performance. In such a case one cannot avoid responsibility for the consequences naturally to be apprehended in the course of the per-

formance of the work by employing another to do the work as an independent contractor. Upon the modern authorities, the question of liability, under such circumstances, does not depend upon an inquiry whether the parties sustain the relation of master and servant, or whether the contract between them makes the employee an independent contractor. The employer cannot absolve himself from the duty which, under the law, he owes to another with reference to the performance of work which is dangerous in itself,—as the digging of a ditch in the highway.

defendants had no right to break up the streets at all; they employed Watson Brothers to break up the streets, and in so doing to heap up earth and stones so as to be a public nuisance; and it was in consequence of this being done by their orders that the plaintiff sustained damage. It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done." The remarks of Wightman, J., were to the same effect: "It seems to me, as it did at the trial, that the fact of the defendants having employed the contractors to do a thing illegal in itself made a distinction between this and the cases which have been cited. But for the direction to break up the streets, the accident could not have happened; and, though it may be that, if the work men employed had been careful in the way in which they heaped up the earth and stones, the plaintiff would have avoided them, still I think the nuisance which the defendants employed the contractors to commit was the primary cause of the accident." Erie, J., succinctly stated his conclusion as follows: "I agree that there should be no rule, on this specific ground that, as I understand the facts, the cause of the accident was the very thing done in pursuance of the specific directions of the defendants contained in their contract; and that in my opinion makes the distinction between the present case and those cited, in which the cause of the accident was the negligence of those doing the thing, not the thing itself." By the other judges the decision was put upon a different ground.

An employer is responsible for damages resulting from work done in the course of the performance of a contract which authorized the contractors to make use of materials which could not be taken without infringing a statute. *Pitts v. Kingsbridge Highway Board* (1871) 19 Week. Rep. 884, 25 L. T. N. S. 195.

A landowner who enters into a contract for the erection of a building on a plan which is prohibited by a valid by-law of a city is liable to an adjoining proprietor for any damage which may be caused by the erection of the building. *Walker v. McMillan* (1882) 6 Can. S. C. 241, Affirming (1881) 21 N. B. 31.

45 L. R. A.

In *Carter v. Berlin Mills Co.* 58 N. H. 52, 42 Am. Rep. 572, the defendant was held not to be responsible for flowing the plaintiff's land, not merely because it had employed an independent contractor to float the logs down the river, but also because the injury was not the direct result of the work it employed.

A person who, without special authority, makes or continues a covered excavation in a public street or highway, for a private purpose, is, in the absence of negligence in the party injured, responsible for all injuries resulting from the way being thereby rendered less safe, irrespective of any degree of care and skill in the party who makes or continues the excavation. *Congreve v. Smith* (1858) 18 N. Y. 79 (plaintiff fell through a flagstone over an area which the defendant had excavated without obtaining a license). The court said: "It is no answer to the present action that the covering of the area was done under the contractors, who had contracted to do the work properly, and that the defendants are not responsible for the negligence of the contractor's servants. The act was that of the defendants; they procured it to be done, and do not appear to have objected to it. Besides, the action may well stand on the basis of continuing the area and the stone covering it, they making the easement unsafe, compared with what it otherwise would have been. That is a sufficient ground of liability. The defendants were bound, at their peril, to make and at all times keep the street as safe as it would have been if the area had not been constructed."

In a later case *Selden, J.*, in discussing the doctrine thus enunciated, remarked that it could not be material whether the excavation was a covered or an open one, provided it was unauthorized, and proceeded thus: "The fact chiefly relied upon in the defendant's behalf, that the injury resulted immediately from the negligence of a contractor, who was doing the work upon his own responsibility, and was bound by his contract with the defendant to guard, by proper precautions, against accidents, does not constitute a defense to the action. The excavation was made on the defendant's account and at his request, in a public street, for a private purpose of the defendant, in which the public had no interest, and, so far as the case discloses, without the consent of the corporate authorities. The act of making the excavation was wrongful, without reference to the manner in which it was made or secured. The defendant was, therefore, liable for the injury which the excavation produced to third persons, without fault on their part, whether the workmen

ployed the Thurstons to do. The court says (p. 59, 58 N. H. p. 579, 42 Am. Rep.): "The plaintiff's injury was not the natural result of the work contracted to be done. A reasonable use of the dams for proper purposes, and a reasonable use of the stream for the transportation of logs, were lawful, and the authority conferred by the defendants was to execute the contract by a proper and reasonable use of all its means and appliances." If it had appeared in that case that the work which the contractors agreed to do would necessarily produce the damage the plaintiff suffered, it is believed the opposite result would have been reached, as was the case in *McDonnell v. Rifle Boom Co.* 71 Mich. 61, 38 N. W. 681. It was held in that case that where a boom company, having full

control and management of a stream and the dams thereon, contracts for driving logs therein, the reasonable performance of which contract obliges the contractor to so run and manage the logs and water as to damage riparian owners, such damage is legally attributable to the company, and may be recovered of it. This doctrine is recognized in *Knowlton v. Hoit*, 67 N. H. 155, 30 Atl. 346, and in *Manchester v. Warren*, 67 N. H. 482, 32 Atl. 763. See also *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 71 N. H. 522, 60 L. R. A. 116, 53 Atl. 807. In *Bower v. Peate*, L. R. 1 Q. B. Div. 321, 326, Lord Cockburn says: "There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences

were guilty of negligence or not. . . . The basis of the defendant's liability is his own wrongful act in procuring the excavation to be made without authority, and not the negligence of the contractor or his workmen in performing or guarding the work." *Creed v. Hartmann* (1864) 29 N. Y. 591, 86 Am. Dec. 341 (plaintiff fell through planks stretched across a trench dug for a sewer).

If the plans supplied by the defendant for a building to be erected by him did, as a matter of fact, violate the provisions of a specific statute applicable to the class of work in question, he cannot exculpate himself by showing that they were approved by the officials of the civic department which exercises a supervision over such work. Such a department cannot authorize the execution of work on an illegal plan, nor absolve the defendant from his statutory duty. *Pitcher v. Lennon* (1896) 12 App. Div. 356, 42 N. Y. Supp. 156, where the provisions of the New York building law were not complied with.

One is liable for an injury caused by the slipping of a stone which was so placed on the sidewalk of a city street, in front of his premises, in violation of an ordinance, as to constitute a nuisance, although it was placed there by an independent contractor only two or three days before. *Skelton v. Larkin* (1894) 82 Hun. 388, 31 N. Y. Supp. 234, Affirmed in (1895) 146 N. Y. 865, 41 N. E. 90.

In *Clark v. Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590, the court, while recognizing the principle exemplified in the cases above cited, reversed the judgment for the plaintiff for the reason that the trial judge had instructed the jury on the theory that an excavation made by a contractor in front of the defendant's premises was necessarily unlawful, because it was not done under a license.

For other cases in which the principle stated in the text has been recognized, see *Shea v. River Bridge & K. Drainage Board* (1880) Ir. L. R. 6 C. L. 179 (opinion of Brien, J.); *Ware v. St. Paul Water Co.* (1870) 2 Abb. (U. S.) 261. Fed. Cas. No. 17,172; *Colgrove v. Smith* (1894) 102 Cal. 220, 27 L. R. A. 590, 36 Pac. 411; *Wabash, St. L. & P. R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296; *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Berg v. Parsons* (1898) 156 N. Y. 109, 41 L. R. A. 391, 66 Am. St. Rep. 542, 50 N. E. 957. 65 L. R. A.

It will be observed that, by changing the logical standpoint, the cases which have been made to turn upon this principle may, without difficulty, be brought within the purview of another principle, *viz.*, that a person who is subject to a statutory duty must, at his peril, see that it is fulfilled whether the work to which it is incident is or is not let out to an independent contractor. (See subd. III. of note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor resulting from nonperformance of absolute duties.*)

IV. Liability where performance of work will involve commission of trespass.

"Where a trespass has been committed upon the rights or property of another by the advice or direction of a defendant, it is wholly unimportant what contractual or other relation existed between the immediate agent of the wrong and the person sought to be charged. The latter cannot shelter himself under the plea that the immediate wrongdoer did the act in execution of a contract, or that he came within the definition of an independent contractor as to the performance of the work in the execution of which the tortious act was committed. If he advised or directed the act his liability is established." *Ketcham v. Newman* (1894) 141 N. Y. 205, 24 L. R. A. 102, 36 N. E. 197.

A railway company is liable for the trespass of a contractor in building a portion of the road upon land not owned by it, if it appears that the work was done under its direction, or the contractor's action was ratified by it. *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430.

A railroad company, by whose direction a contractor for the construction of its road enters and builds the road upon the land which it has acquired, without having condemned an existing leasehold interest, or acquired that interest in any other manner, is liable, as a joint tortfeasor with the contractor and his servants, for damages done by them, in the prosecution of the work, to the crops of the lessee. *Ullman v. Hannibal & St. J. R. Co.* (1877) 67 Mo. 118. The court said: "The right of way acquired by the defendant was subject to the leasehold interest of the plaintiff. It is clear that the defendant had no right to enter upon the land in question without the plaintiff's consent; and,

can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise." To the same effect are *Hardaker v. Idle District* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196; *Penny*

v. Wimbledon Urban [1898] 2 Q. B. 212, 217, 67 L. J. Q. B. N. S. 754, 78 L. T. N. S. 748, 62 J. P. 582; *Holliday v. National Teleph. Co.* [1899] 2 Q. B. 392, 68 L. J. Q. B. N. S. 1016, 81 L. T. N. S. 252, 47 Week. Rep. 658; *Gray v. Pullen*, 5 Best & S. 97, 34 L. J. Q. B. N. S. 265, 11 L. T. N. S. 569, 13 Week. Rep. 257.

The American courts generally take the same view of the law. In *Robbins v. Chicago*, 4 Wall. 657, 678, 18 L. ed. 427, 432, it is said that an employer is liable "where the work to be done necessarily constituted an obstruction or defect in the street or highway, which rendered it dangerous as a way for travel and transportation unless properly guarded or shut out from public use; that in such cases the principal for whom the

having no such right itself, it could confer none upon the contractor and his workmen. The contractor and his workmen were, therefore, trespassers, and having gone there at the instance and by the direction of the defendant, for the purpose of constructing its road, the defendant was also a trespasser with them, and as such was jointly liable for all damages directly resulting from the work done by them in the execution of the contract." *Clark v. Hannibal & St. J. R. Co.* (1865) 36 Mo. 202, was distinguished on the ground that the defendant had there acquired a complete and perfect right to enter upon the land of the plaintiff and construct its road, and the trespasses complained of were committed by the servants of the contractors who had engaged to do the work.

In a case where the injury complained of was that the construction of a railway was commenced before the legal condemnation of the land, the defendant company's answer was, that the acts complained of were done by subcontractors for the construction of its road, and that, in order to construct the same, it was necessary to enter upon plaintiff's land. The court said that this was in effect an admission that the work constituting the acts complained of was done under a contract entered into by defendant, or, in other words, that the defendant had contracted for its performance, and thereby directed it to be done, and that, under such circumstances the defendant's liability was the ordinary liability of one who commands or directs the commission of a trespass. *Leber v. Minneapolis & N. W. R. Co.* (1882) 29 Minn. 250, 13 N. W. 31.

If the facts presented are such as to render the distinction material a requested charge to the effect that a railway company is not liable for trespasses committed by a contractor for the construction of the road is properly qualified by the proviso that, if the construction was attempted under such circumstances as to make an entry on the premises for that purpose a trespass, the defendant was liable notwithstanding the contract. *Houston & G. N. R. Co. v. Meador* (1878) 50 Tex. 77 (fences were torn down by the contractor, and the crops in a field were damaged).

The council of a city, being empowered to abate nuisances, and also to straighten, widen, and otherwise improve the bed or channel of either branch of a river within the city limits, passed an ordinance declaring one branch of

said river, within said limits, a public nuisance, and providing for its abatement by the excavation of a new channel across plaintiff's premises. Afterwards, pursuant to a contract let by the board of public works of said city, in its name, for the excavation of said new channel, acts were done by the contractor constituting a trespass on plaintiff's premises. It was held that the city was liable, the action of the council being within the scope of its general powers, and taken in the belief that it was exercising a lawful power for the public good. *Hamilton v. Fond du Lac* (1876) 40 Wis. 47.

When a city, acting within its general powers to improve streets, makes a contract for the grading of a street, by the terms of which the contractors, in consideration of doing such grading, are to receive and appropriate to their own use all the stone in the street; and, under and in accordance therewith, the contractors proceed to remove the stone,—they are the agents of the city in the premises, and the city is responsible for their acts. *Rich v. Minneapolis* (1887) 37 Minn. 423, 5 Am. St. Rep. 861, 35 N. W. 2.

The state is liable for all trespasses committed by a contractor with the knowledge and acquiescence of its agents, in executing a contract to excavate rock from the bed of a stream in which it has no right except to use the water. Its responsibility is then referable to the fact that its original entry upon the land, and its direction to do the work, were wrongful *per se*. But its liability for the act of the contractor in piling waste material upon riparian land, where it has the right to remove the rock from the stream, depends upon the fact whether or not such act was authorized, sanctioned, or directed by it. *Coleman v. State* (1892) 134 N. Y. 564, 31 N. E. 902.

That a person who employs an independent contractor to build a house on land on which the employer has no right to build it is jointly liable with the contractor for trespass, was a doctrine treated by Willes, J., as being beyond dispute. *Upton v. Townsend* (1855) 17 C. B. 30, 25 L. J. C. P. N. S. 44, 1 Jur. N. S. 1089, 4 Week. Rep. 56 (for the entire passage, see II., *supra*.)

Where the alleged ground of an action of trespass to real estate was the extension of an excavation for a cellar and foundation of a building beyond the defendant's lot upon that of the plaintiff, and it appeared that such excavations

work was done could not defeat the just claim . . . of the injured party by proving that the work which constituted the obstruction or defect was done by an independent contractor. . . . Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." See also *St. Paul Water Co. v. Ware*, 16 Wall. 566, 576, 21 L. ed. 485, 488; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234; *Woodman v. Metropolitan R.*

Co. 149 Mass. 335, 4 L. R. A. 213, 14 Am. St. Rep. 427, 21 N. E. 482; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 522, 28 Atl. 32; *Deming v. Terminal R. Co.* 169 N. Y. 1, 88 Am. St. Rep. 521, 61 N. E. 983; *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269; *Circleville v. Neuding*, 41 Ohio St. 465; *Hawver v. Whalen*, 49 Ohio St. 69, 14 L. R. A. 828, 29 N. E. 1049; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 224, 76 Am. St. Rep. 375, 55 N. E. 618; *Matheny v. Wolffs*, 2 Duv. 137; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Independence v. Slack*, 134 Mo. 66, 34 S. W. 1094; *Spence v. Schultz*, 103 Cal. 208, 37 Pac. 220. In *Wright v. Holbrook*, 52 N. H. 120, 13 Am. Rep. 12, the defendant, as one of a committee representing the town of Keene, employed Nourse as an independent contractor to clear a piece of woodland be-

were made by the defendant's son under a very indefinite contract with the defendant for the erection of a house for the defendant, it was held that, if such trespass was committed by the direct execution of plans devised and employed by the defendant, either by his previous command or by his subsequent ratification, he would be liable for the same. *Mamer v. Lussem* (1872) 65 Ill. 484.

An instruction is erroneous, which embodies the doctrine that a person who contracts for the erection of a building is not responsible where the work has been let to a contractor, although he may have told such contractor to make the building 60 feet front, and this direction may have rendered it necessary to encroach upon the adjoining premises in making the excavation for the foundations. The defendant is bound to know the width of his lot; and if he becomes a party to any encroachment upon the premises of his neighbor, and his neighbor's house is destroyed, he is a cotrespasser, and is as responsible as though he himself made the excavation. *Williamson v. Fischer* (1872) 50 Mo. 198 (neighbor's house fell because deprived of lateral support).

An instruction embodying the doctrine that the independence of the contract was conclusive in the defendant's favor was held to have been properly refused, where that contract provided for the cutting of timber upon another person's land. *Crisler v. Ott* (1894) 72 Miss. 166, 16 So. 416.

It has been held that the owner of a building is not liable for injuries to the child of a tenant because of the negligence of an independent contractor to whom he has surrendered possession of the premises for the purpose of improving the building, although such owner has no consent of the tenant to enter upon the premises. *McDermott v. McDanel* (1894) 55 Ill. App. 226. The court remarked that entering upon the work without the consent of the parents of the child was no wrong to anybody else, whether a member of the family or not. But the decision seems to be of very dubious correctness.

As to liability of the employer where the trespass was merely collateral, and not a direct result of the work contracted for, see subd. VII., d, of note to *Sallotte v. King Bridge Co.*, ante, 620, on *General rule as to absence of liability of employer for torts of independent contractor.* 65 L. R. A.

V. Liability where performance of work will necessarily cause injury.

a. In general.

In a large number of decisions employers have been held responsible for the acts of independent contractors, on the ground that the stipulated work, however carefully it might be performed, would necessarily cause some definite and specific damage either to the complainant individually, or to the particular class of persons to which he belonged, or to the public generally.

In *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32, and *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461, the following passage from Cooley on Torts, p. 547, is referred to with approval; "The employer must not contract for that the necessary or probable effect of which would be to injure others."

An employer is liable for the acts of an independent contractor under a "contract in its very nature and necessarily injurious to a third person." In such a case the injury does not result from the manner in which the work is done, but from the fact that it is done at all. *Williams v. Fresno Canal & Irrig. Co.* (1892) 96 Cal. 14, 31 Am. St. Rep. 172, 30 Pac. 961.

In denying the right of the plaintiff to recover against the employer the courts sometimes take occasion to declare the inapplicability of this rule; as where it is stated that the case was not one in which the defendant "contracted for work to be done which would necessarily produce the injuries complained of." *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267.

The form in which this rule is enounced above indicates that it is not applicable, generally speaking, to cases in which the work would not have entailed any injurious consequences if it had been carefully executed.

In *Chartiers Valley Gas Co. v. Waters* (1888) 128 Pa. 220, 16 Atl. 423, the trial judge had charged the jury that, if the defendant gas company undertook to lay its main along the street of a certain city, it owed to another company which already had its pipes there, and to the property holders, and to the public, a duty of supporting such pipes; and that, if an es-

longing to the town; and it was held that he was not liable for damages caused by a fire which was set by Nourse to burn the brush on the lot, and which escaped, through the latter's negligence, onto the plaintiff's adjoining wood lot. The questions whether the work Nourse was employed to do was essentially dangerous to the property of others, and whether, if it was, the defendant could escape liability therefor because of the contract, were not discussed by the court or raised by counsel. If it is assumed that the work done in a reasonable way, or in the way contemplated by the parties, would not constitute a menace to the property of others, and require extra precautions for protection, the decision is in accord with the general rule that the employer is not liable for the negligence of an independent contractor; and it is prob-

able the court adopted that view of the nature of the contract. In the case of *Black v. Christchurch Finance Co.* [1894] A. C. 48, 63 L. J. P. C. N. S. 32, 6 Reports, 394, 70 L. T. N. S. 77, 58 J. P. 332, under a similar state of facts, the defendant was held liable.

As the case does not disclose that permission was obtained from the selectmen to dig up the street by either the defendants or McFadden (Pub. Stat. chap. 82, §§ 1, 2), the effect of such permission upon the defendants' liability, if any, has not been considered. The result is that the order of the court directing a verdict for the defendants was error.

Exceptions sustained.

Chase, J., absent. The others concur.

cape of gas was caused by its failure to perform this duty, the fact that the work of laying the main had been intrusted to a contractor did not absolve it from liability. Commenting upon this instruction, the supreme court said: "The learned judge seems to think that because the pipe of the Philadelphia Company was necessarily undermined and therefore contemplated by the contract, it changes the rule, because it is a necessary interference with the rights of others. The answer is, there is no necessary interference with the rights of others unless negligence exists. Both companies had their rights, and they are perfectly consistent with each other. If the company itself was guilty of negligence she would be liable for consequent injury to another's rights; if the contractor alone is guilty, he alone is liable." It is very doubtful, however, whether this would be accepted as correct in all jurisdictions. The circumstances would rather seem to demand an application of the doctrine reviewed in the note to *Jacobs v. Fuller & H. Co. post*, —, on *Liability of employer for injuries caused by the performance of work by independent contractor which is dangerous unless certain precautions are observed*.

Upon the ground above stated, the principal employer has been held to be liable where the property of an abutting owner was damaged as a result of the grading of a street by a municipal corporation. *Sewall v. St. Paul* (1874) 20 Minn. 511, Gil. 459.

He has also been held liable where access to the premises of a landowner was obstructed as a result of the excavation of a railway cutting, which entailed an alteration of the grade of the street on which the premises abutted. *Alabama Midland R. Co. v. Coskry* (1890) 92 Ala. 254, 9 So. 202. It was remarked that responsibility is imposed upon a railway company for every wrong done by a contractor within the limits of his duties in grading its roadbed, for the reason that such grading is conclusively presumed to have been done pursuant to its directions given through its engineer. The court therefore declined to accept the contention of counsel that the proof failed to connect the defendants with the commission of the wrong complained of, inasmuch as, for aught that appeared, the subcontractor, who did the grading, was alone responsible for the depths of the cuts

or excavations, and that he might, by shallower cuts, have avoided the injury for which plaintiff claimed damages.

A similar ruling was made in *Alabama Midland R. Co. v. Williams* (1890) 92 Ala. 277, 9 So. 203, where it was held that an action lies under such circumstances, although the landowner sold to the railroad company a right of way through his property, unless the terms of the sale, or the attendant circumstances, authorize the inference that the resulting damage was included in the compensation paid.

And where, in the proper performance of a contract for the construction of a public sewer, the surface of adjoining land, no part of which is taken for the purpose of the work, cracks and settles, and buildings thereon are injured by reason of the removal of the subsoil, consisting in part of quicksand, the principal employer has been held liable. *Cabot v. Kingman* (1896) 166 Mass. 403, 33 L. R. A. 45, 44 N. E. 344 (Holmes, Knowlton, and Lathrop, JJ., dissented). It was held to be immaterial that the soil was removed by means of pumps from the trench into which it had fallen by its own weight, or had been carried by percolating water.

In *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91, recovery was denied for a similar injury, on the ground that the damages were consequential, and the plan adopted was reasonably safe.

Where a landlord, without his tenant's consent, authorizes an adjoining owner to tear down and rebuild a party wall of the store occupied by the tenant, he is liable for the damages suffered by the tenant. *Northern Trust Co. v. Palmer* (1898) 171 Ill. 383, 49 N. E. 553, Affirming (1897) 70 Ill. App. 93. The contract here in question was made with the adjoining owner. In the lower court the decision was put upon the ground that the stipulated work was such as would necessarily damage the tenant. In the supreme court the operations were viewed as a breach of an implied covenant that the lessee should quietly enjoy.

b. Commission of nuisance.

Where the creation of a nuisance is a direct and necessary incident of the stipulated work as a whole, the principal employer is liable.

Peachey v. Rowland (1853) 13 C. B. 182, 17 Jur. 764, 22 L. J. C. P. N. S. 81 (*arguendo*); *Dressell v. Kingston* (1884) 32 Hun, 533; *Johnston v. Phoenix Bridge Co.* (1901) 169 N. Y. 581, 62 N. E. 1096, Affirming (1899) 44 App. Div. 581, 60 N. Y. Supp. 947 (injury resulted from the failure of the contractor to place lights to warn passers-by of the presence of an obstruction created by a barrier which he erected around a ditch dug in the street); *Ware v. St. Paul Water Co.* (1870) 2 Abb. (U. S.) 261, Fed. Cas. No. 17,172 (wagon overturned by obstruction in street created by trenches dug for laying water pipes, and by steam drills); *Deford v. State* (1868) 30 Md. 179 (cornice projecting dangerously far out into the street fell on a passer-by); *Spence v. Schultz* (1894) 103 Cal. 208, 37 Pac. 220 (excavation 14 feet deep in the sidewalk of a street in a city); *Earl v. Beadleston* (1877) 10 Jones & S. 294 (party wall weakened as a result of the taking down of a house); *Salvas v. New City Gas Co.* (1879; Quebec) 2 L. N. S. C. 97 (horse fell into pit excavated in street of city); *Seymour v. Cummins* (1889) 119 Ind. 148, 5 L. R. A. 126, 21 N. E. 549 (action held maintainable where the injury charged was, that a drainage ditch obstructed the plaintiff's access to his premises; that the soil of his lot fell into it; and that stagnant and filthy water was allowed to remain in it).

In *Blake v. Thirst* (1863) 2 Hurlst. & C. 20, 32 L. J. Exch. N. S. 188, 8 L. T. N. S. 251, 11 Week. Rep. 1034, where the plaintiff was injured by falling at night into an unfenced and unlighted sewer, which a subcontractor had been employed to excavate. *Pollock, C. B.*, expressed the opinion, during the argument of counsel, that the principal contractor was liable on the ground that the injury was caused by the thing contracted to be done. In his judgment he put his decision on the ground that the act which caused the mischief was done by the order and under the immediate directions of the defendant.

In *Hole v. Sittlingbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 30 L. J. Exch. N. S. 81, 3 L. T. N. S. 750, 9 Week. Rep. 274, a contractor employed by a railway company to build a drawbridge over a navigable river executed the work so unskillfully that it was found impossible to open the bridge for vessels passing up and down. The company was held to be liable for damages caused by the obstruction to navigation which had thus been created. *Pollock, C. B.*, said that he rested his judgment "simply on the ground that there is a distinction between mischief which is collateral and that which directly results from the act which the contractor agreed to do." *Wilde, B.*, said: "The present defendants were authorized to take land for the purpose of their railway, and to build a bridge over the Swale. Instead of erecting the bridge themselves, they employed another person to do it. What was done was done under their authority. In the course of executing their order, the contractor, by doing the work imperfectly, obstructed the navigation. It is the same as if they had done it themselves. It is not distinguishable from the case where a landowner orders a person to erect a building upon his land which causes a nuisance. The person who ordered the structure to be put up is liable, and it is no answer for him to say that he ordered it to be put up in a different form." As the acts which authorized the company to build the bridge in this case provided that it

should not be lawful to detain any vessel navigating the river for a longer time than was sufficient to enable any carriages, etc., ready to traverse, to cross the bridge, it would seem that the defendant might also have been held liable on the ground of the contractor's having infringed a statutory duty. See subd. III. of note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from non-performance of absolute duties of employer*.

A canal company is liable to a landowner adjoining the line of the canal for damage caused by a contractor's scraping off the surface of his field to obtain material for the banks of the canal, where the contract, as drawn, could not be executed without doing the work in this manner. *Williams v. Fresno Canal & Irrig. Co.* (1892) 96 Cal. 14, 31 Am. St. Rep. 172, 30 Pac. 961.

In *Skelton v. Fenton Electric Light & P. Co.* (1894) 100 Mich. 87, 58 N. W. 609, it was held that the plaintiff, a worker in marble, would be entitled to recover upon proof of the facts set out in a declaration which alleged that his monuments were injured by large quantities of soot and other substances, which collected on the defendant's iron smokestack, and were blown on to the monuments on the plaintiff's premises. As the injury was the natural result of erecting such a smokestack at that place, the defendant was precluded from raising the defense that it had been erected by an independent contractor.

In *Carlson v. Stocking* (1895) 91 Wis. 432, 65 N. W. 58, the liability of the employer was held to be a question for the jury, where the plaintiff's land was flooded by the water which escaped through a dam belonging to the employer, when it was opened by the contractor to give a passage for the logs which he had agreed to drive to a certain point.

On the express ground that the fact that some of the garbage which had been deposited in a lake was carried against a fishing net by the ordinary movement of the water was not a necessary or natural result of the work of depositing such garbage, it was held that the defendant city was not liable for the negligence of the person who had contracted for the deposit of the garbage at some point not less than 15 miles from the city. *Kuehn v. Milwaukee* (1896) 92 Wis. 263, 65 N. W. 1030.

For other cases recognizing the doctrine that the employer is liable if the act contracted to be done will produce a nuisance, see *Shea v. River Bride & K. Drainage Board* (1880) Ir. L. R. 6 C. L. 179 (subd. VII. f, of note to *Jacobs v. Fuller & H. Co. post.*); *Overton v. Freeman* (1852) 11 C. B. 807, 874, 3 Car. & K. 52, 21 L. J. C. P. N. S. 52, 16 Jur. 65, per *Cresswell, J.*; *Ware v. St. Paul Water Co.* (1870) 2 Abb. (U. S.) 261, Fed. Cas. No. 17,172; *McNamee v. Hunt* (1898) 30 C. C. A. 653, 59 U. S. App. 9, 87 Fed. 298; *Birmingham v. McCary* (1887) 84 Ala. 469, 4 So. 630; *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345; *Atlanta & F. R. Co. v. Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277; *Florsheim v. Dullaghan* (1895) 58 Ill. App. 593; *Wabash, St. L. & P. R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep. 690, 12 N. E. 296; *Kellogg v. Payne* (1866) 21 Iowa, 575; *Connors v. Hennessey* (1873) 112 Mass. 96; *State, Redstrake, Prosecutor, v. Swayze* (1889) 52 N. J. L. 129, 18 Atl. 697; *Berg v. Parsons* (1898) 156 N. Y. 109, 41 L. R.

A. 391, 66 Am. St. Rep. 542, 50 N. E. 957; *Upington v. New York* (1901) 185 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Southern Ohio R. Co. v. Morey* (1890) 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 289; *Sanford v. Pawtucket Street R. Co.* (1896) 19 R. I. 537, 33 L. R. A. 564, 35 Atl. 67; *Emmerson v. Fay* (1896) 94 Va. 60, 26 S. E. 386.

The fact that the contract was not one which looked to the creation of conditions amounting to a nuisance is frequently adverted to as an element in cases where the employer was held not to be liable. See, for example, *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 24 L. J. Q. B. N. S. 138, 1 Jur. N. S. 677, 3 Week. Rep. 181, 3 C. L. Rep. 700; *Hackett v. Western U. Teleg. Co.* (1891) 80 Wis. 187, 49 N. W. 822; *Molline v. McKinnie* (1888) 30 Ill. App. 419 (excavation in front of a house under erection); *Martin v. Tribune Asso.* (1883) 30 Hun, 391 (vault dug under a street by permission of the city authorities); *Ryan v. Curran* (1878) 64 Ind. 345, 31 Am. Rep. 123 (passer-by fell through a grating into a cellar underneath a sidewalk); *City & Suburban R. Co. v. Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643 (steam engine used to haul cars along a railway track on a highway); *Ferguson v. Hubbell* (1884) 97 N. Y. 507, 49 Am. Rep. 544 (clearing off wood and brush from land); *Susquehanna Depot v. Simmons* (1886) 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434 (similar facts); *Vanderpool v. Husson* (1858) 28 Barb. 196 (derrick extending over a sidewalk and used to raise a roof to a house); *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113 (ditch dug in street for the purpose of laying a pipe from a spring).

In a case where the defendant, the landlord of the plaintiff, had employed a contractor to remove the walls of an adjacent building also owned by him, it was held that no recovery could be had for the damage which the plaintiff's goods suffered as a consequence of the performance of the work. The decision was put upon the ground that the work did not necessarily entail the infliction of the injury. But emphasis was also laid on the fact that the lease did not contain any covenant to repair, or keep in repair, the premises, or that the adjacent property should remain in the same condition as at the time of hiring. (See subd. XI. of note to *Anderson v. Fleming*, 66 L. R. A. —, dealing with the liability of the employer in case of nonperformance of absolute duties.) *Rotter v. Goerlitz* (1891) 16 Daly, 484, 12 N. Y. Supp. 210.

c. *Blasting operations.*

Under this head particular attention should be directed to several cases in which the defendant was held to be liable for injuries caused by blasting operations.

In *Hay v. Cohoes Co.* (1849) 2 N. Y. 159, 51 Am. Dec. 279, the defendant was a canal company, and while engaged in excavating a canal, which it was authorized by law to construct, upon land of which it claimed to be owner, it knocked down the stoop of the plaintiff's house and part of his chimney, and did other injuries. The court held that the defendant was liable in damages, notwithstanding that the work was done by a contractor (see [1848] 3 Barb. 42), observing that it could not accomplish a legal object in an unlawful manner. To the same effect is *Tremain v. Cohoes Co.* (1849) 2 N. Y. 163, 51 Am. Dec. 284.
65 L. R. A.

These decisions were followed in *Buddin v. Fortunato* (1890) 16 Daly, 195, 10 N. Y. Supp. 115 (where the plaintiff's premises were injured by blasting which was necessary for the performance of certain work which the defendant had contracted to do for a city); and in *Carman v. Steubenville & I. R. Co.* (1854) 4 Ohio St. 399. In the latter case the specifications provided that the "solid rock," as defined therein, was to be "removed by blasting," and an injury to the plaintiff's house was caused by a fragment of such rock thrown out by a blast. Discussing the evidence, the court said: "No proof was given that the work was not prosecuted with care and prudence, or that the injury was not the unavoidable consequence of blasting in that particular locality. Now, it seems very clear that the contractors did nothing that the defendants had not authorized to be done. But the defendants had no right to use their own lands, or authorize others to use them, so as to interfere with the undisturbed possession and lawful enjoyment of adjoining lands."

We do not construe the agreement as absolutely binding the contractors to remove the rock in this particular manner. They might, undoubtedly, have adopted other and more expensive modes of doing it, without affording the defendants any cause of complaint. But nothing of that kind was contemplated. The defendants put them in possession, with the right to remove rock, wherever found, in the manner mentioned in the contract; and, having enjoyed the benefits of this cheaper mode of doing the work, they cannot escape the responsibilities attending it. If they reserve no power to prevent injury, where blasting could not be safely employed, they were clearly in fault in giving so unrestricted a license. If they had the power, it is almost equally clear they should have exerted it." "A principle as old as civilization itself, and no less of morals than of law, requires of everyone to so use his own property as not to injure others. This devolves upon every owner of real estate the affirmative duty of preventing it from becoming a nuisance to adjoining proprietors. Whether he can divest himself of this obligation consistently with the full operation of this important principle, while he retains the possession and control of the property, so as to escape liability when he suffers it to be occupied by a contractor who erects a nuisance upon it to the injury of others, is a question that I am very far from being prepared to answer in the affirmative."

In Vermont a railroad company was held liable for its failure to remove rocks thrown on land adjoining the right of way, as a result of blasting operations conducted by a contractor. *Sabin v. Vermont C. R. Co.* (1853) 25 Vt. 363. In this case the point that a contractor had been employed was not even raised by the defendant's counsel.

See also *Brennan v. Schreiner* (1892) 28 Abb. N. C. 481, 20 N. Y. Supp. 130, where the court overruled a demurrer to a petition for an injunction restraining the blasting of a stratum of rock which extended under the premises of the plaintiff and defendant.

In this connection, reference may be also made to the very able dissenting opinion which Dwight, C., filed in *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267; for, although it has now been settled in New York by this and other decisions—
48

(see subd. VII., b, 9, of note to *Salliotte v. King Bridge Co.*, ante, 620, on *General rule as to absence of liability of employer for torts of independent contractor*), that an employer cannot be held liable for injuries caused by the negligence of a contractor in blasting, the fundamental principle upon which the learned commissioner based his conclusion was that, "where the employer is under a duty to do an act in a particular way, and where the act causing the injury is not indirect and casual, but the very act which the employee was directed to do, the distinction between a servant and a contractor vanishes. The employer is, in a true sense, the cause of the wrongful act. Negligence ceases to be material." He considered that the case before him fell within the scope of this principle, as the plaintiff and defendant were each proprietors of land, and as such proprietors each was bound by the rule so to use his own as not to injure another. "This rule," he remarked, "would make a proprietor liable for casting out stone upon his neighbor's land, whether by blasting or in any other manner; even though that might be necessary to enable him to prosecute his lawful business." He also pointed out that the contractor, among other things, was directly employed to do blasting, and that he was not acting merely under a general contract to build the road. The necessity of blasting was therefore anticipated, and it was provided for. He then summed up as follows: "The ground upon which the decision of this case is to be rested is substantially this: Railway companies, in excavating for their works, if they cast stones and earth, by blasting or otherwise, upon the lands of adjoining proprietors, are presumptively liable for the injuries caused, as having committed a breach of duty imposed upon them by the general rule of law that one must use his own property so as not to injure an adjoining proprietor. This presumption may be repelled by showing that the act of casting out the stones, etc., was necessary to the construction of their works, as authorized by the legislature; in which case the act becomes *damnum usque injuria*. Unless the presumption can be repelled in this manner, they are liable for the consequences of the unlawful act caused by their breach of duty, and cannot shift off responsibility by showing that the act was done through the medium of a contractor. This rule is particularly applicable where the contractor is employed to do the very act which, in its results, causes such breach of duty." The reasoning and conclusions thus adopted are entirely in harmony with the general principles underlying the cases cited above.

The theory upon which these cases were decided distinguishes them, in a logical point of view, from those in which recovery has been allowed on the ground that such operations are intrinsically dangerous, and impose upon the employer an absolute duty to see that special precautions are taken. See subd. VI., VII., of note to *Jacobs v. Fuller & H. Co.* post, —, on *Liability of employer for injuries caused by the performance of work by independent contractor*, which is dangerous unless certain precautions are observed.

VI. Liability where work is done according to plans furnished by employer.

The employer is manifestly liable as the actual author of the injury complained of, where
65 L. R. A.

it is shown to have been due to conditions or occurrences which are the immediate result of performing the stipulated work in the manner designated by the plans and specifications which were furnished to the contractor. *Uppington v. New York* (1801) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91 (*arguendo*); *Pitcher v. Lennon* (1896) 12 App. Div. 356, 42 N. Y. Supp. 156; *Meler v. Morgan* (1892) 82 Wis. 289, 33 Am. St. Rep. 39, 52 N. W. 174; *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345 (*arguendo*); *Lancaster v. Connecticut Mut. L. Ins. Co.* (1887) 92 Mo. 460, 1 Am. St. Rep. 739, 5 S. W. 23 (wall, not being sufficiently supported, fell on plaintiff's building); *Cloud County v. Vickers* (1900) 62 Kan. 25, 61 Pac. 391 (defectively planned bridge fell on workman while it was being constructed); *Tyler v. Tehama County* (1895) 109 Cal. 618, 42 Pac. 240 (bridge abutment so built as to turn water of river onto plaintiff's land).

An independent contractor is liable in exoneration of the employer only for the defects in doing the work, and not for defects in design.

Church of the Holy Communion v. Paterson Extension R. Co. (1902) 68 N. J. L. 399, 53 Atl. 449 (retaining wall on railway failed to furnish support to landowner abutting on a railway); (1902) 68 N. J. L. 405, 53 Atl. 1079.

That the defendant railway company could have been liable for a nuisance caused by the insufficient capacity of a culvert in an embankment, if it had been shown that the specifications in the contract required such a pipe to be placed there, was conceded in *Atlanta & F. R. Co. v. Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277.

Where the wall of a house adjacent to one which is being erected for the defendant falls as a result of the fact that the trench of the wall of the new house is excavated by the contractor for the work to the depth indicated by the plans, and by reason of such contractor's failure to shore up the adjacent wall properly, the injury is deemed to be the consequence of the act which the contractor was employed to do, and the landowner is therefore liable. *Wheelhouse v. Darch* (1877) 28 U. C. C. P. 269.

A person who contracts with another for the building of a house on his own land is liable for the consequences of the erection of a wall of insufficient strength, where he reserves the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail, or execution of the contract, without in either case invalidating the contract. *McMillan v. Walker* (1881) 21 N. B. 31.

In commenting upon the efforts of the defendant to prove that the work of constructing the building in question had been turned over to the contractors before the plaintiff, a servant of a subcontractor, had been injured by the fall of a floor and a wall, the court said: "The accident certainly occurred after this; but if the defendant's plans of rebuilding, as recommended by his architect, required the use of materials and structures that were unsafe, his responsibility for any injury accruing by reason of such plans was not transferred to the contractors." *Horner v. Nicholson* (1874) 56 Mo. 220.

An owner of land who contracts for an excavation is not relieved from liability for failure to support an adjoining building by the fact that the excavation was deeper than contemplated by the contract under which he parted

with possession to the contractors, where he made a subsequent contract providing that the excavation should be made to such depth. *Cohen v. Simmons* (1892) 50 N. Y. S. R. 146, 21 N. Y. Supp. 385.

The mere fact that specifications for a building only state the depth of the foundation for a simple use of the walls will not render the employer liable for the negligence of the contractor in sinking other parts of the foundation to a smaller depth. Under such circumstances, the specifications, though incomplete on their face, cannot mislead the contractor, since mentioning the depth of the foundation at one point is a sufficient direction to him to construct the entire foundation of at least that depth. *Neumann v. Greenleaf Real Estate Co.* (1898) 73 Mo. App. 326.

In a case where a building collapsed in consequence of a violation of N. Y. Laws 1892, chap. 275, § 483, limiting the weight allowable in a superficial foot of brickwork foundation, the court, in discussing the inferences of the jury from the evidence, said: "In truth the jury might have made a much stronger finding against the defendant than knowledge and permission of the unlawful act, *viz.*, that he contracted for and instructed the doing of it. He furnished to the builders both the plans and specifications by which they were to construct, and the material, the insufficiency of which was the direct cause of the accident. Thus, whether the fatal vice inhered in the plans originally, or was due to a faulty detail of construction, the defendant would be liable, for he directed the use of both plans and material." *Pitcher v. Lennon* (1896) 12 App. Div. 356, 42 N. Y. Supp. 156.

In cases of this description the guilt of the employer is undoubtedly aggravated, from a moral point of view, if he still persists in having the work executed after he has been informed by the contractor that the plans are defective.

Such were the circumstances in *Cloud County v. Vickers* (1900) 62 Kan. 25, 61 Pac. 391.

But this added element is plainly not necessary to complete the cause of action from this point of view.

VII. *Liability where work is done according to methods prescribed by employer.*

It is also held that the intervention of an independent contractor is no protection to the employer where the injury was the result of adopting inherently dangerous methods of work which were appointed, presented, or contemplated by himself.

In *McDonnell v. Rife Boom Co.* (1888) 71 Mich. 61, 38 N. W. 681, it was proved that the contractors were required by the defendant company to keep during the driving season, and until the whole of the logs were run down, a jam of logs $2\frac{1}{2}$ miles above the mouth of a river, so as to keep the space below and between said jam and the sorting grounds filled with logs as fast as the company wanted to use them. The trial judge charged the jury, in substance, that if, in order to fulfil this contract, it was necessary that such quantities of logs should be kept below the lower dam as would cause a solid jam of several miles in length, and by so doing the water was backed upon plaintiff's land, the defendant was liable. The court said: "This proposition was correct; and it needs no argument to sustain it. The defendant had exclusive control and management of this river, 65 L. R. A.

in the first place, and if, in turning over its control to a contractor, it burdened such contractor with conditions which, if complied with, necessarily caused damage to plaintiff, it became responsible for such damage. The question was left to the jury to say whether or not this contract could have been performed by the contractor without damage to the plaintiff, and they were instructed that, if they found it could have been so performed, then the contractor, and not the company, would be liable for the injuries done plaintiff." The jury were also instructed as to the letting out of water from the lower dam, and the injuries resulting therefrom. They were told, in effect, that if it was necessary, in order to fulfil their contract with the company, so to flood the river as to damage plaintiff, then the company must settle for such damage; but if it was not necessary, the contractor must be the one to recompense the plaintiff. This instruction was held to be in accordance with the well-settled general principles of the law, as applied to contractors, and to be as favorable to the defendant as it could ask.

Where the roof of a hall on the upper floor of a building broke through under the weight of the snow accumulated upon it, a tenant of the ground floor, whose goods were damaged by the water which ran down, was held entitled to recover from the landlord, on the ground that while the building was being altered he had directed that the posts on which the roof rested should be removed, and that the roof should be supported by iron bars running across the building and fastened outside. *Evans v. Murphy* (1898) 87 Md. 498, 40 Atl. 109.

In *Murray v. Arthur* (1901) 98 Ill. App. 331, the employer was held liable where he insisted on the use of a certain kind of brick for the construction of a chimney, the result being that the rain washed out the mortar, and descended through the wall into the plaintiff's store.

In *Lockwood v. New York* (1858) 2 Hilt. 66, the defendant was held liable for injuries caused by the subsidence of a house, resulting from the withdrawal of the sheath piling of a sewer, as required by the defendant's agents.

In *Threlkeld v. White* (1890) 8 New Zealand L. R. 513, where the defendant was held liable for the negligence of a contractor for the clearance of land in allowing fire to spread onto the adjoining premises, one of the grounds assigned for the decision was that the fire was used "as a part of the work undertaken." The court laid it down that, if the evidence shows that a landowner contemplated the use of fire for the purpose of clearing his land, he is legally in the same position as if he had by the contract expressly allowed the use of fire.

In cases in which the employer's intention is not defined by an explicit provision in the agreement the question whether he contemplated that the work should be executed in the manner in which it was actually executed is to be determined from a consideration of any circumstantial evidence that is available.

In *Andrews v. Runyon* (1884) 65 Cal. 620, 4 Pac. 669, where it was sought to charge one who had employed an independent contractor to repair a levee near a highway with liability for an injury caused by an excavation which the contractor had made in the highway for the purpose of obtaining materials, the jury were instructed that if, at the time the contract was made, it was the fair understanding and inten-

tion of all parties that the road was to be dug up for the purpose of building the levee; then whoever made the contract was liable, because, if those were the facts, the digging up of a public road was an inherent part of the scheme of building the levee. These remarks were held to be misleading. "As to defendant's liability in this regard," said the court, "the direction should have been that the jury must be satisfied that it was a part of the contract to build the levee with dirt taken from the road, or they were to disregard it. The law does not justify the holding of a party bound for the consequences of an illegal act, from a mere suggestion in a conversation in regard to a matter of contract, unless there can be justly inferred from it an intention on his part to bind himself contractually. The understanding and intention are to be inferred from what was agreed on contractually."

In *McNamee v. Hunt* (1898) 30 C. C. A. 653, 59 U. S. App. 9, 87 Fed. 298, the gist of the action was that the contractor was a negligent and careless man, within the knowledge, or means of knowledge, of the defendant; that no provision was made in the contract for the observance of proper precautions in doing a piece of work which necessarily required blasting in the heart of a city; that in fact the contractor did this work without taking such precautions, and so negligently that a piece of rock was thrown out by the blast, and struck the leg of the plaintiff below, who was at the door of a hotel on a public street, out of sight of the blasting. The court, in discussing the position of the plaintiff, that the case came within the scope of the rule which affects the employer with liability where the work is such that a nuisance necessarily results from doing it in the ordinary manner, said: "This being so, a decisive question in the case is whether, when McNamee made this contract, he authorized blasting to be done in order to complete it; or, in other words, whether, in order to fulfil his contract, the contractor necessarily had to blast, and McNamee knew this. If blasting was not in terms authorized, or if blasting was not necessary to be used in performing the contract of excavating the foundation, or if McNamee did not contemplate blasting, then blasting which injured the plaintiff below was purely collateral to the work contracted to be done, and McNamee would not be liable, because he never authorized blasting to be done. Examining the contract, we see that blasting is not provided for in express terms. The advertisement called for bids at a stated sum, and not for bids by cubic yard. The bid does refer to excavating hard rock at so much per cubic yard. But, following the advertisement, the lump sum offered is accepted, and nothing is said about blasting in the acceptance. . . . The evidence tends to show that there was nothing in the surface appearance of this lot to indicate that blasting was necessary. McNamee, in his evidence, without objection, swore that there was not; that in fact he did not think there was any; and that in point of fact he did not suppose that there was any necessity for the use of blasting. There may have been an inference from Britt's bid that blasting was necessary, as he included in his bid a charge for removing 'hard rock.' But this was only an inference; and the offer was neither accepted nor noticed by McNamee. It therefore becomes a question of fact whether the condition of the soil where the foundation was

to be dug was such that McNamee must have known that blasting was necessary, and also whether he did not acquire this knowledge during the performance of the contract."

In a case where the injury was due to the use of a steam engine for handling materials for the repair of a turnpike, it was shown by the evidence of the contractor's superintendent that the machinery used in and about the work was of the ordinary kind used for such purposes; and it also appeared that the contract required the contractor "to make all necessary connections with present track to run cars to crusher." The conclusion of the court was that the turnpike company had reason to believe a steam engine would be used in the execution of the work; but it was considered that, as the use of the steam engine on the road in question was not a nuisance *per se*, there was no obligation on the company to prohibit its use. *City & Suburban R. Co. v. Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643.

In determining the legal effect of the contract, and the construction to be put upon its terms, it is permissible to consider the situation of the parties and their methods of doing the same class of work, and to assume that the contract was made with reference thereto. Hence, although it is ordinarily presumed that the contractor is employed to do an act in a reasonable and careful manner, yet, if the employer is aware that he has methods of his own which are in themselves negligent or unlawful, the inference will be that he was left free to adopt his own negligent method, and that the injury was, in a judicial sense, the result of executing the work in the manner contemplated by the parties in making the agreement. *Branck v. Elmore* (1892) 114 Mo. 55, 21 S. W. 451, where the plaintiff was injured by a fragment of rock thrown by a blast, the accident being caused by the contractor's failure to cover the rock to be blasted before firing the shot. Discussing the evidence, the court said: "We think the contract between defendant and these employees, which may be fairly deduced from the foregoing evidence together with the circumstance in which it was made, was that Railey and Crowburger were employed by defendant, at 40 cents per yard, to make an excavation of defined dimensions into the rock, by means of blasting in their customary way, they to furnish all needful material, adopt their own methods, and to be free from the control or direction of defendant in other respects, except that defendant reserved the right to put his servants into the same excavation to remove dirt and loose rock, but not to interfere with the work of Railey and Crowburger. . . . If the contract had been in writing, and had specified that the work should be done in a particular way, which was in itself negligent, then, under the foregoing decisions, defendant would be held liable for damages resulting from its execution in the negligent manner provided, though no further control had been retained over the work. The same rule should apply here if the contract was made with the knowledge, on the part of defendant, that under it the work would be done in a negligent manner. In such case permission should be held equivalent to direction."

Compare also *McNamee v. Hunt* (1898) 30 C. C. A. 653, 59 U. S. App. 9, 87 Fed. 298, as stated, *supra*.

In order to charge an employer with liability

for an injury resulting from conditions which were created by his consent, and therefore understood by him to be incidental to the performance of the work, it must be shown that those conditions were the legal cause of the injury complained of. No action can be maintained for that injury if it resulted proximately from the unauthorized act of a third party.

In *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N. J. L. 17, 10 Am. Rep. 205, the plaintiff's intestate was killed by the explosion of a can of nitroglycerin upon a section of the defendant's road, the grading of which was to be done by F. V. S., who, with the defendant, had made a subcontract with one Shaffner for the rock excavation, the understanding of all parties being that nitroglycerin was to be used for the removal of the rock. The accident was due to the negligence of one Burns, a servant of Shaffner, who had charge of the nitroglycerin. After the contract had been sublet to Shaffner he applied to the engineer of the company for permission to occupy a portion of its land upon which he might erect a magazine in which to store the oil necessary for the work of blasting. The permission was granted, and the magazine was located by the direction of the company's engineer. But it was further established that Shaffner had, without the knowledge or permission of the company, clandestinely engaged in the business of selling the explosive to outside parties, and that the accident occurred about 150 yards from the magazine, while Burns was taking part in this unauthorized traffic. Discussing the contention that the injury resulted from a nuisance erected and

maintained on the lands of the defendant by its consent, the court said: "It is obvious that the injury received by the deceased, from which death resulted, is too far removed from the act of the company to impose a liability for it upon them. It did not result naturally or proximately from the nuisance they permitted on their lands, but was caused directly by the unauthorized and independent act of a third person intervening between the nuisance they consented to and the injury. . . . If the case had shown that they had consented to the use of their land for the traffic in which Shaffner had engaged, they might have been held for any injury that resulted immediately in connection with the transaction of that business. No such case was made at the trial. The injury was not caused by the nuisance which had the approbation and consent of the company. Their consent was to the erection of a magazine to be used for the limited purpose of storing materials for the necessary operation of their works, in the handling and management of which Burns would have been continually under the observation of others engaged on the works, who would have detected any unfitness for his business arising from intoxication. At most, consent to the erection of the magazine for that purpose can only be said to have afforded an opportunity for the unauthorized act of Shaffner in appropriating it to another use, and the negligent act of Burns, who in law is a stranger to the defendants, and for whose acts Shaffner alone is responsible."

C. B. L.

NORTH DAKOTA SUPREME COURT.

William J. CLAPP, Special Administrator,
etc., of Louis Houg, *Appt.*,

v.

Louis HOUG, *Respt.*

(.....N. D.....)

*1. Subdivision 2 of § 6325, Rev. Codes 1890, providing for the appointment of a special administrator in cases where "the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe, either that he is dead, or has been secreted, confined, or otherwise unlawfully done away with," is invalid, as depriving the person of his property and its possession without notice or due process of law, when applied to the property of a person living, although such special administrator has no power to administer such estate generally.

2. The taking of the possession of the property of such person under letters

* Headnotes by MORGAN, J.

NOTE.—For a similar case in this series holding that a statute authorizing administration upon the estate of a person who has left home and has not been heard from for seven years is unconstitutional, see *Carr v. Brown*, 38 L. R. A. 294.
65 L. R. A.

of administration issued without notice is not such notice to such owner as will validate the proceedings.

3. The taking of possession of a person's property under such circumstances cannot be upheld as a proper exercise of the police power of the state.

4. Costs and disbursements incurred by such special administrator, acting in good faith, are not a legal charge against such person or his property, as the proceedings are wholly void.

(February 11, 1904.)

APPEAL by defendant from a judgment of the District Court for Grand Forks County affirming an order of the County Court granting a motion to set aside the appointment of a special administrator for the property of Louis Houg. *Affirmed.*

The facts are stated in the opinion.

Mr. F. H. Peterson, with Mr. William J. Clapp, in *propria persona*, for appellant:

The statute under consideration is purely and simply for the appointment of a special administrator, and his business is only to collect and hold the property until one of two things is accomplished: (a) the return

of the owner; or (b) proof of his death and the appointment of a general administrator. It does not contemplate distribution, but the preservation of the property. Its object is to enable creditors and next of kin of absentees to take possession of property that would otherwise go to waste, and hold it for the benefit of the absentee or his heirs. How, then, can it be argued successfully that it will deprive a person of his property without due process of law? Its object and effect are just the opposite, *viz.*, to protect the property and return it to him or to his duly appointed representatives.

Mr. Guy C. H. Corliss, for respondent:

The order appointing the special administrator is absolutely void for want of jurisdiction. The statute does not intend, in the teeth of the Constitution, to vest jurisdiction in the county court over the estates of living persons. Administration proceedings as to the parties living are absolutely void.

Allen v. Dundas, 3 T. R. 125; *Griffith v. Frazier*, 8 Cranch, 9, 3 L. ed. 471; *Burns v. Van Loan*, 29 La. Ann. 560; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *Moore v. Smith*, 11 Rich. L. 569, 73 Am. Dec. 122; 1 *Williams*, Exrs. 461; *Melia v. Simmons*, 45 Wis. 334, 30 Am. Rep. 746; *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355; *Withers v. Patterson*, 27 Tex. 495, 86 Am. Dec. 643; *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213; *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; *M'Pherson v. Cunliff*, 11 Serg. & R. 422, 14 Am. Dec. 642; *Stevenson v. Superior Court*, 62 Cal. 60; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *D'Arusment v. Jones*, 4 Lea, 251, 40 Am. Rep. 12; *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458; *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122; *Day v. Floyd*, 130 Mass. 488; *French v. Frazier*, 7 J. J. Marsh. 425; *Peebles's Appeal*, 15 Serg. & R. 39; *State v. White*, 29 N. C. (7 Ired. L.) 116; *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420; *Devlin v. Com.* 101 Pa. 273, 47 Am. Rep. 710.

Even if the statutes and Constitution of North Dakota permitted administration proceedings with respect to the property of living persons, such proceedings would constitute taking the property without due process of law within the meaning of the 14th Amendment to the Federal Constitution.

Thomas v. People, 107 Ill. 517, 47 Am. Rep. 458; *Carr v. Brown*, 20 R. I. 215, 38 L. R. A. 294, 78 Am. St. Rep. 855, 38 Atl. 9; *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 641; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Epping v. Robinson*, 21 Fla. 36; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550; *Springer v. Shavender*, 116 N. C. 12, 33 L. 65 L. R. A.

R. A. 772, 47 Am. St. Rep. 791, 21 S. E. 397, 118 N. C. 33, 54 Am. St. Rep. 708, 23 S. E. 976.

Morgan, J., delivered the opinion of the court:

In December, 1899, one Louis Houg, thirty years of age, disappeared from Grand Forks county under circumstances which afforded reasonable grounds for the belief that he was dead, or had been secreted or otherwise unlawfully made away with. Upon his disappearance, search was made for him by the public authorities, and a reward offered by the county commissioners of said county for the production of his body and the apprehension of his murderers. All his relatives were notified of the facts relating to his disappearance. Some of his relatives resided in Minnesota, and others in Norway. Upon their request, a most careful and thorough search was again made for his body. One Swenson, a brother-in-law of Houg, consulted the state's attorney, and upon his advice an application was made for the appointment of a special administrator, and for this purpose Swenson was given a power of attorney from all the relatives of said Houg to act as their representative. When Houg disappeared he left in the house, on the farm on which he worked as foreman, personal property consisting of clothing, a trunk, carpenter's tools, and one promissory note for \$500, and some other personal property. There were no creditors. All of his personal property was worth about \$540. The appellant, William J. Clapp, was duly appointed special administrator on April 30, 1901, under subdivision 2 of § 6325, Rev. Codes 1899, and duly qualified by giving a bond for the faithful discharge of his duties. He inventoried the property, and took the same into his possession. Said Houg was not dead, however, and informed his relatives of his whereabouts in January, 1902. He had secretly left the place on which he worked, and had gone to the state of Washington, where he worked without communicating to any of his former friends or his relatives his whereabouts, although able to do so; he being of good health during all this time, and capable of writing to them if he so desired. The expenses of the special administrator, attorneys' fees, court fees, searching for the body, and other disbursements, amounted to \$245.84. The probate court disallowed the bill for expenses and disbursements, and the administrator appealed to the district court. The trial court found that the order of the county court appointing a special administrator of Houg's estate was null and void, for the reason that said Houg was not dead, but a living person, and denied the administrator's

application for costs and necessary disbursements and expenses incurred while acting as such special administrator. The administrator appeals from the judgment entered on such finding.

It is conceded by the respondent that the administrator and all persons concerned in the appointment of an administrator acted in good faith. It is also conceded by the respondent that the disbursements, as presented for allowance, are reasonable in amount, in view of the services rendered. It is conceded by the appellant that the order appointing the special administrator was properly set aside, but he contends that the necessary expenses of such administration should be allowed and paid before he can be compelled to turn over the property. The grounds of his contention are that the statute under which the appointment was made does not contemplate a general administration of the estate, but simply taking possession of the estate of the absentee until his return, or until satisfactory proof of his death is received, and a general administrator appointed. The statute under which the appointment was made reads as follows:

"Sec. 6325. A special administrator shall be appointed when necessary or proper for the protection of the property or the rights of creditors or other persons interested in the estate, in either of the following cases: . . . (2) In a special proceeding in which probate or general administration is denied because the death of the person whose estate is in question is not satisfactorily proved; but he is shown to have disappeared under circumstances which afford reasonable grounds to believe, either that he is dead, or has been secreted, confined, or otherwise unlawfully made away with."

"Sec. 6328. A special administrator has the same authority as a general administrator to take into his possession personal property, to secure and preserve it, to collect debts due the estate, and to take charge of the real estate and preserve it from waste or other injury and receive the rents, profits, and income thereof and for either of those purposes he may maintain any action or special proceeding. He must also make an inventory and render an account, and may sell perishable property, or do any other act which he may be specially required to do by direction of the court, but cannot act generally in matters pertaining to the settlement of the estate."

"Sec. 6331. When letters testamentary or of general administration on the estate are granted the powers of a special administrator cease and he must forthwith deliver to the executor or administrator all the prop-

erty and effects of the decedent remaining in his hands."

It will be observed that the appointment of a special administrator is to continue, under the terms of the statute, until a general administrator or an executor is appointed. The statute makes no provision for the disposition of the property by the special administrator in case of the return of the person believed to be dead. Nor is there any provision for allowance of his costs or for his compensation in the event of the person returning and demanding his property. The appellant claims that he should be allowed his costs in the proceeding, on the ground that the statute contemplates taking care of an absentee's property, and does not provide for its final distribution, and that it is, in that view, a valid law. Respondent contends that the entire proceeding is based upon an assumption of death, and is one authorizing taking possession of property under the belief that the absentee owner is dead, and holding the same until satisfactory proof of his death is made, and general administration initiated, and that the proceedings in this case are void because taken upon the estate of a living person. Appellant concedes that the estate of a living person cannot be administered and distributed.

We shall not determine in this case whether this statute is applicable to the estate of dead or of living persons, or both, nor whether the statute is unconstitutional, as conferring powers upon the probate court, in respect to preserving the property of absentees, not vested in it by § 3 of the Constitution. Conceding, for the purposes of this case only, that such power may be conferred upon the county court in respect to the property of living absentees, we reach the conclusion that the law, so far as it affects the property of living persons, contravenes the provision of the 14th Amendment of the Federal Constitution, that persons shall not be deprived of their property without due process of law. The proceedings under which special administrators are appointed in cases like the one at bar follow a refusal to appoint a general administrator on account of the failure of satisfactory proof of the death of the owner of the property to be taken into possession. No additional notice is given after the refusal to appoint a general administrator. The notice previously given as provided by § 6317, Rev. Codes 1899, is a notice to all persons interested in the estate, and rests on the assumption that the owner is dead. This is in no sense a notice to the owner of the estate, but is a notice to those interested therein adversely to him. *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup.

Ct. Rep. 1108; *Carr v. Brown*, 20 R. I. 215, 38 L. R. A. 294, 78 Am. St. Rep. 855, 38 Atl. 9. He is not a party to the notice, nor to the proceedings. No hearing is afforded him on any question. The fact that he "has disappeared under circumstances which afford reasonable grounds to believe, either that he is dead, or has been secreted, confined, or otherwise unlawfully made away with," is adjudicated without any finding of any kind of an attempt to notify him. The possession of the property is transferred to another. The tangible form of the property is changed by suits and collections. What may be deemed perishable property is sold. Costs and expenses are incurred. He is now called upon to pay these expenses, or his property will necessarily be sold to pay them. This is claimed to be done for his benefit, by preserving his property. If this law in fact contemplates the taking possession of the property of a living person, he should have an opportunity to be heard, upon some kind of notice, before the steps are taken; and taking them, without some prescribed notice to him to be given in some way indicated, is depriving him of his property without due process of law. In *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458, it was said: "The general rule unquestionably is that no one is bound by an adjudication of which he had no notice, or to which he was not a party. Testing the present case by this rule, appellee is clearly not bound." In *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, the court said: "As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters assumes that fact, and is addressed, not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors, or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta*." In *Hollingsworth v. Barbour*, 4 Pet. 475, 7 L. ed. 926, the court said: "It is an acknowledged general principle that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principle of natural justice that no man's right should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right. This opportunity is afforded (or supposed, in law, to be afforded) by a citation or notice to appear, actually served, or constructively, by pursuing such means as the law may in special cases regard as equivalent to personal service." In *Walden v. Craig*, 14 Pet. 154, 10 L. ed. 397, the court said: "It is admitted that the

service of process or notice is necessary to enable a court to exercise jurisdiction in a case, and, if jurisdiction be taken where there has been no service of process or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void." See also *Boswell v. Otis*, 9 How. 336, 13 L. ed. 164; *Nations v. Johnson*, 24 How. 203, 16 L. ed. 631.

Appellant's contention on the question of notice is that this is a proceeding *in rem*, and taking possession of the property is notice to the owner. The proceedings were taken and the administrator appointed before possession was taken of the property, so that the possession of the property was taken under an order void, as to him, for want of notice. It is the petition that gives the county court jurisdiction to act at all, and the filing of the petition is not followed by giving the owner notice and an opportunity to be heard. He is not bound at all unless he can be bound by void proceedings. We discover no difference in this case from other proceedings *in rem* in state courts. No contention will be made that in attachment and foreclosure of real-estate mortgages by advertisement, and like proceedings, notice would be given to the owner by taking the possession of the property. Even in proceedings strictly *in rem*, in admiralty courts, notice is generally essential, unless the proceeding is brought against the property, as defendant. In such cases, taking possession is deemed notice to the owner under the Federal practice. As was said in *Hollingsworth v. Barbour*, 4 Pet. 475, 7 L. ed. 926: "The course of proceeding in admiralty causes, and some other cases where the proceeding is strictly *in rem*, may be supposed to be exceptions to this rule. They are not properly exceptions. The law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered as affected by this constructive notice. But if these cases do form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly *in rem*, and in which the thing condemned is first seized, and taken into the custody of the court." See also *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 224, 1 Fed. Rep. 641. Under the cases cited, the taking of the property in this case would not be constructive notice to the owner. It was taken under an order of the county court, made without any notice or pretended notice. It was not taken by virtue of valid process. In *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458, the court said: "But it is said the grant of letters upon an estate is in the nature of a proceeding *in rem*, and therefore

the case in hand does not come within the rule mentioned,—that, the proceeding being against the estate itself, those having an interest in it must look out for themselves. Conceding this to be so, what follows? Are we to conclude, because the law confers power upon the probate court to grant administration on a dead man's estate upon a mere *ex parte* petition, that it therefore follows the court may lawfully make such grant upon a live man's estate, and that even without giving him an opportunity to be heard?" The absence of notice renders the proceedings void, and the statute is of no validity, as against the property of a living person, because it does not provide for notice to him. In no case, under state procedure, is the mere taking of possession of property equivalent to notice of action to be taken in reference to such property. We do not refer, in what has been said, to destruction or regulation of property under what is denominated the police power of the state.

It is, lastly, claimed that the proceedings can be sustained, although based on no notice, and the statute upheld as constitutional, under the police power of the state. No case is cited, and we find none, bringing this case within the regulations of that power. Such power extends to protection of life, health, general welfare, and the property of citizens from injurious results from the actions of others, or in the use of their property, but does not generally go to the extent of depriving them of such property, or its possession, without notice, and due process of law. Generally, and except in cases of danger to health or property rights, the exercise of such power is subject to the constitutional guaranty of the 14th Amendment. It is only in such and other similar cases that property can be taken without notice. "Due process of law" has been defined as follows: "By the law of the land is most clearly intended the general law,—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." *Dartmouth College v. Woodward*, 4 Wheat. 579, 4 L. ed. 644; *Cooley*, Const. Lim. 5th ed. 432; *Burdett v. Allen*, 35 W. Va. 347, 14 L. R. A. 337, 13 S. E. 1012; *Ft. Smith v. Dodson*, 51 Ark. 447, 4 L. R. A. 252, 14 Am. St. Rep. 62, 11 S. W. 687. In *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, the court said: "The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction and wholly void as against 65 L. R. A.

him, all acts of the administrator, whether approved by that court or not, are equally void. The receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title. . . . And he is not bound either by the order appointing the administrator, or by a judgment in any suit brought by the administrator against a third person, because he was not a party to, and had no notice of, either." The effect of holding that the special administrator lawfully took possession of the property in this case would be that a person, by absenting himself as Houg did, subjects his property to be taken and dissipated in paying the expenses of court proceedings. We do not think that such a construction was intended, nor that possession of the property was intended to be taken under such circumstances as are here presented. The property consisted of inanimate personal property. Leaving it, as was done, in no way affected the public, or the public health or welfare. The injury following its abandonment was to Houg alone. If the property was of such character that its presence was injurious to others, or of such character that it should be cared for in order to preserve life or prevent suffering, the General Statutes afford ample authority for taking possession of it for such purpose. § 7560, Rev. Codes 1899. But the taking of possession of it under this law, in the interests of the absentee, without, at least, notice to him, cannot be done without his consent, under the circumstances of this case; and, as the law provides for no notice, it must be held invalid to that extent, at least.

The language of the court in *Moore v. Smith*, 11 Rich. L. 569, 73 Am. Dec. 122, may be quoted as applicable to this case to some extent: "Under a comparison of the several merits of these parties, blame and laches have been imputed to the plaintiff for his long-continued neglect of his property and friends, by which others were misled. Of the reasons of the plaintiff's conduct, we are not informed. It is enough that he was under no legal obligation to stay where his property was, or to give information concerning himself when he was away. He encountered the risk of the statute of limitations, which, if his absence had been a little longer, would have forever barred him."

For a general discussion upon the validity of statutes similar to the one under consideration, see 1 Woerner's Am. Law of Administration, § 212.

The judgment is affirmed.

Young, Ch. J., concurs. **Cochrane**, J., having been of counsel in the court below, took no part in the decision.

William BARRY, *Plff. in Certiorari*,
v.

John E. TRUAX, Clerk of Cavalier District
Court.

(.....N. D.....)

- *1. "The right of trial by jury," which is secured to all by § 7 of the state Constitution, includes all of the substantial elements of the trial by jury as they were known to and understood by the framers of the Constitution and the people who adopted it.
2. The system of trial by jury in criminal cases, which existed in this jurisdiction for fourteen years prior to the adoption of the Constitution, gave the state, as well as the defendant, a right to have the place of trial changed from the county where the offense was committed to another county, when necessary to secure a fair and impartial trial; and it was the right thus known and understood which is secured by the Constitution.
3. At common law the right of trial by a jury of the county of the offense was a general one, not unconditional, but always subject to the exception that the indictment might be removed and the trial take place in another county, either upon the application of the prosecution or the defendant, when necessary to secure a fair and impartial trial.
4. Rev. Codes 1899, § 8122, which provides for a change of place of trial to another county, upon the application of the state's attorney, when a fair and impartial trial cannot be had in the original county, merely perpetuates the right as it was known when the Constitution was adopted, and also as it existed at common law, and does not violate the right of trial by jury as secured by § 7 of the state Constitution.

(May 21, 1904.)

PETITION by defendant for a writ of certiorari to review an order granting a change of venue in a prosecution for murder. *Denied.*

The facts are stated in the opinion.

Messrs. Morrill & Engerud, with *Mr. Joseph Cleary*, for plaintiff in certiorari:

The right to jury trial, guaranteed by the constitutional provision, is the right to trial by jury as that right was recognized by the usage of the common law.

Debates Constitutional Convention N. D. pp. 361, 362; *State v. Bates*, 43 L. R. A.

*Headnotes by YOUNG, Ch. J.

NOTE.—For a case in this series holding that the right to trial by jury at common law includes the right to have the jury obtained from the vicinage or county where the crime is committed, and the statute providing for change of venue without defendant's consent is unconstitutional, see *People v. Powell*, 11 L. R. A. 75, with note as to change of venue in criminal cases.
45 L. R. A.

33, and notes, 14 Utah, 293, 47 Pac. 78; *Harris v. People*, 128 Ill. 585, 15 Am. St. Rep. 153, 21 N. E. 563; *Koppikus v. State Capital*, 16 Cal. 248; *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L. R. A. 437, 60 Am. St. Rep. 450, 68 N. W. 53; *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116; *Sovereign v. State*, 4 Ohio St. 489; *Clark v. Utica*, 18 Barb. 451; *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671; *Watt v. People*, 126 Ill. 9, 1 L. R. A. 403, 18 N. E. 340.

The panel must be composed of men from the county where the offense was committed.

4 Bl. Com. p. 349; 2 Pollock & M. History of English Law, 621; Chitty, Crim. Law, 177; 3 Reeves, History of English Law, 476; Cooley, Const. Lim. 5th ed. p. 390; Bacon, Abr. title, *Juries*, p. 308.

When William and Mary succeeded James II. they were forced to agree and acknowledge the Declaration of Rights prepared by the Commons and approved by the Lords. Prominent amongst the rights so insisted upon was the declaration that every Englishman had the inherent right to trial by jury of the vicinage.

When the controversy arose between the American Colonies and George III. one of the chief grievances was the arbitrary acts of the government in deporting colonists from their colonies to England for trial.

The term "jury trial" means the common-law jury with all its essential incidents.

Watt v. People, 126 Ill. 9, 1 L. R. A. 403, 18 N. E. 340; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635; *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 258; 12 Enc. Pl. & Pr. p. 289, and note; Dillon, Laws & Jurisprudence of England & America, p. 124; 4 Bl. Com. 349, 350.

The community whose peace the offender has disturbed alone can condemn. Notwithstanding his legal guilt, his neighbors may acquit him.

In England, of course, the Parliament was supreme, and could abrogate these constitutional rights. It was frequently done; but the very fact that an act of Parliament was required demonstrates that the courts had no inherent power to grant a change.

4 Bl. Com. pp. 303-305.

Where there is a constitutional guaranty of jury trial the legislature cannot impair or take away any of the common-law attributes thereof.

4 Enc. Pl. & Pr. p. 378, and notes; *People v. Powell*, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481; *State v. Knapp*, 40 Kan. 148, 19 Pac. 728; *Wheeler v. State*, 24 Wis. 52; *State v. Denton*, 6 Coldw. 539; *Dougan v. State*, 30 Ark. 41; *Ex parte Rivers*, 40 Ala. 712; *Bramlett v. State*, 31 Ala. 376;

State v. Arrison, 20 Ohio L. J. 474; *State v. Albee*, 61 N. H. 423, 60 Am. Rep. 325; *Watt v. People*, 126 Ill. 9, 1 L. R. A. 403, 18 N. E. 340; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635.

Offenses committed in Wales were, by the act of Henry VIII., made cognizable in the next English county, on motion of the attorney general. This act was justified by the turbulent conditions in Wales. The case of *King v. Athos*, 8 Mod. 136, shows how obnoxious the act was considered by Welshmen, and that it was considered to be an innovation.

Even in misdemeanors change was granted only on the strongest showing.

Rex v. Harris, 3 Burr. 1330, 1 W. Bl. 378; *King v. Nottingham*, 4 East, 208, 1 Smith, 31.

Mr. Chitty expressly states that in felony cases the defendant cannot be deprived of a trial in the vicinage, even by the express authority of the King.

1 Chitty, *Crim. Law*, p. 190; *State v. Albee*, 61 N. H. 423, 60 Am. Rep. 325.

Under the English common law, "vicinage" meant "county."

The principle underlying the rule as to vicinage is unquestionably the idea of local self-government,—the idea of representation of the community.

1 Stubb, *Const. Hist. Eng.* 664; 1 Taylor, *Origin & Growth of Eng. Const.* pp. 314-333; *State ex rel. Snell v. McCarty*, 52 Ohio St. 363, 27 L. R. A. 534, 39 N. E. 1041; *State v. Lowe*, 21 W. Va. 782, 45 Am. Rep. 570; *Buckrice v. People*, 110 Ill. 29; *State v. Hatch*, 91 Mo. 568, 4 S. W. 502; *Armstrong v. State*, 1 Coldw. 338.

Mr. E. R. Sinkler, with **Mr. George M. Price**, for defendant in certiorari:

The statute authorizing the right to try a defendant in a county without which the crime was committed is constitutional.

State v. Gut, 13 Minn. 341, Gil. 315; *State v. Robinson*, 14 Minn. 453, Gil. 333; *State v. Miller*, 15 Minn. 344, Gil. 277; *People v. Fuhrmann*, 103 Mich. 593, 61 N. W. 865; *People v. Grossman*, 103 Mich. 601, 61 N. W. 867; *People v. Webb*, 1 Hill, 179; *People v. Baker*, 3 Park. Crim. Rep. 181; *State v. Myers*, 21 Ohio L. J. 57; *People v. Vermilyea*, 7 Cow. 132, *People v. Wright*, 5 How. Pr. 526; 1 Chitty, *Crim. Law*. 201, Am. ed. 836; *King v. Nottingham*, 4 East, 208, 1 Smith, 31; *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *Ex parte Cox*, 12 Tex. App. 655; *Frizzell v. State*, 30 Tex. App. 42, 16 S. W. 751; *Robinson v. State* (Tex. Crim. Rep.) 63 S. W. 869; *Bohannon v. State*, 14 Tex. App. 271; *Cannon v. State*, 41 Tex. Crim. Rep. 467, 56 S. W. 351; *Nite v. State*, 41 Tex. Crim. Rep. 340, 54 S. W. 763; *State ex rel. Brown v. Stewart*, 60 Wis. 65 L. R. A.

587, 50 Am. Rep. 388, 19 N. W. 429; *Com. v. Davidson*, 91 Ky. 162, 15 S. W. 53; *Hewitt v. State*, 43 Fla. 194, 30 So. 795.

In construing the statute as to whether or not it is in violation of the Constitution, it is essential that the court should take into consideration the laws in existence immediately prior to the adoption of such Constitution, and the contemporaneous history.

People v. Harding, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555; 6 Am. & Eng. Enc. Law, 2d ed. p. 930; *Opinion of the Justices*, 41 N. H. 550.

When a statute has been in force among a people prior to the adoption of a Constitution, such statute will be continued in force unless plainly repugnant to the Constitution.

State v. Pugsley, 75 Iowa, 742, 38 N. W. 501.

Where there is no constitutional impediment, the English rule, permitting the prosecutor as well as the defendant to be the applicant, may well prevail also with us.

Bishop, *New Crim. Proc.* § 75.

In England the applicant for a change of venue may be either the prosecutor or the defendant.

King ex rel. Daubus v. Penprase, 4 Barn. & Ad. 574; 1 Nev. & M. 312; *Rex v. Hunt*, 3 Barn. & Ald. 444, 2 Chitty, 130; *King v. Holden*, 5 Barn. & Ad. 347, 2 Nev. & M. 167; *King v. St. Mary on the Hill*, 7 T. R. 735; *Rex v. Harris*, 3 Burr. 1330, 1 W. Bl. 378; *King v. Nottingham*, 4 East, 208, 1 Smith, 31; *Rex v. Cowle*, 2 Burr. 859; *People v. Webb*, 1 Hill, 179; 1 Chitty, *Crim. Law*, Am. ed. 1836, 201; *People v. Vermilyea*, 7 Cow. 139; *State v. Miller*, 15 Minn. 344, Gil. 277; *Com. v. Davidson*, 91 Ky. 162, 15 S. W. 53; *People v. Baker*, 3 Park. Crim. Rep. 181, 3 Abb. Pr. 42; *People v. Wright*, 5 How. Pr. 26; Clark, *Crim. Proc.* 418; *People v. Mather*, 3 Wend. 434; *McMillan v. State*, 68 Md. 307, 12 Atl. 8; *Adams v. State* (Tex. Crim. Rep.) 23 S. W. 691.

The construction which the people placed upon the Constitution is to be considered and determined to greater or less extent from the state laws existing prior to its adoption, and the history of such laws.

People v. Harding, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555; Black, *Const. Lim.* pp. 67, 68; Cooley, *Const. Lim.* p. 210; *Mauldin v. Greenville*, 42 S. C. 293, 27 L. R. A. 284, 46 Am. St. Rep. 723, 20 S. E. 842; *Maynard v. First Representative Dist.* 84 Mich. 228, 11 L. R. A. 332, 47 N. W. 756; *Fox v. McDonald*, 101 Ala. 51, 21 L. R. A. 529, 46 Am. St. Rep. 98, 13 So. 416; *Johnston v. State*, 128 Ind. 16, 12 L. R. A. 235, 25 Am. St. Rep. 412, 27 N. E. 422; 8 Enc. Law & Proc. 736; *People ex rel. Lynch v. LaSalle County*, 100 Ill. 495; *Baltimore v. State*, 15 Md. 376, 74 Am. Rep. 572; *Rathbone v.*

Wirth, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15; *State v. Pugsley*, 75 Iowa, 742, 38 N. W. 501; *Creve Coeur Lake Ice Co. v. Tamm*, 138 Mo. 385, 39 S. W. 791; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317.

This court must find, in order to declare that this provision of the statute is unconstitutional, that it is repugnant to some express provision of the Constitution.

N. D. Const. Schedule; *State ex rel. Ohlquist v. Swan*, 1 N. D. 5, 44 N. W. 492; *Doherty v. Ransom County*, 5 N. D. 1, 63 N. W. 148; *Roessler v. Taylor*, 3 N. D. 546, 58 N. W. 342.

The court has jurisdiction to change the place of trial in felony as well as in misdemeanor.

Queen v. Fay, Ir. Rep. 6 C. L. 436; *King v. Nottingham*, 4 East, 211, 1 Smith, 31.

Where the Crown defends the person indicted, the attorney general is equally entitled to the certiorari to remove the indictment, as a private prosecutor would be, or as he would be if prosecuting for the Crown.

King v. Stannard, 4 T. R. 161; *Res v. Coule*, 2 Burr. 859; *King v. St. Mary on the Hill*, 7 T. R. 735; *Res v. Athoe*, 1 Strange, 553; *King v. Parry*, Leach, C. L. 108; *King v. Holden*, 5 Barn. & Ad. 347, 2 Nev. & M. 167; *Reg. v. Simpson*, 5 Jur. 462; *Reg. v. Sheldon*, 32 L. T. N. S. 27; *Reg. v. Barrett*, Ir. Rep. 4 C. L. 285, 18 Week. Rep. 671; *Queen v. Phelan*, 14 Cox, C. C. 679; *Reg. v. Patent Eurika & Sanitary Manure Co.* 13 L. T. N. S. 365; Wharton, Crim. Pl. & Pr. 8th ed. § 602; Proffatt, Jury Trial, 149.

Young, Ch. J., delivered the opinion of the court:

The plaintiff, a resident of Cavalier county, in the seventh judicial district, is charged with the murder of one Andrew Mallem, which is alleged to have been committed in that county on January 3, 1901. He was brought to trial on July, 1901, upon an information filed by the state's attorney of that county. The jury returned a verdict of guilty, and affixed life imprisonment as a penalty. Upon appeal to this court the verdict was set aside and a new trial ordered. *State v. Barry*, 11 N. D. 428, 92 N. W. 809. At the second trial, which took place in November, 1903, the jury failed to agree upon a verdict. Preliminary to the third trial, the state moved for a change of place of trial to another county, upon the ground that a fair and impartial jury could not be secured, or a fair and impartial trial had, in Cavalier county. The motion was granted, against the plaintiff's objection, and on March 7, 1904, the presiding judge made an order transferring the case to Walsh county, which is an adjoining county 65 L. R. A.

in the same judicial district. The validity of this order is presented to this court for determination upon a writ of certiorari sued out by the accused, the plaintiff in the present proceeding.

The position of counsel for plaintiff is that the district court was without lawful authority to make the order in question, and that it is therefore void. The order was made under the authority of § 8122, Rev. Codes 1899, which authorizes a change of place of trial in criminal cases upon the application of the state's attorney, and it is not claimed that the application by the state's attorney did not fully comply with the requirements of the statute. The sole contention is that § 8122, *supra*, is unconstitutional. Counsel for plaintiff contend that § 7 of the state Constitution, which is a part of the Declaration of Rights, guarantees to every person in this state an unqualified right to a trial by a jury of the county where the offense was committed, and that neither the legislature nor the courts have power to deprive him of that right. Section 7 of the Constitution reads as follows: "The right of trial by jury shall be secured to all, and remain inviolate; but a jury in civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law." The statutory provisions relating to change of venue in criminal cases are contained in article 5 of chapter 9 of the Code of Criminal Procedure, embracing §§ 8110 to 8122, inclusive, of the Revised Codes of 1899. The first section grants to a defendant the right to a change of place of trial when a fair and impartial trial cannot be had in the county or judicial district in which the action is pending, and specifies, as one of the grounds for a change, the impossibility of obtaining a jury that has not formed an opinion as to the guilt or innocence of the defendant such as would disqualify them as jurors. The several sections following this relate chiefly to matters of procedure. Section 8122 upon which this order is based, reads as follows: "The state's attorney, on behalf of the state, may also apply in a similar manner for a removal of the action, and the court, being satisfied that it will promote the ends of justice, may order such removal upon the same terms and to the same extent as are provided in this article, and the proceedings on such removal shall be in all respects as above provided."

It is entirely clear that the constitutionality of the statute authorizing a change of the place of trial upon the application of the state turns upon the meaning to be ascribed to the phrase "right of trial by jury." What are the scope and extent of this right, which the Declaration of Rights secures to

all and declares shall remain inviolate? Is it an unconditional right to a trial by a jury drawn from the county where the offense was committed, and prohibiting a change of place of trial to another county when a fair and impartial trial cannot be had in the county where the venue was originally laid? If it is true, as counsel for plaintiff contend, that "the right of trial by jury" thus guaranteed is an unqualified right to a trial by a jury of the county where the offense was committed, and that no person can, without his consent, be tried in any other county, it is apparent that no act of the legislature can deprive him of that right. Section 8122, Rev. Codes 1899, which confers the right to change the place of trial upon the state, would in that event be unconstitutional and void, and would furnish no legal justification for the order in question. If, on the other hand, the right to a trial by a jury of the county of the offense is conditioned upon the possibility of a fair and impartial trial in that county, it will be conceded that § 8122, *supra*, is constitutional and valid. The question involved is an important and delicate one; important because it calls for a judicial declaration as to the scope of the most important of constitutional rights, the right of trial by jury; delicate, because it involves a consideration of an alleged infringement of that right by a co-ordinate branch of the government. Proper deference for legislative authority has given rise to the settled rule that all acts of the legislature will be presumed to be valid and constitutional, and courts will declare them void only when it is clear that they violate the fundamental law. In case of doubt, the presumption of validity will prevail, and the law be sustained. When, however, the conflict is clear, the duty is cast upon the court to declare the conflict and thus sustain the integrity of the Constitution.

We are convinced that the legislation in question is constitutional and valid and this conclusion does not rest upon the mere presumption of validity which attends all legislative acts. On the contrary, we think it is demonstrably clear that the "right of trial by jury" which is secured by the Declaration of Rights is in no respect impaired by the act of the legislature authorizing a change of place of trial to another county, upon the state's application, when a fair and impartial trial cannot be had in the original county. It will be noted that the Constitution does not enumerate the details or incidents of the right of trial by jury. This omission, however, gives no authority to the legislature or to the courts to destroy by legislation or by judicial construction, any of the substantial elements of the right of jury trial which were intended to be secured. The 65 L. R. A.

Constitution refers to "the right of trial by jury" as a right well known and commonly understood at the time of its adoption, and it is the right so understood which is secured by it. Our duty in this case is therefore to ascertain whether it was the understanding of the framers of the Constitution, and the people who adopted it, that the right of trial by jury included, as one of its substantial elements, an absolute right to a trial by a jury of the county where the offense was committed. If such was their intent it must be given effect the same as though it had been expressly written into the Constitution. We are unable, however, to find any ground whatever to sustain the existence of any such intent. On the contrary, there is, in our opinion, convincing evidence that the right of trial by jury, as that right was known at the time of the adoption of the Constitution, did not include an absolute right to a trial by a jury of the county where the offense was committed, but that the right was conditioned upon the possibility of a fair and impartial trial being had in that county. In other words, the right of trial by jury, as it now exists, with the right on the part of the state to secure a change of venue to another county when necessary for a fair and impartial trial, is the same as existed when the Constitution was adopted. The present statutes regulating changes of venue in criminal cases, including § 8122, *supra*, were first enacted by the people of this jurisdiction in 1875, and they have been a part of the statutory law of this jurisdiction continuously since that date. See §§ 285-291, Crim. Proc. Laws 1875, pp. 122, 123; also the same numbered sections of the Code of Criminal Procedure, Rev. Codes 1877; also §§ 7312 to 7318, inclusive, Comp. Laws 1887. The Constitution was adopted in 1889. It will thus be seen that, for a period of fourteen years prior to its adoption, the people who adopted it had lived under a system of criminal laws created by themselves, which authorized the prosecution, as well as the defendant, to secure a change of place of trial to another county when necessary to a fair and impartial trial. The right, as it exists under the statute under consideration, is therefore the same as that which existed when the Constitution was adopted, and for fourteen years prior thereto. The supreme court of Iowa held, upon a similar state of facts, that a like provision in the Constitution of that state did not prohibit legislation authorizing a change of place of trial by the state. In that case it was contended that the trial jury must come from the county where the offense was committed. In denying this, the court said: "The first Constitution of this state was adopted in 1846, and it con-

tained the following provision: "The right of trial by jury shall remain inviolate, but the general assembly may authorize trial by jury of a less number than twelve men in inferior courts." This Constitution was superseded by the one now in force, which was adopted in 1857, and it contains, in substance, the same provision. A statute precisely the same as § 4160 of the Code was in force when the first Constitution was adopted, . . . and such a statute has been in force at all times since 1843. This being so, the right of trial by jury is the same now as it was when the first Constitution was adopted, and therefore the statute in question is not unconstitutional, for the reason that constitutional rights of the defendant have not been in any respect impaired." *State v. Pugsley*, 75 Iowa, 742, 38 N. W. 498. This conclusion necessarily follows from an application of the well-settled rule of construction which requires that "a constitution shall be held to be prepared and adopted in reference to existing statutory laws, upon the provisions of which in detail it must depend to be set in practical operation" (*People ex rel. Jackson v. Potter*, 47 N. Y. 375; *People ex rel. Wood v. Draper*, 15 N. Y. 537; *Cass v. Dillon*, 2 Ohio St. 607; *People ex rel. Atty. Gen. v. New York*, 25 Wend. 22), and the further rule that courts are bound to presume that the people adopting a constitution are familiar with the previous and existing laws upon the subjects to which its provisions relate, and upon which they express their judgment and opinion in its adoption (*Baltimore v. State*, 15 Md. 376, 480, 74 Am. Dec. 572; *State v. Mace*, 5 Md. 337; *Bandel v. Isaac*, 13 Md. 202; *Manly v. State*, 7 Md. 135; *Hamilton v. St. Louis County Ct.* 15 Mo. 5; *People ex rel. Kennedy v. Gies*, 25 Mich. 83; *Servis v. Beatty*, 32 Miss. 52; *Pope v. Phifer*, 3 Heisk. 686; *People v. Harding*, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555; *Creve Coeur Lake Ice Co. v. Tamm*, 138 Mo. 385, 39 S. W. 791). The fact that the Constitution secures "the right of trial by jury" by simply declaring it, without adding words expressly limiting the locality of a trial jury is significant, too, of an intent to merely perpetuate the right as it then existed and was known to the people who gave to the Constitution their approbation. Further evidence of this intent is also found in the fact that the statutes relating to a change of place of trial, theretofore in force, were perpetuated upon the recommendation of the two code commissions, which were composed of men learned in the law and familiar with the previous legislation of the state. One of the members of the first commission, and its secretary, were members of the constitutional convention. As a contemporaneous

construction, this is entitled to great weight. *Cooley*, Const. Lim. 7th ed. 102. See also *Baltimore v. State*, 15 Md. 376, 480, 74 Am. Dec. 572, and *People ex rel. Atty. Gen. v. New York*, 25 Wend. 22; also *People ex rel. Lynch v. La Salle County*, 100 Ill. 495.

Counsel for plaintiff contend that the right to a trial by a jury of the county where the offense was committed was one of the essential elements of the common-law right of trial by jury, and that the right secured by the Constitution must be held to be that recognized by the usage of the common law of England. It is undoubtedly true that the common law may be, and is, properly resorted to as an aid in construction, and, in the absence of other evidence of intent, it might be presumed that it was the intent of the framers of the Constitution to perpetuate the right of trial by jury as it existed at common law. But it is a cardinal rule of construction that a constitution must be so construed as to give effect to the intention of the people who adopted it; and, while it will be construed with reference to the doctrines of the common law, its intent never will be overruled by them. *Black*, Const. Law, §§ 38, 42; *Cooley*, Const. Lim. 7th ed. 94; *Flavell's Case*, 8 Watts & S. 197. In short, the question is always one of intent, and, where the intent is clear, it, and not the doctrines of the common law, will prevail. A similar contention was advanced in the case of *The Huntress*, 2 Ware, 89, Fed. Cas. No. 6,914, involving the meaning of the words "admiralty" and "maritime," as those words are used in the 3d Article of the Constitution of the United States, which extends the judicial powers to "all cases of admiralty and maritime jurisdiction." It was held in that case that the words were used in the sense which they had in this country at the time of the adoption of the Constitution, and that, where technical terms of law or jurisprudence are used in the Constitution, which are common to our own law and to the law of England, if there is a difference of signification in the two countries, the meaning which they have in our own country is to be preferred. We fully approve the principle of interpretation laid down in that case in the following language: "The assumption is, and it is made without a tittle of proof, unless general argument is to be taken as proof, that the framers of the Constitution, silently, and without the slightest notice, referred, for the sense of these words, not to the meaning which they had in our jurisprudence, but to that which they bore in the jurisprudence and laws of England. If the fact be so, we will venture to affirm that it is a fact unique in the history of the world. It may safely be said that no man and no

other body of men engaged in framing an organic law for the government of a great nation ever, silently and without notice of any such intention, referred, for the sense and meaning of any of their words, to the signification which they had in laws and jurisprudence of a foreign nation,—especially if these words had a well-known meaning in their own country. We may here be met by an argument that the Constitution does, in fact, refer to the common law for the definition of words, by the use of technical terms of that law, as ‘habeas corpus,’ ‘trial by jury,’ etc., without proceeding to define them. But these words were just as familiar in our law as in that of England. And if, by supposition, there had been any difference in the sense in which they were used in the English statutes and common law and that in which they were generally used and understood in this country, can there be a doubt which sense is adopted by the Constitution? The common law, and, of course, the sense in which the technical words of that law are used, was never in force in this country any further than as it was adopted by common consent or by the colonial legislatures. Beyond this, it was as much a foreign law as that of France or Holland; and, for the definition of any technical terms of general law or jurisprudence, we may with just as much propriety refer to the laws of any other foreign country as to those of England, except so far as the law of England has been adopted and incorporated into our own laws and jurisprudence. And where the same words have a different import in the two countries, that which prevails in our own is most certainly to be preferred.” It is entirely clear, therefore, that the right of trial by jury which is secured by the Constitution is the right of trial by jury with which the people who adopted it were familiar, and that was the right which had obtained a fixed meaning in the criminal jurisprudence of the territory, as defined by the statutes which existed prior to and at the time of the adoption of the Constitution. That right, as we have seen, gave to the prosecution, as well as the defendant, the right to change the place of trial when necessary to secure a fair and impartial trial. The present law is in no respect different, and is therefore not vulnerable to the constitutional objection urged against it.

In reaching the conclusion just announced, we have assumed the correctness of the contention that at common law the prosecution had no right to change the venue, but that, on the contrary, it was the defendant’s unqualified right to demand a jury panel from the county where the offense was committed. We do not think, however, 65 L. R. A.

that this contention accords with the fact. We are of opinion that neither the common law as it existed in England at the time of the Revolution, nor as adopted in this country, gave the defendant an absolute right to a trial in the county of the offense. This is, at least, the opinion of a large number of American courts, whose views are entitled to most respectful consideration, and, as we shall hereafter see, it is sustained by the English cases and text writers. In New York, from an early day, it was the custom to award a change of place of trial to the prosecution. In *People v. Vermilyea* (1827) 7 Cow. 137, it was said that “the course in criminal prosecutions, where a clear case is made out, is to order a suggestion upon the record that a fair and impartial trial cannot be had in the county where the offense is laid. A *venire* is then awarded to the sheriff of another county, and the cause tried there, the indictment remaining unaltered as to the venue.” In *People v. Webb* (1841) 1 Hill, 179, the venue was changed in a criminal case, upon application of the public prosecutor, upon the ground that a fair and impartial trial could not be had in the county where the indictment was found. The court said: “The Revised Statutes . . . impliedly authorize us to make such a change for special cause on an indictment coming into this court by certiorari. This is also an authority which we have at the common law,”—citing 1 Chitty, *Crim. Law*, 201; *King v. Nottingham*, 4 East, 208, 1 Smith. 31; *People v. Vermilyea* (1827) 7 Cow. 137. In *People v. Baker* (1856) 3 Abb. Pr. 42, a murder case, it was urged that the writ of certiorari could not lawfully issue upon the application of the prosecution to remove an indictment to another county. This was denied, and the court stated that there can be no doubt that it has always been competent for counsel for the Crown in England, and, since our Revolution, for the counsel for the people of the state (unless abrogated by statute), to remove criminal cases by certiorari, and, after an exhaustive review of the authorities, held that a change may be ordered upon the application of the prosecution as well as the defendant, when made upon the ground that a fair and impartial trial cannot be had in the original county. In *Price v. State* (1849) 8 Gill, 296, which was a murder case removed to another county, upon the application of the attorney general, for the purpose of securing a fair and impartial trial, it was contended that this was a violation of the common-law right of trial by jury guaranteed by the Maryland Constitution. This was denied. The court said: “That the court of King’s bench has rightfully exercised this power of removal as an acknowledged, if not an essential, part

of its ordinary common-law jurisdiction, both in respect to criminal and civil cases, does not seem to have been doubted in any of the cases in which its exercise is reported to us, of which several may be found referred to in 1 Chitty, *Crim. Law*, 201. It is there said that 'at common law the court has power of directing the trial to take place in the next adjoining county when justice requires it.' . . . The same considerations must govern, and the same result be obtained, in regard to the state and the party. There is no canon of interpretation which can be applied to the one which will not apply with equal force to the other." In *Jerry v. Townshend* (1852) 2 Md. 274, it was said that "all laws for the removal of causes from one vicinage to another were passed for the purpose of promoting the ends of justice by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests or rights of one or the other of the parties to the suit. This is a common-law right belonging to our courts, and, as such, can be exercised by them in all cases, when not modified or controlled by our constitutional or statutory enactments,"—citing *Price v. State* (1849) 8 Gill, 296. The cases last cited were approved in *Cooke v. Cooke*, 41 Md. 302. The supreme court of Pennsylvania, in *Com. v. Balph*, 111 Pa. 365, 3 Atl. 220, after pointing out that its jurisdiction was similar to that of the King's bench, and reviewing the English and American authorities upon this question, stated that, "after a case has been so brought into the King's bench, it may be tried at bar, or at nisi prius by a jury from the county from which the record was brought, or, if it is suggested upon the record and proof by an affidavit that an impartial trial cannot be had in such county, the record may be remanded to another county for trial. The latter is an important provision, as it amounts practically to a change of venue, and may take place in cases where no such change is given by statute,"—and reached the conclusion that it "possessed the inherent power of issuing writs of certiorari to remove criminal cases, to try such cases at bar in any district where it might chance to be sitting, or send it for trial at nisi prius, and, upon sufficient cause shown, to send it for trial to a county other than the one in which the indictment was found." See also *Com. v. Delamater*, 145 Pa. 210, 22 Atl. 1098, and *Kendrick v. State*, *Cooke* (Tenn.) 474, and cases cited. The same view is held in Michigan. The Constitution of that state provides that "the right of trial by jury shall remain." etc. In *Stuart v. Kimball*, 43 Mich. 443, 5 N. W. 635, a statute which authorized the indictment and trial of trespassers upon state

lands, in any county in the Upper Peninsula was held unconstitutional, for the reason that it violated the right of trial by a jury of the vicinage as known at the common law,—a right which was held in that case, as it is, indeed, in all cases, to be one of the substantial and beneficial elements of a jury trial. The case did not involve the question as to whether the right is unqualified, or the right of the state to secure a change when necessary for a fair and impartial trial. Nevertheless, Mr. Justice Cooley, who wrote the opinion, indicated his views on that subject in the following language: "It has been doubted in some states whether it was competent even to permit a change of venue, on the application of the state, to escape local passion, prejudice, and interest. *Kirk v. State*, 1 Coldw. 344; *Osborn v. State*, 24 Ark. 629; *Wheeler v. State*, 24 Wis. 52. But this may be pressing the principle too far. *State v. Robinson*, 14 Minn. 447, Gil. 333; *Gut v. Minnesota*, 9 Wall. 35, 19 L. ed. 573." The significance of the statement. "this may be pressing the principle too far," will be better understood when we consider that the Constitution of Tennessee guarantees a trial by "an impartial jury of the county in which the crime shall have been committed;" that of Arkansas and Wisconsin "an impartial jury of the county or district," etc.; and that it was under these express constitutional limitations as to locality that the courts were constrained to hold, in the cases referred to by Judge Cooley, that the right to a trial by a jury of the county or district was an absolute one. In the later case of *People v. Peterson*, 93 Mich. 27, 52 N. W. 1039, where the question was directly involved, that court held a statute authorizing a change of place of trial upon the state's application was constitutional, and, after quoting the above language of Judge Cooley, said: "This statute is but declaratory of the common-law power vested in the circuit courts of this state. It is said by Bishop, in his work on Criminal Procedure, that the change of venue is usually ordered on application of the prisoner, first giving notice to the prosecuting officer, and then supporting the application by affidavits: but it may equally be ordered, in the absence of any provision of written law to the contrary, when applied for by the representative of the government. 1 Bishop, *Crim. Proc.* § 73. In support of this doctrine are cited *People v. Webb*, 1 Hill, 179, and *People v. Baker*, 3 Park. *Crim. Rep.* 181. In *People v. Webb*, 1 Hill, 179, it was held that a change of venue might be awarded by the court on application of the state, on motion of the public prosecutor, if it appeared that a fair and impartial trial could not be had in the

county where the indictment was found. We think it is well settled that, where there is no constitutional provision fixing the vicinage within which the trial must be had, the rule of the common law must prevail, unless changed by statute; and that, under their common-law powers, the circuit courts have the right, upon cause shown, to change the venue upon the application of the people." This case was followed and approved in *People v. Fuhrmann*, 103 Mich. 593, 61 N. W. 865.

Numerous cases might be cited which, under the supposed coercion of constitutional provisions providing for a trial by a jury "of the county," or "of the county and district," or "of the vicinage," hold that the legislature cannot authorize a change by the state, even when necessary to secure a fair and impartial trial. But, even under such constitutional restrictions, the cases are not uniform. The Constitution of Minnesota guarantees "a speedy and public trial by an impartial jury of the county or district where the crime shall have been committed." It was held in *State v. Miller*, 15 Minn. 344, Gil. 277, that a statute authorizing a change by the state from a county in one judicial district to an adjoining county in an adjoining district was not unconstitutional. The court said, "that both Constitution and law are but the affirmance of the common-law right of the defendant to an impartial jury of the county where the act was committed, subject to the right of the court to change the place of trial whenever such impartial jury cannot be had there." *Com. v. Davidson*, 91 Ky. 162, 15 S. W. 53, is to the same effect. The correctness of the declarations as to the common-law right in the cases to which we have referred is, we think, fully sustained by the English cases and text writers. In England the King's bench had general supervisory jurisdiction, in criminal cases, coextensive with the Kingdom, and a change of the place of trial from the county of the offense in criminal cases was effected by aid of a writ of certiorari issued by that court. In 4 Bl. Com. 320, the second of the four grounds upon which that writ was frequently issued is stated as follows: (2) "Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed in order to have the prisoner or defendant tried at the bar of the court of King's bench, or before the justice of nisi prius," etc. And, in the same connection, that learned author states that "a certiorari may be granted at the instance of either the prosecutor or the defendant; the former as a matter of right, the latter as a matter of discretion." See also 2 Hawk. P. C. chap. 27, § 27. Were authority necessary to sustain the foregoing 65 L. R. A.

text, it will be found in the following cases: *King v. Holden*, 5 Barn. & Ad. 347, 2 Nev. & M. 167; *King v. Thomas*, 4 Maule & S. 442; *King v. Russell*, 4 Barn. & Ad. 576, note; *Rex v. Ellis*, 6 Barn. & C. 145, 9 Dowl. & R. 174, 5 L. J. Mag. Cas. 1; *Queen v. Palmer*, 5 El. & Bl. 1024; *King ex rel. Dabbus v. Penprase*, 4 Barn. & Ad. 573, 1 Nev. & M. 312; *Queen v. Fay*, Ir. Rep. 6 C. L. 436; *Rex v. Hunt*, 3 Barn. & Ald. 444, 2 Chitty, 130; *King v. Eaton* (1787) 2 T. R. 81, 1 Revised Rep. 436; *Re Listowel's Fishery*, Ir. Rep. 9 C. L. 46; *Reg. v. Barrett*, Ir. Rep. 4 C. L. 285, 18 Week. Rep. 671; *Queen v. Phelan*, 14 Cox, C. C. 579. It will appear from an examination of these cases that the writ was granted as of course when applied for by the Crown or the attorney general; and that no distinction was made between misdemeanors and felonies, except that in case of a felony the showing by a defendant that a fair and impartial trial could not be had must be more conclusive than in case of a mere misdemeanor. So firmly was the Crown's right to the writ established at common law, that acts of Parliament which took away the right to the writ in general language were held not to apply to the Crown because it was not expressly so stated. *Rex v. Bodenham*, 9 Ad. & El. 504; *Rex v. Bodenham*, 1 Cowp. 78; *Rex v. —*, 2 Chitty, 136; *King v. Davies* (1794) 5 T. R. 626, 5 Eng. Ruling Cases, 543, 2 Revised Rep. 683. It is true that most of the reported cases on this subject are where the application was by the defendant. The reason for this is found in the fact that the Crown's right was an admitted one, whereas that of the defendant rested upon an exercise of the court's discretion; and the latter was therefore most frequently the subject of judicial inquiry. The Crown's right was seldom, if ever, challenged; and no case has been cited or found by us where it was denied. It was exercised upon the application of the prosecution in *Reg. v. Barrett*, Ir. Rep. 4 C. L. 285, 18 Week. Rep. 671, where, on a trial for felony the jury was not able to agree upon a verdict, and the prisoner was discharged. The Crown then moved to have a second trial in some other county, on the ground that a fair trial could not be had in the county where the offense was committed. It was held that the court of Queen's bench had the same jurisdiction to change the place of trial in felony as in misdemeanor, and that the place of trial should be changed, as the court was of opinion that a fair trial could not be had in the county where the offense was committed. So, also, in *Queen v. Phelan*, 14 Cox, C. C. 579: "In an indictment for murder the trial had twice been ready for hearing; once in the local venue where the alleged crime was com-

mitted, and once in the venue fixed by the winter assizes act. On both these occasions the trial was postponed on the ground that an impartial trial could not be had, it appearing on affidavit that large numbers of the jurors who would try the case were members of an association called 'The Land League,' which association had subscribed to the defense of the prisoners, the crime being of an agrarian nature. The venue was now changed from the local one to a district where it appeared probable a fair and impartial trial could be had, the Crown being put under terms to expedite the hearing of the case, and to pay the costs to the accused persons necessarily incurred by the change of venue." So, too, the place of trial was changed upon the Crown's application in a case reported in 2 Chitty, 136. In *Queen v. Palmer*, 5 El. & Bl. 1024, the defendant was tried for murder, convicted, and executed in another county than that of the offense. It is true that in that case the indictments—for there were several of them—were removed to King's bench upon a writ issued upon the defendant's application; but the record shows that the motion which fixed the place of trial was made by the attorney general. Lord Campbell, Ch. J., said: "No doubt, after the indictment has been removed, there may be a trial at bar, though at present I see no ground for that; or there may be a trial in any court of England in which the court may think it right that such a trial should take place." And the other justices separately expressed their assent to this view. Blackstone, cited to sustain the unqualified character of the right of trial by a jury of the vicinage, does not support that view, but rather the reverse. True, in book 4, p. 350, he says: "When, therefore, a prisoner on his arraignment hath pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors *liberos et legales homines de vicineto*; that is, freeholders, without just exception; and of the *viane* or neighborhood, which is interpreted to be the county where the fact is committed." And, again, he states that a grand jury "cannot regularly inquire of a fact done out of that county for which they are sworn." But these are statements of general, and not absolute, rules. Indeed, in this connection, on page 305, he cites a large number of offenses, including murder, which might be inquired of and tried in any county of the Kingdom, and concludes: "But, in general, all offenses must be inquired into, as well as tried, in the county where the fact is committed." Reference has already been made to his enumeration 65 L. R. A.

of the impossibility of a fair and impartial trial in the county of the offense as one of the four grounds for the issuance of the writ of certiorari, and that the right to the writ, when applied for by the Crown, was absolute. Further confirmation is found in his eulogy upon the jury system. Volume 3, p. 384. After stating that "the locality of trial required by the common law" was a result of the ancient locality of jurisdiction, namely, in the manor and the hundred, and gradually in the county, which formerly made it necessary that the jurors should be tenants of the lord or members of the hundred where the offense was committed, he said: "The restriction as to hundreds hath gradually worn away and at length entirely vanished: That of counties still remains for many beneficial purposes. But, as the King's courts have a jurisdiction coextensive with the Kingdom, there surely can be no impropriety in sometimes departing from the general rule when the great ends of justice warrant and require an exception." Our conclusion, that at common law the right of trial by a jury of the county of the offense was a general one, not unconditional, but always subject to the exception that the indictment might be removed and the trial take place in another county, either upon the application of the prosecution or the defendant, when necessary to secure a fair and impartial trial, and without substantial difference between felonies and misdemeanors, except as to the degree of proof necessary to procure the change, is also supported by the text of other distinguished English authors whose common-law learning vouches for the accuracy of their statements. See 1 Chitty, *Crim. Law*, 378, 495; 2 Hale, P. C. 162, 210; 1 Roscoe, *Crim. Ev.* 8th ed. 290, 372, and cases cited.

The supreme court of California held, in *People v. Powell*, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481, that a constitutional provision identical in language with our own—and it is upon this case that counsel for plaintiff chiefly rely—prohibited the legislature from authorizing a change of place of trial to another county upon the state's application. We cannot agree to the correctness of this decision. Its fallacy lies in erroneously assuming that at common law the defendant had an unqualified right to a trial by a jury of the county of the offense. The people of California, when they adopted their first Constitution, did not enter into statehood from a territorial government, like the people of this state. In the absence of any other certain means of ascertaining the nature of the right of trial by jury intended to be secured by their Constitution, the court turned to the common law, and, assuming that the common-law right was an unquali-

fied one, necessarily reached the conclusion that the legislature could not take it away. The error lies in the assumption. The crowning purpose of the jury system, through its various stages of development, has been to provide a fair and impartial trial. Under the interpretation of the California court, the right secured is not the common-law right of trial by jury. It is more. It secures to the defendant a fair and impartial trial in the county of the offense, if such a trial can be had; and, if not, it grants him immunity from trial and punishment for his offense. The common law, which may be said to be the ripened product of the wisdom and experience of successive generations, is not properly chargeable with the origin of any such doctrine. The Crown, through the King's bench, always had the power to accord a fair and impartial trial. If it could not be had in the county where the offense was committed, it was secured by transferring the indictment for trial to another county. Our Constitution was adopted after, and not in the light of, the California case, and is not, therefore, controlled by it. As we have seen, the right of trial by jury had acquired a fixed meaning among the people who adopted our Constitution when they adopted it, and it is the right, thus understood, which was secured; and it is, in fact, merely the right as it existed at the common law.

It follows from what we have said that the District Court did not act without lawful authority in making the order in question.

The writ will therefore be quashed.

All concur.

Cochrane, J., did not sit in the above case, or take any part in the decision, Judge **Charles A. Pollock**, of the Third Judicial District, sitting in his place by request.

NORTHWESTERN TELEPHONE EX- CHANGE COMPANY, *Respt.*,

v.

E. B. ANDERSON et al., *Appts.*

(.....N. D.....)

*1. A person licensed to move houses

*Headnotes by MORGAN, J.

NOTE.—For a case in this series holding that an injunction will lie to prevent the moving of a building through a city street where this would result in injury to the wires of an electric railway company and stop the running of cars for several hours, see *Williams v. Citizens'* R. Co. 15 L. R. A. 64.
65 L. R. A.

in the city of Grand Forks is legally liable for damages done by him while moving a house, such damages being done to the wires and property of a telephone company, duly authorized by ordinance to establish a telephone system in said city, and maintained therein.

2. By the passage of such ordinance, which gave the city benefits, and its acceptance by the company, and its expenditures thereunder, a contractual relation was created between the company and the city, which became a vested right that could not be impaired by subsequent action of the city directly or indirectly annulling it for purposes not public, and for purposes of a personal or private nature.
3. The use of a street for moving houses is an extraordinary use thereof. Such use may be permitted, but not so as to destroy the use of the street for travel or necessary public purposes, and cannot be legally done in destruction or impairment of vested rights.

(February 8, 1904.)

APPEAL by defendants from a judgment of the District Court for Grand Forks County in favor of plaintiff in an action brought to recover the loss inflicted on plaintiff by the use of a street by defendants for the moving of a building. *Affirmed.*

The facts are stated in the opinion.

Mr. Guy O. H. Corliss, for appellants:

It rests within the power of the governing body of a municipality to allow its streets to be used for the purpose of moving buildings thereon from one lot to another in the city. Such authority cannot be bargained away by contract, but is vested in the governing body for the benefit of the general public as a trust.

Commissioners' Court v. Street, 116 Ala. 28, 22 So. 629; *Hibbard v. Chicago*, 173 Ill. 91, 40 L. R. A. 621, 50 N. E. 256; *Snyder v. Mt. Pulaski*, 176 Ill. 397, 44 L. R. A. 407, 52 N. E. 62.

Mr. Tracy R. Bangs, for respondent:

The acceptance by the plaintiff of the terms and conditions of the ordinance granting to it the use of the streets and alleys of the city of Grand Forks created a contract between the plaintiff and the city.

Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; *Michigan Teleph. Co. v. St. Joseph*; 121 Mich. 502, 47 L. R. A. 87, 80 Am. St. Rep. 520, 80 N. W. 383.

The streets of a city are highways, dedicated to the use of the public for particular purposes. Their purpose is to provide the public with means to travel from place to place, and their use is subordinate to their purpose.

Taylor v. Portsmouth, K. & Y. Street R. Co. 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560.

No individual can, as a matter of right, make an unusual or extraordinary use of the highways to the detriment of the public, or of others exercising vested rights therein.

There is no common-law right to move a house along the streets of a city, and such a use of the streets is an extraordinary use for which the municipality may require a license.

24 Am. & Eng. Enc. Law, p. 119.

By virtue of the contract the plaintiff acquires rights which cannot be destroyed or impaired.

St. Paul v. Chicago, M. & St. P. R. Co. 63 Minn. 330, 34 L. R. A. 184, 63 S. W. 267, 65 N. W. 649, 68 N. W. 458.

The moving of the building was far from being a public necessity or convenience, and plaintiff was not bound to submit, without compensation, to the injury occasioned to its property by its removal, though the defendant, in the performance of his work, may have been acting with lawful authority.

Day v. Green, 4 Cush. 433; *Dickson v. Kewanee Electric Light & Motor Co.* 53 Ill. App. 379; *New York & N. J. Teleg. Co. v. Desheimer*, 14 N. J. L. J. 295; *Pennsylvania Teleph. Co. v. Varnau*, 2 Monaghan (Pa.) 645, 15 Atl. 624; *Williams v. Citizens R. Co.* 130 Ind. 71, 15 L. R. A. 64, 30 Am. St. Rep. 201, 29 N. E. 408; *Eureka City v. Wilson*, 15 Utah, 53, 48 Pac. 41.

Morgan, J., delivered the opinion of the court:

This action is brought to recover damages alleged to have been caused to plaintiff's property by the defendants while moving a house through and upon the streets of the city of Grand Forks. The complaint alleges the incorporation of the plaintiff company under the laws of the state of Minnesota, doing business as a telephone company in said state and in the state of North Dakota by legal authority; that in August, 1890, the city of Grand Forks, under statutory authority, passed an ordinance, which was duly approved by the mayor, and published as provided by law, granting the plaintiff company a franchise to erect telephone poles in the streets and alleys of said city, to place wires and cross-bars thereon, and to do the same for the purpose of supplying said city and its citizens the benefits to be derived from communication by telephone between themselves; that such ordinance provided that it should take effect in ten days after the acceptance by the plaintiff of certain conditions and re-

strictions imposed by the ordinance upon said telephone company. Among such conditions, and as a consideration for granting such franchise, was one to the effect that such telephone poles were to be placed at such places, and the wires stretched across or along said streets at such height, as directed by the city engineer and approved by the city council. A further condition to and consideration for the granting of such franchise was that said company should allow said poles to become a city instrumentality for attaching thereon, at the upper arm thereof, the city's fire-alarm or police wires, and that said city should have the use of one telephone free of charge, and such others as it desired for its business at 75 per cent of the usual price charged therefor. Said company unconditionally accepted all the conditions imposed by such ordinance by an acceptance thereof in writing, duly filed in the city clerk's office. The complaint further alleges that the plaintiff, upon its acceptance of the conditions imposed by the ordinance, established a telephone system in said city at a large expense, and has ever since maintained the same as a local telephone system and as a long-distance system, with facilities for communication between said city and other cities in North Dakota and in Minnesota, South Dakota, Wisconsin, and Iowa; that in April, 1900, the defendant Anderson notified the plaintiff that he intended to move a building known as the "Arlington hotel" through and along some of the streets of said city, naming them, and notified the plaintiff to give its wires the required attention in view of such moving. The plaintiff thereupon commenced an action against said defendant, and procured from the district court of Grand Forks county a preliminary injunction against the moving of said building as an interference with its property rights, as such moving would injure its property by breaking its wires; that upon the service of such injunctive order, summons, and complaint the defendant appeared in said action, and moved that such injunctive order be set aside. The court made an order denying such motion unless the defendant Anderson would furnish a bond indemnifying the plaintiff against all damages incurred by it by reason of the moving of said building, by destruction of its property. The bond was furnished, and the building moved. This action is brought on the bond. Damages are alleged at \$207.95. The answer alleges that the defendant rightfully moved such building under legal authority granted to him by virtue of a permit to move said building, issued to him pursuant to a valid ordinance of said city, authorizing the building inspector of said

city to issue such permits to persons entitled thereto, as the defendant was as a duly licensed "house mover;" and that he gave to the city a bond, as provided by its ordinances, indemnifying the said city against any liability incurred by it by reason of damages incurred by it on account of moving of houses by him pursuant to such permit. The case came to trial before a jury upon admitted facts. The trial court directed a verdict for the plaintiff. Judgment was entered pursuant to such verdict, and defendants excepted thereto. The defendants appeal from such judgment.

The only error assigned is that the court erred in directing a verdict for the plaintiff. Two questions only are involved in this appeal: (1) Plaintiff's rights under the ordinance granting it a franchise to establish and maintain a telephone system within said city; (2) defendant Anderson's rights, under the permit issued to him to move said building, based on the ordinances of said city. The plaintiff claims that by its acceptance of the conditions of the ordinance granting the right to establish a telephone system in said city, and its expenditure of large sums of money in establishing and maintaining such system, a contract was entered into with said city under such ordinance, and vested in said company inviolable rights, which it cannot be deprived of by the use of said streets in matters of a private nature not included in the lawful use of said streets for traveling purposes by the public, and that the use of said streets for house-moving purposes is not a use of them for traveling purposes, and not the primary or usual use of them. On the part of the defendant, it is claimed that, Anderson, having been licensed, and by special permit authorized to move the building, his acts in doing so were rightful and legal, and that the city had no power to grant plaintiff privileges that would bargain away defendants' right to move buildings along the streets, as said business is a lawful, necessary, and usual use of the city's streets. The city council of Grand Forks is authorized, under its charter, "to lay out, establish, open, alter, widen, grade, pave, or otherwise improve, streets, alleys, avenues, . . . and vacate the same, . . . and to regulate the use of the same." Comp. Laws, subds. 7, 9, § 885. Subdivision 10 of said section provides that it may prevent and remove obstructions and encroachments upon its streets. Subdivision 17 of said § 885 authorizes the city council "to regulate and prevent the use of streets, sidewalks, and public grounds for signs, sign posts, awnings, telegraph or telephone poles," etc. A telephone system is

classed as a public use, and to further its establishment the right of eminent domain may be exercised. § 5956, subd. 7, Rev. Codes 1899. The sections above referred to confer upon the city the power to pass the ordinance under which the plaintiff company was granted the franchise under which it established and maintains its telephone system in said city. The city council's authority to pass such ordinance as one of its granted powers is not contested in this case. It is claimed, however, that it could not, by so doing, impose any burdens upon the defendant Anderson in properly exercising his license to use the streets in his business of moving houses. In *Donovan v. Allert*, 11 N. D. 289, 58 L. R. A. 775, 91 N. W. 441, this court held that city councils may authorize the use of the streets for appliances necessary to the maintenance of telephone systems, but that, having done so, abutting owners are not thereby deprived of the right to compensation therefor as owners of the fee to the streets. The city council having, under such statutory authority, granted plaintiff the right to use the streets of the city for this purpose under an ordinance with proper restrictions upon the exercise of the right so that travel shall not be interfered with, the question remains for answer, What are plaintiff's rights so far as this litigation is concerned? Was the right granted a naked permission to set poles and string wires on the streets, or was it accompanied by protection from damages by reason of other uses of the streets permitted by the council for private purposes? The city receives pecuniary benefit from the plaintiff in the free use of plaintiff's property. This was exacted as a condition precedent to the ordinance becoming operative. The conditions imposed on the plaintiff before the streets should be used by it were accepted. The plaintiff company applied for the franchise. The city granted this privilege on terms imposed as a consideration. The plaintiff accepted the franchise with the conditions imposed. It has thereafter expended large sums in carrying into effect its acceptance of the ordinance with its conditions. A contract was thereby, in effect, entered into between the two corporations. The contract cannot now be impaired by the city in granting to persons the use of the streets for private purposes. "So an ordinance authorizing a telephone company to maintain lines on its streets, without limitation as to time, for a stipulated consideration, when accepted and acted upon by the grantee by a compliance with its conditions, becomes a contract which the city cannot abolish, or alter without consent of the grantees." *Rutland Electric Light Co. v.*

Marble City Electric Light Co. 65 Vt. 377, 20 L. R. A. 821, 36 Am. St. Rep. 868, 26 Atl. 635. "Certainly, after the expenditure of money in the erection of poles, made in reliance upon the municipal designation, the company obtains a vested right, of which they cannot be stripped by a subsequent revocation of such designation." *State, Hudson Teleph. Co. Prosecutor, v. Jersey City*, 49 N. J. L. 304, 60 Am. Rep. 619, 8 Atl. 124. "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside, or to interpolate new and more onerous conditions therein. Such has been the well-recognized doctrine of the authorities since the *Dartmouth College Case*, 4 Wheat. 518, 4 L. ed. 629." *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533. "When the construction company and the complainant accepted the privileges granted to them by the laws of the state, and the municipality had duly given its permission, and the corporations had expended their money in valuable improvements, contracts were entered into which neither the state nor the municipality could impair or destroy in the absence of power to do so being reserved in the grant itself, or in the Constitution, which becomes a part of such contracts." *Michigan Teleph. Co. v. St. Joseph*, 121 Mich. 502, 47 L. R. A. 87, 80 Am. St. Rep. 520, 80 N. W. 383. See also *Northwestern Teleph. Exch. Co. v. Minneapolis*, 81 Minn. 140, 53 L. R. A. 175, 83 N. W. 527, 86 N. W. 69; *St. Louis v. Western U. Teleg. Co.* 63 Fed. 68; *State, Meyers, Prosecutor, v. Hudson County Electric Co.* 60 N. J. L. 350, 37 Atl. 618; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; *Knowville v. Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501.

It is true that the ordinance under which the plaintiff is maintaining this system was not repealed, but the effect of granting defendant the right to move the building was destructive of plaintiff's property, and therefore a violation of plaintiff's contractual rights under the ordinance. Whether such contractual rights could be relied on in case of changes in the location of poles or damage done to them demanded by a necessary and usual use of the streets by the city, is not here presented. Whether the use of the street in moving houses is inconsistent with plaintiff's use of the streets under the ordinance, or impairs its right to use such streets, is the only question passed on here.

The city gave the defendant permission to move the building in question. The defendant was licensed to move houses in said city. 65 L. R. A.

The license was granted only on condition that he give a bond to indemnify the city against any loss occasioned by the defendant in that business to property, public or private. A license fee of \$25 was also exacted as a condition to the granting of such license, and paid by defendant. By granting the license under the ordinance, the council acted under the statutory power given it to regulate the use of the streets. That the council can rightfully do so under restrictions is undoubtedly true. It is not an absolute right that anyone can demand, but the power is to be exercised or not, as a matter of discretion. *Woodward v. Boston*, 115 Mass. 81; *Eureka City v. Wilson*, 15 Utah, 53, 48 Pac. 41, 15 Utah, 67, 62 Am. St. Rep. 904, 48 Pac. 150. The use of the streets for moving houses is not, however, a usual, but is rather an extraordinary, one. It does not pertain to the primary right to the use of the streets for travel or other public purposes. The public derives no benefit therefrom generally. Such extraordinary use of the street may, however, be permitted as a favor, under restrictions safeguarding the rights of the public to the street in certain cases, as necessity may require. In *Millville Traction Co. v. Goodwin*, 53 N. J. Eq. 448, 32 Atl. 263, the court said: "Because of the privileges thus secured to it by the law and the action of the city authorities, the company has invested its money, and they thereby perfected obligations which the Constitution says shall not be impaired. The defendants propose to occupy the highway, not for the purpose of ordinary travel or communication, but for the purpose of removing a very large frame building, to do which nearly the entire street is occupied. This, it must be admitted, is an obstruction of the street. It certainly interferes more or less with ordinary travel, but the question is not whether or not they may so occupy the street in case by so doing they do not become a nuisance to others who desire and have a lawful right to use the streets for the purposes for which they are established, but the question is whether or not they have a right, in using the street, to prevent the company from the full, free, and complete exercise of the franchises with which it is clothed. I think the statement of the question brings with it the correct answer. While all persons ordinarily have a right to use the street to the same extent with the car company, yet they have no right unduly or unreasonably to occupy the street, and so to prevent the passage of trains." In that case the defendant had no license or permit to move the house. Hence the case is in point only in principle in this case. In *New York & N. J. Teleg. Co. v. Dezheimer*, 14 N. J. L. J. 295, the defendant

was a licensed housemover, and in moving a house cut the wires of the company's system. Suit was brought for damages, and the jury was charged that the defendant was liable if he cut any wires that were put up and maintained in accordance with the city ordinance under which they were put up, and ordered damages assessed in plaintiff's favor for such as were thus maintained and were cut, and these only. In *Williams v. Citizens' R. Co.* 130 Ind. 71, 15 L. R. A. 64, 30 Am. St. Rep. 201, 29 N. E. 408, the court said: "Where a right to use a street is acquired pursuant to statute and under a license from the municipality, it is in the nature of a contract right, and the municipality itself cannot destroy or materially impair it. . . . It is undoubtedly true that all such rights are subordinate to the paramount power, usually denominated the police power, for that power cannot be annihilated by contract. . . . It would violate the plainest principles of law to permit an individual citizen to confiscate or destroy the property of a corporation which had assumed to exercise rights under the laws of the state, and to which the officers of the governmental subdivision have given recognition by granting to it the right to use the streets of a city. . . . The appellants in this case are not asking to be allowed to make an ordinary use of the streets of the city. They are, on the contrary, asking that they be permitted to use the streets in an extraordinary mode, and for an unusual purpose. . . . It would be strange, indeed, if large buildings could be moved along through the thronged streets of a city without control or restriction, and it would be equally strange if the owner of a building could destroy the property of others in order to enable him to move his building from one place to another." In *Dickson v. Kewanee Electric Light & Motor Co.* 53 Ill. App. 379, the jury were instructed that the company "had the right to place wire in the street, if allowed by corporate authority, if it did not interfere with the ordinary use of the public in the streets, and that removing the house along the streets was not within the rights enjoyable by the public as a use of the public streets." This instruction was sustained in the appellate court. See also *Pennsylvania Teleph. Co. v. Varnau*, 2 Monaghan (Pa.) 15 Atl. 624; *Day v. Green*, 4 Cush. 433; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Townsend v. Epstein*, 93 Md. 537, 52 L. R. A. 409, 86 Am. St. Rep. 441, 49 Atl. 629.

The evidence shows that the wires were stretched and the poles placed in compliance with the ordinance under the supervision of the city officers. The building which was moved was a large building, and 43 feet

high when being moved, and 7 feet higher than the highest of plaintiff's telephone wires, as placed pursuant to such ordinance. Our conclusion is that the defendants' rights to the street for house-moving purposes were subordinate to those of the plaintiff; that plaintiff was given paramount rights to the streets by virtue of the ordinance containing no provision for direct or indirect revocation for private purposes; that defendant was a mere licensee, with privileges to use the streets in a manner not unreasonably interfering with the use of the streets for traveling purposes, and without interference with those having prior rights to them under ordinances that have ripened into relations in the nature of contracts, thereby becoming vested rights; that the use of the streets by defendant for such purposes was not an ordinary, but an exceptional and extraordinary, use thereof, out of which the public as such derives no benefit; that neither the defendant's license, nor the special permit to move this building, did or could protect him from liability for damages to plaintiff arising out of the exercise of the permission given him to move this building. The council did not, and would have no power to, grant a license to move the building, and give therewith immunity from damages consequent upon the exercise of the license. Such permission can only be given by the council for the use of the street for such purpose; that is, for moving the building. To add to such permission expressly or in effect a provision that the exercise of the permission would leave those damaged thereby without remedy against the defendant, would be a void, unreasonable, and inoperative provision. Its effect would be to impair and nullify the previous grant to the plaintiff, under which vested rights ripened. To compel plaintiff to remove its wires or repair them whenever called upon to do so by persons moving houses would add a burdensome and unreasonable condition to the ordinance under which it acts, not contemplated by its terms as passed. So far as the plaintiff is concerned, and its property rights, defendant was a trespasser, acting without any legal authority. Appellants' contention is that plaintiff accepted the terms of the ordinance with knowledge that the council possessed the power to authorize the moving of buildings, and possessed such power as a trust which could not be impaired. This would be true of any usual use of the streets or for traveling purposes, or necessities arising in the interests of the public. So far as purely private interests are concerned, the plaintiff's rights cannot be jeopardized by imposing new and unrea-

sonable conditions. We think it more reasonable to say that the plaintiff accepted the ordinance under a presumption, which it had a right to indulge in, that its rights were paramount so far as extraordinary uses of the streets were concerned, and only subject to impairment by the usual and necessary use of the streets, or when public necessities demand it.

The defendants are legally liable for the

damages incurred, and *the judgment will be affirmed.*

All concur.

Cochrane, J., having been of counsel in the court below, took no part in the decision, Judge **W. J. Kneeshaw**, of the seventh judicial district, sitting in his place by request.

OHIO SUPREME COURT.

John E. HUMPHREYS, *Exr., etc., of* Isabella Brown, Deceased, *et al., Plffs., in Err.,*

v.

STATE of Ohio *et al.*

(70 Ohio St. 67.)

*1. Where the probate court, in the settlement of the estate of a decedent, determines the liability of a devisee, legacy, bequest, or inheritance to pay a collateral inheritance tax, under the provisions of § 2731-1, Rev. Stat., appeal may be taken by either party to the controversy regarding the tax from the judgment of the probate court to the court of common pleas, as authorized by § 2731-13, Rev. Stat.; and where the state, or the prosecuting attorney in behalf of the state, takes the appeal. It may be done without giving an undertaking for such appeal, and without filing the written notice of an intention to appeal provided for in § 6408, Rev. Stat. The appeal may be perfected by either party according to the provisions of §§ 6411 and 5227, Rev. Stat.

2. Boards and societies and auxiliaries thereto, which are incorporated and organized under the laws of other states, for "purposes of purely public charity or other exclusively public purposes," are not "institutions" of that class in this state within the meaning of the latter clause of § 2731-1, Rev. Stat.; and where they are entitled to receive property within the jurisdiction of this state by deed of gift, bequest, or devise, such gift, bequest, or devise is liable to a collateral inheritance tax as provided in said section, although some of the charitable work, operations, and enterprises of the institutions so incorporated and organized are carried on within this state.

3. The statute so construed is not objectionable to the 2d section of our Bill of Rights, nor to the 14th Amendment to the Constitution of the United States.

(March 22, 1904.)

*Headnotes by the COURT.

NOTE.—For another case in this series holding that an exemption of any religious or charitable corporation from the payment of a collateral inheritance tax will extend only to domestic corporations, see *Re Prime*, 18 L. R. A. 713.

65 L. R. A.

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas, which in turn affirmed a judgment of the Probate Court subjecting certain legacies in the will of Isabella Brown to the payment of an inheritance tax. *Affirmed.*

Statement by **Price, J.**:

On July 9, 1888, Isabella Brown, a resident of Cincinnati, duly executed her last will and testament, in which she made some bequests to her sister, Mrs. Atkins, to a nephew, Meredith Atkins, and other bequests to Mrs. Gass, of Camden, New Jersey, in trust, with provision therein that the income arising from the money so bequeathed should be paid to two nieces, Harriet and Mary Gass, until each should arrive at the age of thirty-two years, when the principal sum should be paid them equally. The testator bequeathed to the American Bible Society the sum of \$5,000, to the American Tract Society \$5,000 and to the American Sunday School Union \$2,000. Bequests were also made to certain missionary societies and other benevolent religious organizations, which are named separately in the will, and which are also plaintiffs in error. This will was admitted to probate on September 19, 1899, and John E. Humphreys, executor, who was, by the terms of a codicil to the will, appointed executor, entered upon the execution of the trust. In progress of the settlement of the estate a question arose in the probate court concerning the payment of an inheritance tax on the several legacies made by the will to the various religious societies and boards, and the executor, Humphreys, submitted to the probate court his petition to have the matter determined. The prosecuting attorney of Hamilton county appeared in behalf of the state, and contended that each of said legacies was subject to a collateral inheritance tax. After hearing, that court decided that no inheritance tax is payable on any

of the legacies to the religious societies and boards, and ordered the executor to distribute the estate accordingly. The prosecuting attorney gave notice of appeal from so much of said order as finds that an inheritance tax is not payable upon the legacies to the American Bible Society and the several other religious societies and boards, naming each in the notice. The appeal was filed in the court of common pleas, where a motion was made by the appellees to dismiss the appeal on the ground that no appeal bond had been given, nor was written notice of intention to appeal filed, and on the general ground that appellant had not otherwise complied with the law for such appeals. The court of common pleas overruled the motion, and the appellees excepted. The case was then heard on the merits, and the court found and adjudged that each of said legacies is liable to a tax of 5 per cent of the amount of such legacies, with interest thereon from August 25, 1900. A motion for new trial was overruled, a bill of exceptions taken embracing the evidence adduced at the hearing, and the case was taken on error to the circuit court, where the judgment of the court of common pleas was affirmed. Error is prosecuted in this court to reverse the judgments of the circuit and common pleas courts. Additional facts appear in the opinion.

Messrs. Lawrence Maxwell, Jr., John E. Humphreys, and Joseph S. Graydon, for plaintiffs in error:

The judgment entry in the probate court recites that the prosecuting attorney gave notice of his intention to appeal; but no written notice was filed. The appeal was, therefore, not properly taken, and the court of common pleas erred in overruling the motion to dismiss the appeal.

90 Ohio Laws, 17, § 13; Rev. Stat. § 2731-13; *Browne v. Wallace*, 66 Ohio St. 57, 63 N. E. 588.

All of the institutions to which Isabella Brown gave legacies, with the exception of the Board of Freedmen's Missions, carry on their operations and dispense their charities to a large extent in the state of Ohio. They are "in the state of Ohio."

All that is required of the institution is that it shall be "in the state of Ohio." It fills the description if it is, in a real and substantial sense, in the state, although it may also be in other states.

Gerke v. Purcell, 25 Ohio St. 229.

The mere form of organization or place of incorporation is not the substantial or important thing in determining whether an institution can be truly said to be in Ohio, for it is the institution itself, and not the form or shell, with which the statute deals. 65 L. R. A.

Morawetz, Priv. Corp. 2d ed. § 1046, p. 1006; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279.

The tax at bar is a special tax upon the right to inherit, and not a general property tax.

State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L. R. A. 218, 41 N. E. 579.

The sovereign is bound to express its intention to tax in clear and unambiguous language, and a liberal construction should be given to words of exception confining the operation of duty.

Hidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; *Warrington v. Furbor*, 8 East, 242, 6 Esp. 89; *Williams v. Sangar*, 10 East, 66; *Denn ex dem. Alanifold v. Diamond*, 4 Barn. & C. 243; *Tomkins v. Ashby*, 6 Barn. & C. 541, 9 Dowl. & R. 543, 5 L. J. K. B. 246; *Doe ex dem. Scruton v. Snaith*, 8 Bing. 146; *Wroughton v. Turtle*, 11 Mees. & W. 561; *Cooley*, Taxn. 146; *Re Enston*, 113 N. Y. 174, 3 L. R. A. 464, 21 N. E. 87; *Re Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Gurr v. Scudds*, 11 Exch. 190, 3 Week. Rep. 457; *United States v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690; *United States v. Watts*, 1 Bond, 580, Fed. Cas. No. 16,653; *Fox v. Com.* 16 Gratt. 1.

The statute imposes a tax upon the right to inherit against all nonresident charitable institutions, while relieving all resident institutions of the same class. This discrimination against the right to inherit, on the ground of the residence of the legatee, contravenes the 2d section of our Bill of Rights and the 14th Amendment of the Constitution of the United States.

State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L. R. A. 218, 41 N. E. 579; *Re Mahoney*, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389; *Sprague v. Fletcher*, 69 Vt. 69, 37 L. R. A. 840, 37 Atl. 239.

Corporations are persons within the meaning of the 14th Amendment, and entitled to the equal protection of the laws.

Santa Clara County v. Southern P. R. Co. 18 Fed. 385, Affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 154, 41 L. ed. 606, 608, 17 Sup. Ct. Rep. 255; *Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226; *Parker v. North British & M. Ins. Co.* 42 La. Ann. 428, 7 So. 599; *San Francisco v. Liverpool & L. & G. Ins. Co.* 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380; *Re Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161, 73 Pac. 424; *Re Stanford*, 126 Cal. 112, 45 L. R. A. 788, 58 Pac. 462; *Re Mahoney*, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037,

18 Sup. Ct. Rep. 594; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218, 41 N. E. 579; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564.

Messrs. Hoffheimer, Morris, & Sawyer for defendants in error.

Price, J., delivered the opinion of the court:

It is said in the opening of the brief for plaintiffs in error that this proceeding involves two questions of law: "(1) Whether the appeal from the probate court to the court of common pleas was duly taken; (2) whether the legacies are taxable."

1. The right to appeal in cases like the present is conferred by § 2731-13, Rev. Stat., which is: "The court of probate, having either principal or auxiliary jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to said tax that may arise, affecting any devise, legacy, or inheritance under this act, subject to appeal as in other cases; and the prosecuting attorney shall represent the interests of the state in any such proceedings." It is claimed for plaintiffs in error that the words "subject to appeal as in other cases" mean that the remedy of appeal must be exercised according to the general rule provided for appeal from the probate to the court of common pleas, which is found in § 6408, Rev. Stat. That section provides, in substance, that the person desiring to take an appeal shall, within twenty days after the making of the order, decision, or decree from which he desires to appeal, give a written undertaking . . . to the adverse party, with one or more sufficient sureties, to be approved by the probate judge, and conditioned, etc. But when the person appealing . . . is a party in a fiduciary capacity, in which he has given bond within this state, and he appeals in the interest of the trust, he shall not be required to give bond, but shall be allowed the appeal by giving written notice to the court of his intention to appeal within the time limited for giving bond. It is conceded in this case that no bond was given by either the state or by the prosecuting attorney in behalf of the state, and it is manifest on the record that the only notice of appeal was given by journal entry as follows: "The prosecuting attorney gives notice of appeal from so much of said order as finds that an inheritance tax is not payable upon the legacies to the following legatees, *viz.*, American Bible Society" *et al.*, naming each of the other religious societies and boards receiving legacies. But is the mode of appeal governed by § 6408, Rev. Stat.? In such a

proceeding before the probate court it cannot be correctly stated that either the state or the prosecuting attorney acts in a fiduciary capacity. On the contrary, the state is a sovereign, and such is its relation to the controversy. It is provided in § 213, Rev. Stat.: "No undertaking or security is required on behalf of the state or of any officer thereof in the prosecution or defense of any action, writ, or proceeding; nor is it necessary to verify the pleadings on the part of the state or any officer thereof in any such action, writ, or proceeding." It is under this section that the state or its officer is relieved from giving bond for an appeal, and not under § 6408, *supra*; and, the state or the prosecuting attorney not sustaining a fiduciary relation to the proceeding, the notice of appeal in behalf of the state need not be in writing, as provided in the latter section, for it is only where that relation exists that such written notice is required under its provisions. We are of opinion that § 6411 of the same chapter and title furnishes the guide in this case. "The provisions of law governing civil proceedings in the court of common pleas shall, so far as applicable, govern like proceedings in the probate court, when there is no provision on the subject in this title." We have seen that the other provisions of the title do not apply to this class of proceedings. We therefore look to the manner of appeal from the court of common pleas as found in § 5227, Rev. Stat., which is: "A party desiring to appeal his cause to the circuit court shall, within three days after the judgment or order is entered, enter on the records notice of such intention. . . ." This was the law at the time of the appeal in this case. Notice of intention to appeal was entered on the records of the probate court in conformity with the above rule, and we think it is sufficient. The appeal was properly sustained.

2. Whether the legacies are subject to the collateral inheritance tax depends on the construction of section 2731-1, Rev. Stat. The statute in its present form was enacted April 6, 1900. See 94 Ohio Laws, p. 101. This act provides, in part: "That all property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, . . . or the lineal descendants of any adopted child,

the wife or widow of a son, the husband of the daughter of a decedent, shall be liable to a tax of 5 per centum of its value, above the sum of \$200; 75 per centum of such tax to be for the use of the state, and 25 per centum for the use of the county wherein the same is collected. . . . But the provisions of this act shall not apply to property, or interests in property, transmitted to the state of Ohio under the intestate laws of this state, or embraced in any bequest, devise, transfer, or conveyance to or for the use of the state of Ohio, or to or for the use of any municipal corporation or other political subdivision of said state for exclusively public purposes, or public institutions of learning, or to or for the use of any institution in said state for purposes of purely public charity or other exclusively public purposes; and the property, or interests in property so transmitted or embraced in any such devise, bequest, transfer, or conveyance is hereby declared to be exempt from all inheritance and other taxes, while used exclusively for any of said purposes." The words in the exemption clause, "to or for the use of any institution in said state for purposes of purely public charity or other exclusively public purposes," are the subject of the present controversy. The first lines of the act are comprehensive, and would embrace the legacies named, and subject them to the inheritance tax, unless they are saved by the above exemption clause. Therefore counsel have discussed, and we are called upon to consider, the scope of the language quoted when applied to the facts of the present case. What are the material facts? It is shown by the record that all the legatee societies and boards who are plaintiffs in error, save the Woman's Home Missionary Society, are incorporated in states other than Ohio; and while they are not organizations for profit, but for the purpose of advancing the cause of religion and dispensing charity, they are, nevertheless, foreign corporations. Some were chartered under the laws of New York, and others under the laws of Pennsylvania. The Woman's Home Missionary Society is an auxiliary to the Board of Home Missions, and the Woman's Foreign Missionary Society is auxiliary to the Board of Foreign Missions. The parent of all these societies and boards seems to be the General Assembly of the Presbyterian Church in America, incorporated in another state, which is the central and supreme authority; and where the subordinate societies and boards became incorporated it was done under the direction of the general assembly. The American Tract Society has colporteurs in almost, if not all, the states of the Union, and other agencies for the distribution of

religious literature. The aim of the American Bible Society is the distribution of the Holy Scriptures, translated into numerous languages, among the people generally, and especially among the destitute and needy classes. While foreign corporations, or auxiliaries thereto, it is true that the work laid out for each board and society is carried on in all the states through local and subordinate agencies; and it may be admitted that theirs are works of charity in the broad sense that the uplifting of men, women, and children to the standard of life taught in the Scriptures is, indeed, a work of charity, the greatest of the three Christian graces. The funds to carry forward these religious enterprises under the various names and organizations are raised by church and other collections and largely aided by devises and legacies. The testatrix, Isabella Brown, no doubt was a devout member of the Presbyterian Church, and of her bounty she liberally gave to these several societies and boards, believing they could best employ her gifts in advancing the cause of the church of her choice.

The work of the Board of Missions for Freedmen lies mostly in our southern states. But it must be stated as a fact appearing in the record that, while legatees who are plaintiffs in error through auxiliary and subordinate agencies are diligent in every state of the Union, the higher authority to which they must account resides beyond the jurisdiction of this state, and hence the question recurs, Are they "institutions in this state for purposes of purely public charity, or other exclusively public purposes?" We are urged to conclude that, because the work of these societies and boards is in progress, in greater or less degree, and their influence felt, in this state through the various subordinate agencies employed, the institutions themselves are in this state within the meaning of the statute. If this is true of Ohio, it is true of every other state, and we have these institutions, not only in the state where they are chartered, but omnipresent, and in all the states; in other words, they would, as institutions, exist in any state where any of their charitable or religious enterprises are projected and carried on, no matter in what degree. Such a construction of the facts and the law, we think, is not permissible, if the statute is valid, of which we shall speak later in this opinion. It seems to be true that some of these societies and boards have an office in Ohio in charge of a representative, the better to conduct the affairs of that church agency. So, also, have railway, insurance, telegraph, telephone, and other foreign corporations; but that is to further their business enterprises. Such companies are not "institutions in this

state" because they have traffic and conduct business here. They are still corporations and institutions of the state where chartered and organized. Learned counsel for plaintiffs in error ask in their brief: "Where are these institutions if not in Ohio? Where were the institutions before charters were granted? for they were in existence long prior to the dates of the charters." It is perhaps true that these institutions now operating under charters may have had another form of existence prior to the date of the charters, but in the wisdom of the general assembly of the church it was decided to organize them under charters, and it selected the state under whose laws it should be done. It is not a new proposition that the home of the corporation is the state of its incorporation, and, when so incorporated under the laws of a state selected for that purpose, it has also selected its abiding place, and no longer can be recognized as homeless, or as abiding in every state where they have agencies carrying forward their work of benevolence and charity. We think this view is abundantly supported by the authorities. The will of Mrs. Brown, who was a resident of Cincinnati, gave no directions to her executor or her legatees as to the place where the money should be expended, nor does it undertake to control the time or place of the expenditure. Once in the possession of these institutions, it may be disbursed as they deem proper, and all of it may be disbursed in communities beyond our borders. So we do not find that we are adopting a narrow construction of our statute if it appears that it undertakes to tax the right of the foreign, though charitable, institutions, to receive and so absolutely control the disposition of property owned by the testatrix in this state. We think these legatees are not "institutions in this state" within the meaning of the statute.

The doctrine we maintain is happily expressed by Justice Field in *Paul v. Virginia*, 8 Wall. 181, 19 L. ed. 380, as follows: "Now, a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of 65 L. R. A.

those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. . . . They may exclude the foreign corporations entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest. The whole matter rests in their discretion." Again, in speaking of the assent of the other states to transact business within their borders, the learned justice adds "that such assent may be granted upon such terms and conditions as those states may think proper to impose." We have from this high authority a definition of the situs of corporations and their relation to states other than where chartered, and we find no distinction in this respect between business corporations and those not for profit, or for religious or charitable purposes. Quotation from other authorities we think superfluous, and it seems clear that these charitable and religious institutions, being corporations foreign to this state, are not "institutions in this state," and are therefore not within the exemption provided in the inheritance statutes.

Applying the doctrine in a practical manner, we have numerous decisions, many of which are cited in the brief for defendants in error. We will occupy space in citing and discussing but few of them, and only such as may serve as fairly representative of the many others. In *People ex rel. Huck v. Western Seaman's Friend Soc.* 87 Ill. 246, it appears that the society was incorporated under the laws of Ohio. It had a building in Chicago in charge of a superintendent, where seamen, dockmen, were solicited to meet for religious and moral instruction, and lodging was provided for needy cases. The object of the society, as declared in the act of incorporation, is "for disseminating moral and religious instruction, and other charities, among sailors and laborers doing business on our western waters." This institution resisted the collection of a tax on the Chicago premises on the ground that, being a place where charity is dispensed, it was exempt. The court, on page 249, says: "But if a broader construction could be given to the statute, and it could be held to embrace all institutions that dispense charity, whether public or private, and the property used exclusively for that purpose, there is still a valid reason why the property in this case is not exempt from its just proportion of taxation. The statute must, in any event, be understood to have exclusive reference to institutions or corporations created by the laws of this state, and not to foreign

corporations that may choose to locate branches in this state. It is only by that comity that exists between states that foreign corporations are permitted to transact in this state the business for which they were created. The general assembly has manifested no intention to relieve the property situated in this state, belonging to such corporations, no matter what their objects may be, whether charitable or otherwise, from the burdens of taxation." We further illustrate the application of the statute by reference to another leading case decided by the court of appeals of New York: *Re Prime*, 136 N. Y. 347, 18 L. R. A. 713, 32 N. E. 1091. Prime, a resident of that state, died in the city of New York on April 7, 1891, leaving a will disposing of real and personal property. He gave legacies to collateral relatives, and also to two foreign corporations,—the American Board of Commissioners for Foreign Missions and the Presbyterian Board of Relief for Disabled Ministers. The taxing authorities exacted a collateral inheritance tax on the legacies to those corporations as well as on the legacies to the collateral heirs. These legatees appealed, and the controversy finally reached the court of appeals. Other questions were in the case as to the condition of the statutes of that state upon the subject, which are not relevant here, and they are omitted. We quote from the able opinion of Andrews, Ch. J., as follows: "The claim that the test of liability of foreign corporations to a legacy tax is the liability of a domestic corporation of the same character to the payment of such a tax, and that, if one is exempt, the other is exempt also, has, we think, no foundation. In both cases the question is the same,—Has the statute made the legacy taxable? . . . The argument that gifts for the promotion of charity, education, and religion should be encouraged, and should not be diminished by exactions of the state, presents a moral and political, rather than a judicial, question. It is the duty of courts in the interpretation of statutes to declare the law as it is, and the interests of society are best subserved by a close adherence by courts to what they find to be their plain meaning, neither narrowing the application on the one hand nor extending the meaning on the other to meet cases not specified, which may seem to be within the reason of the law. . . . It is the policy of society to encourage benevolence and charity. But it is not the proper function of a state to go outside of its own limits, and devote its resources to support the cause of religion, education, or missions for the benefit of mankind at large." The opinion from which the above is quoted was unanimous. The same court has before it 65 L. R. A.

another inheritance tax case, which is found in *Re Balleis*, 144 N. Y. 132, 38 N. E. 1007, where the *Prime Case* was considered, and its principles unanimously approved. It was held that "a statute of a state granting powers and privileges to corporations must in the absence of plain indications to the contrary, be held to apply only to corporations created by the state, and over which it has the power of visitation and control. . . . The legislature in such cases is dealing with its own creations, whose rights and obligations it may limit, define, and control." The *Prime Case* was considered as a valuable authority in *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, and it is quoted from, as we have done, with approval, and adds, as found on page 629, 163 U. S., page 288, 41 L. ed., and page 1075, 16 Sup. Ct. Rep.: "Such a tax [inheritance tax] was also held by this court to be free from any constitutional objection in *Mager v. Grima*, 8 How. 490—493, 12 L. ed. 1168—1170, Mr. Justice Taney remarking that 'the law in question is nothing more than an exercise of the power, which every state and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominion, may be transferred by last will and testament or by inheritance, and of prescribing who shall and who shall not be capable of taking it. . . . If a state may deny the privilege altogether, it follows that when it grants it it may annex to the grant any conditions which it supposes to be required by its interests or policy.' . . . We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States [a legatee of personal property], since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it." The same doctrine is found in *Eidman v. Martinez*, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

From the foregoing cases we see that the exemptions of charitable institutions would relate only to domestic institutions of that class, even if the words "in the state" had been omitted from the statute. It is not a tax upon property, but upon the right to receive property and have it transferred. Our statute does not impose the tax upon the property directly, because it provides that "all administrators, executors, and

trustees . . . shall be liable for all such taxes, with lawful interest, as hereinafter provided."

However, it is argued that our construction of the statute places it in conflict with § 2 of our Bill of Rights, and also in conflict with the 14th Amendment to the Constitution of the United States. We will consider these guaranties together. That part of § 2 of our Bill of Rights which is germane to the argument is: "And no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly." That portion of the so-called 14th Amendment to the Constitution of the United States which is pertinent now is: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person . . . the equal protection of the laws." Very much that we have already said and quoted bears upon the interposition of these provisions, and we still fail to see how the statute under consideration discriminates against the institutions complaining here. Section 2 of the Bill of Rights interdicts the conferring special privileges and immunities beyond the power of the general assembly to alter, revoke, or repeal. There is nothing occult or mysterious about this language in our declaration of fundamental principles. Our Constitution was adopted by the people of Ohio as their charter of rights and restraints, and it is not charged with the care of nonresident persons or corporations; and the statute in question creates no privileges or immunities in favor of charitable institutions within the state which the general assembly may not alter, revoke, or repeal; and surely it is competent for it to exempt the property of institutions, corporations, which it has created, which property is devoted to purely religious or charitable purposes. There are no Ohio institutions here complaining of any discrimination against them. Nor do we see any help for plaintiffs in error in the 14th Amendment to our Federal Constitution. The statute we are considering does not abridge the privileges or immunities of citizens of other states, nor does it deny to any person the equal protection of the laws. Within the meaning of this clause a foreign corporation is not a citizen, and cannot invoke its protection. By judicial construction of the Constitution of the United States and the Federal judiciary act, a corporation is a citizen, for the purposes of Federal jurisdiction, of the state by which its charter has been granted, and this without reference to the residence of the members or shareholders who compose the corporation. When a corporation chartered by or created

under the laws of a foreign state is sued in a state court it may remove the cause to the circuit court of the United States in like manner as a nonresident citizen may, without regard to residence of its members or shareholders. But it is a settled principle of constitutional law that a corporation is not a citizen within the meaning of that clause of the Constitution of the United States which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." 10 Cyc. Law. & Proc. 150; *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *Tatem v. Wright*, 23 N. J. L. 429; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972. In *Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737, the Supreme Court of the United States says in the syllabus: "Corporations are not citizens within the meaning of the clause of the Constitution declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Article 4, § 2, cl. 1. A private corporation is included under the designation of 'person' in the 14th Amendment to the Constitution, § 1. The provisions in the 14th Amendment to the Constitution, § 1, that 'no state shall deny to any person within its jurisdiction the equal protection of the laws,' do not prohibit a state from requiring for the admission within its limits of a corporation of another state such conditions as it chooses." This doctrine was fully reviewed and indorsed in *Horn Silver Min. Co. v. New York*, 143 U. S. 306, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403. It seems unnecessary to cite other decisions by state courts, since the highest tribunal in the land has thus expounded these constitutional provisions.

There is another reason why the alleged discriminations against nonresident institutions is without foundation. The legislature has the right, in laying taxes, to classify corporations, as has been done in this state in recent years, and which has been upheld by this court as within the constitutional power of the general assembly. Railroad companies are reached by one mode of appraisal and assessment for taxes; telegraph, telephone, and express companies by other methods; and more private corporations by still another mode. No discriminations can be tolerated in favor of or against one of the corporations of the same class; but there is no valid objection in the fact that one class is required to share in the common burden of taxation in a different way—even in a different degree—from those in other classes. *Lee v. Sturges*, 46 Ohio St. 153, 2 L. R. A. 556, 19 N. E. 580; *Hag-*

erty v. State, 55 Ohio St. 613, 45 N. E. 1046. If resident corporations, the creatures of our own laws, cannot justly complain of such classification, how can foreign corporations be heard to find fault, when they may be subjected to any reasonable condition for their admission to operate in this state, and

even may be excluded altogether, unless engaged in interstate commerce?

The judgment of the lower court is sound, and it is affirmed.

Spear, Ch. J., and Davis, Shauck, Crew, and Summers, JJ., concur.

OREGON SUPREME COURT.

T. A. LIVESLEY *et al.*, Appts.,

v.

John JOHNSTON, Jr., *et al.*, Respts.

(.....Or.....)

1. **The mutuality of a contract for the purchase and sale of hops to be grown in the future is not destroyed by a clause leaving the purchaser free to reject those tendered if they are not of proper quality and in proper condition.**
2. **The insolvency of the defendant is not of itself sufficient to give equity jurisdiction to enforce specific performance of a contract for the sale of chattels.**
3. **Equity will enforce specific performance of a contract to sell and deliver a crop of hops after it has been produced, where, as part of the consideration, the purchaser surrenders promissory notes of the seller, and undertakes to make advances to aid in cultivating and harvesting the crop, and the seller is insolvent so that an action at law would be fruitless.**
4. **Specific performance of a contract to sell and deliver a crop of hops will not be refused on the ground that the remedy is not mutual, where, had the purchaser capriciously and fraudulently refused to approve and accept hops tendered, the seller would have been entitled to a decree of specific performance to prevent fraud.**
5. **That the complainant in an action to compel specific performance of a contract to sell and deliver a crop of hops does not show that defendant had any interest in the land upon which they were grown is not fatal, although the land is shown to belong to another, since the presumption is that, being in possession, and nothing to the contrary appearing, he held it under a lease.**
6. **One who has agreed to sell and deliver a crop of hops cannot avoid performance on the ground that those produced were not of the agreed quality, where the purchaser is willing to receive them.**

(May 16, 1904.)

NOTE.—As to necessity of mutuality to entitle one to specific performance of a contract, see also, in this series, *Woodruff v. Woodruff*, 1 L. R. A. 380; *Litz v. Goosling*, 21 L. R. A. 127; *Graybill v. Brugh*, 21 L. R. A. 133; *Bigler v. Baker*, 24 L. R. A. 255; *Welty v. Jacobs*, 40 L. R. A. 98; and *Moayon v. Moayon*, 60 L. R. A. 415.
65 L. R. A.

A PPEAL by plaintiffs from a judgment of the Circuit Court for Marion County in favor of defendants in a suit to compel specific performance of a contract to sell and deliver hops. *Reversed.*

Statement by **Wolverton, J.:**

This is a suit to require the specific performance of a contract or agreement for the sale of hops, entered into September 5, 1902, between the defendant Johnston, of the first part, and the plaintiffs, T. A. Livesley & Co., of the second. That portion of it material to the controversy is as follows: "That said party of the first part . . . for and in consideration of the sum of \$1 in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents does grant, sell, and convey and agree to deliver unto the parties of the second part, . . . 20,000 pounds of hops of the crops to be raised and grown by the party of the first part at or near Woodburn in each of the following years: 1903, 1904, 1905, 1906, 1907, on the following described real estate, which is owned by Frank Chappelle, Melane Chappelle, and Peter Deltaur [describing it], and to deliver the said hops in each of said years at Woodburn depot or on board cars free of charge, at such time between the 1st and 31st of October of each of said years as the parties of the second part may direct. Each bale of said hops to contain from 180 to 220 pounds of hops (7 pounds tare per bale to be allowed) and are to be put up in new 24 oz. bale cloth; the said hops shall be of choice quality, of even color, well and cleanly picked and well cured, but not high or slack dried, and not broken, or mouldy. The said parties of the second part agree to advance to the said party of the first part, for the purpose of cultivating, \$250 on or about April, May, and June, and for picking purposes at and during picking time of September of each of said years, the sum of 4½ cents per pound, and for such advances a lien is hereby granted to parties of the second part on said crop of hops prior and preferable to all other liens; and upon the delivery and acceptance of said hops, the

said parties of the second part will pay in current funds of the United States or their equivalent at Salem, Oregon, the balance due on said hops at 9½ cents per pound, that being the agreed price for said hops, and all money advanced for the purposes aforesaid is to be deducted from the purchase price of said hops. The advances made for cultivating shall bear interest at the rate of 8 per cent and advances made for harvesting purposes at the rate of 8 per cent. Should such hops be from any cause of a lesser quality than choice, or not delivered in the condition herein agreed upon according to the judgment of said parties of the second part or their agent, the party of the second part shall nevertheless have the privilege of taking the same, or so many of them as will cover the amount advanced on said crop of hops, with interest at the rate of 8 per cent per annum, at a reduction in price equal to the difference in value between such hops and choice. . . . The party of the first part shall not be liable (except to repay advances) for any shortage on delivery due to causes beyond his control. It is furthermore agreed that the party of the second part, through their agents, shall have the right to determine at picking time when said advances are contemplated to be made, whether or not the growing crop at that time is in proper condition, and if such agents of the party of the second part shall determine that the growing crop is not in such condition, that said party of the second part shall be released from any obligation to furnish any picking money as called for in this contract." The succeeding clause of the agreement is, in effect, a chattel mortgage upon the hops to secure the buyer in the repayment of moneys advanced or to be advanced the grower in pursuance of the agreement. The complaint sets out, among other things, the entering into the agreement by the parties; that, as part consideration for the execution thereof plaintiffs paid to Johnston the sum of \$1, and also surrendered up and delivered to him certain promissory notes due and payable to the plaintiffs, of the face value of \$650; that plaintiffs have performed, and have been at all times ready and willing to perform, all the agreements and covenants upon their part, and have offered and tendered to Johnston the advances required to be made by them, but that Johnston some time early in the year 1903 notified the plaintiffs that he would not accept any advances, and declared that he would no longer be bound by the terms and conditions of the agreement, and has continuously refused to deliver to plaintiffs the hops produced for the year 1903, consisting of 110 bales, of the aggregate weight of 20,000 pounds; that defendant Johnston is

wholly insolvent and unable to respond in damages for the breach of his agreement, and plaintiffs have no plain, speedy, and adequate remedy at law. The purchase price is tendered into court, and a decree demanded that Johnston be required to perform by delivery to plaintiffs of the hops designated. A demurrer was interposed to the complaint, and sustained, and the complaint having been dismissed, the plaintiffs appeal.

Messrs. W. M. Kaiser, W. T. Slater, and Cotton, Teal, & Minor, for appellants:

The agreement has all that is required by the law to constitute a legal contract,—parties, consideration, assent of parties, and subject-matter.

1 Parsons, Contr. 7th ed. *8.

The agreement is mutual, and not unilateral. The seller agrees to sell certain property at a certain price, payable on or before delivery, and the buyer tenders the price and demands the goods.

Wise v. Ray, 3 G. Greene, 430; *Patchin v. Swift*, 21 Vt. 292; *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497, 4 L. R. A. 202, 42 N. W. 356; *Penniman v. Hartshorn*, 13 Mass. 87; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Cutting v. Dana*, 25 N. J. Eq. 265; *Johnston v. Trippe*, 33 Fed. 530; *Storm v. United States*, 94 U. S. 83, 24 L. ed. 42; *Waterman v. Waterman*, 27 Fed. 827.

The agreement was partially performed, and such part performance is sufficient to cure want of mutuality if any existed.

Storm v. United States, 94 U. S. 83, 24 L. ed. 42; *Waterman v. Waterman*, 27 Fed. 827; *Jones v. Binford*, 74 Me. 439; *Sands v. Crooke*, 46 N. Y. 564.

The consideration of the agreement moving to the defendant is threefold: The past indebtedness of the defendant to the plaintiffs: a sum of money paid defendant by plaintiffs at the time the agreement was made; the several promises of the plaintiffs.

1 Parsons, Contr. **436, 444, 448.

The agreement in controversy was founded upon a valuable consideration,—the promises on behalf of Johnston are unequivocal, positive and unconditional. It is therefore immaterial whether the plaintiffs, by the terms of the agreement, were or were not bound to purchase the hops.

Johnston v. Trippe, 33 Fed. 530; *Perkins v. Hadsell*, 50 Ill. 216; *Miller v. McKenzie*, 95 N. Y. 575, 47 Am. Rep. 85; *Waterman v. Waterman*, 27 Fed. 827; *Waterman*, Spec. Perf. § 200; *Fry*, Spec. Perf. § 291; *Clason v. Bailey*, 14 Johns. 484; *Re Hunter*, 1 Edw. Ch. 1; *VanDoren v. Robinson*, 16 N. J. Eq. 256; *Havcratty v. Warren*, 18 N. J.

Eq. 124, 90 Am. Dec. 613; *Smith's Appeal*, 69 Pa. 474; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Vassault v. Edwards*, 43 Cal. 458; *Schræder v. Gemeinder*, 10 Nev. 355.

It is the chief and immediate duty of the seller to tender the goods to the buyer at the place and time fixed by the agreement, and the buyer's duty to accept the goods so tendered and pay the purchase price agreed on.

21 Am. & Eng. Enc. Law, p. 522; 2 Benjamin, Sales, 4th Am. ed. 1013; *Bement v. Smith*, 15 Wend. 493; *Dustan v. McAndrew*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 426; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Bagley v. Findlay*, 82 Ill. 524; *Bell v. Offutt*, 10 Bush, 632; *Ballentine v. Robinson*, 46 Pa. 177; *Sedgwick v. Cotingham*, 54 Iowa, 512, 6 N. W. 738; *Nichols v. Morse*, 100 Mass. 523, 1 Am. Rep. 139; *Wadhams v. Balfour*, 32 Or. 313, 51 Pac. 642; *Gunther v. Atwell*, 19 Md. 157; *Brigham v. Hibbard*, 28 Or. 387, 43 Pac. 383.

The most direct and effectual remedy, where one party refuses to observe the contract, should be the enforcement of the promise.

Waterman, Spec. Perf. §§ 1-5.

This jurisdiction was exercised in the first instance in contracts for the sale of lands and articles of personal property of a peculiar value, the underlying principle in every case being that the property contracted to be sold was supposed to be a peculiar object of desire to the purchaser, far beyond its normal value, and that consequently the remedy at law (damages) was inadequate.

Waterman, Spec. Perf. §§ 16 *et seq.*; *Adams*, Eq. § 77; *Duff v. Fisher*, 15 Cal. 376; *Kirksey v. Fike*, 27 Ala. 383, 62 Am. Dec. 768; *McMullen v. Vanzant*, 73 Ill. 190; *Johnson v. Brooks*, 93 N. Y. 337; *Barnes v. Barnes*, 65 N. C. 201; *Sullivan v. Tuck*, 1 Md. Ch. 59; 2 Story, Eq. Jur. §§ 712, 717, 718; *Cushman v. Thayer Mfg. Jewelry Co.* 76 N. Y. 367, 32 Am. Rep. 315; *Phillips v. Berger*, 2 Barb. 608, 8 Barb. 527; *Tuttle v. Moore*, 16 Minn. 123, Gil. 112; *Cutting v. Dana*, 25 N. J. Eq. 265; *Carpentier v. Ather-ton*, 25 Cal. 564; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152; *Barr v. Lapsley*, 1 Wheat. 151, 4 L. ed. 58.

The facts alleged in the complaint and admitted by the demurrer show that the remedy at law is inadequate.

(*Lark v. Flint*, 22 Pick. 231, 33 Am. Dec. 733; *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459.

Mr. George G. Bingham, for respondents:

A contract, to be enforceable, must be 65 L. R. A.

mutually binding upon the parties to it; and it must be so that either party can maintain an action against the other for a breach, or neither will be bound.

Woolsey v. Ryan, 59 Kan. 601, 54 Pac. 664; *Missouri, K. & T. R. Co. v. Bagley*, 60 Kan. 424, 56 Pac. 759; *Davie v. Lumberman's Min. Co.* 93 Mich. 491, 24 L. R. A. 357, 53 N. W. 625; *Cummer v. Butts*, 40 Mich. 322, 29 Am. Rep. 530; *Jordan v. Indianapolis Water Co.* (Ind. App.) 61 N. E. 12; *Teipel v. Meyer*, 106 Wis. 41, 81 N. W. 982.

A promise made by one party without a corresponding obligation or promise made by the other party is void.

Corbitt v. Salem Gaslight Co. 6 Or. 405, 25 Am. Rep. 541.

There must be mutuality of remedies.

Norris v. Fox, 45 Fed. 406; *Federal Oil Co. v. Western Oil Co.* 112 Fed. 373.

A court of equity will not decree specific performance of a contract that is not fair in all of its provisions.

Hamilton v. Ryan, 103 Ill. App. 212; *Washington Irrig. Co. v. Krutz*, 56 C. C. A. 1, 119 Fed. 280; *Logansport R. Co. v. Logansport*, 114 Fed. 688; *Snider v. Lehn-herr*, 5 Or. 385.

Mr. P. H. D'Arey also for respondents.

Wolverton, J., delivered the opinion of the court:

In support of the demurrer, it is first insisted that the contract or agreement set out, upon which the suit is founded, and which it is sought to have specifically performed, is lacking in the essential of mutuality of obligations between the contracting parties, and is, therefore, without validity or binding effect. The plaintiffs stand upon the agreement, and, of course, assert its legal efficacy. They insist, first, that it does contain mutual obligations which alone render it binding upon both parties, but, if not, that it at least has the force and effect of an option accorded the plaintiffs to purchase the hops, founded upon a sufficient consideration to support it. A promise founded upon a good consideration rendered at the time is obligatory and enforceable. A loan of money and simple-contract debts are familiar instances of the kind. The promise to repay the money or to discharge the debt becomes binding and obligatory by reason of the promisor having received a consideration for making it. When, however, a promise, by whatsoever reason, has become binding, it is more aptly termed an "obligation." But a promise of material import will support a counter promise and *vice versa*. When mutually entered into, they operate one as a consideration for the other; thus constituting an agreement bind-

ing and obligatory upon both parties. Where the agreement is wholly executory, it is essential that the obligations be mutual; else there is no consideration for its support, and it is but a mere *nudum pactum*. These simple principles, aptly applied, will aid us largely in the present controversy.

The contract is between a producer of hops, on the one part, and dealers in that commodity, upon the other. Its terms unmistakably import a sale of the hops to the amount of 20,000 pounds, to be grown by Johnston in each of the five years designated, and an agreement upon his part to deliver them at Woodburn, on board the cars, free of charge, at such time during the month of October as the second parties may direct. The manner in which the hops shall be baled and their quality are specifically defined. This is a clear and absolute undertaking on the part of the seller. The correlative and reciprocal promises on the other part are that the second parties will advance to the first party \$250 on or about April, May, and June of each year for cultivating purposes, and 4½ cents per pound for picking purposes during picking time, in September, and, upon delivery and acceptance of the hops, that they will pay the balance due thereon at 9½ cents per pound, that being the agreed price for the product; all moneys advanced to be deducted from the purchase price. If the contract rested here, nothing else being said, no other provisions made, there could be no cavil or controversy touching its validity and binding effect. It would have then simply been a sale of the hops to be grown, with an agreement to deliver on the one part, and an undertaking on the other part to advance \$250 for the purpose of cultivating, 4½ cents per pound for picking purposes, and pay 9½ cents per pound for the hops upon delivery and acceptance; reserving the right, as was natural, to deduct advances made from the purchase price, paying merely the balance due. The promises of the parties would then have been mutual,—that upon the one hand supporting those upon the other, and *vice versa*, thus creating correlative and reciprocal obligations,—and the contract would unquestionably have been perfectly valid and binding upon both parties. But the promises upon the part of Livesley & Co. to advance picking money and accept the hops are materially qualified by subsequent conditions of the contract, and all its provisions must be construed together to arrive at its true intentment. They are interdependent in character, and none can be eliminated without destroying the contractual intentment and relationship of the parties. Should the hops be, from any cause, of lesser quality than choice, or not delivered in the condi-

tion agreed on, “according to the judgment” of Livesley & Co. or their agent, the contract accords them the privilege, nevertheless, of taking the same, or so many thereof as would be sufficient to cover the advances made on the crop, at a reduction in price of the difference in value between such hops and choice; and it was further stipulated that Livesley & Co. should, through their agent, have the right to determine at picking time whether or not the growing crop was in proper condition, and, if found not to be so, then that they should be relieved from making the stipulated advances of picking money. Thus analyzed, we are enabled to comprehend at a glance the essential features of the contract. Now, the strong contention of counsel for defendants is that the stipulation that as to the hops being of lesser quality than choice, or not in condition as agreed upon, “according to the judgment” of Livesley & Co. or their agent, accorded to them the right or privilege of taking the crop, or not, subject to their mere will or caprice; thus nullifying their promise to purchase, and rendering it of no appreciable obligatory or binding effect upon them. And so with the contemplated advances of picking money. They assert that it was left entirely to their consideration, to be governed by their mere choice or pleasure in the premises. Ordinarily the purchaser of a commodity has the right of inspection upon delivery before acceptance, and, if it does not correspond in kind, quality, condition, or amount to that which is purchased or contracted for, he may reject it. Benjamin, Sales, 7th ed. §§ 695, 701; 2 Mechem, Sales, §§ 1210, 1211, 1375, 1376. The purchaser is conceded the exercise of his judgment, but he exercises it at his peril, and, if he rejects the commodity, which nevertheless comes up to the stipulated standard, he is yet bound for the purchase price, and the seller may recover it of him on proof that he has complied with the terms of the sale. Many cases are to be found where work is agreed to be done, articles furnished, or goods delivered upon sale, to the satisfaction of another, and it is uniformly held that the person to be benefited may exercise his choice of rejection or acceptance, without assigning any reason therefor. That he ought to be satisfied, or that the work, articles, or goods would be satisfactory to a reasonable man or to a court or jury, will not avail as against the exercise of his convictions of sentiment. It is sufficient that he is not satisfied, and his own determination must be taken as final and conclusive. The cases proceed upon the assumption that the buyer has thus reserved to himself an unqualified option, not being willing to leave his freedom of choice to any contention or

subject to any investigation whatever, and whatever decision he arrives at determines the controversy. If the question is one appealing to taste, sentiment, or artistic sensibility, as where the undertaking is to supply a portrait, bust, suit of clothes, musical instrument, article of furniture, or the like, it is, of course, the duty of the buyer to examine the subject of the purchase, and not to reject it unseen; but his determination upon examination cannot be questioned. Where, however, the agreement is to supply a machine which is to work to the satisfaction of the vendee, a reasonable test is required, and he must act in good faith and with honesty of purpose, and cannot be heard to express dissatisfaction which is wholly feigned or simulated. So it has been held in this class of cases that where the purchaser was in fact satisfied, but fraudulently and in bad faith declared that he was not, he is bound nevertheless, and must respond for the purchase price. "It is quite permissible," says Mr. Justice Alvey of the supreme court of Maryland, "to parties to enter into such contracts; and where the approval or satisfaction of the party is made a condition precedent to the right to receive compensation, or the contract price, for the article to be delivered, the court has no right or power to dispense with the condition." *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318, 3 Atl. 306, 65 Md. 226, 9 Atl. 126, 127. And their validity seems to be unquestioned. 1 *Meechem, Sales*, §§ 663-668; *Campbell Printing Press Co. v. Thorp*, 1 L. R. A. 645, 36 Fed. 414; *Silaby Mfg. Co. v. Chico*, 24 Fed. 893; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57, 15 N. W. 906; *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528; *McClure Bros. v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557, 2 Atl. 583.

There is another class of cases where the articles sold or the work to be done or performed is to be subject to the approval of, or to be satisfactory to, some third person; and in many instances that person is the agent or employee of one or the other of the parties to the contract. In cases of this character the approval of the party so designated becomes a condition precedent to a recovery for the price. He must, however, have acted in good faith and with an honest purpose, and cannot arbitrarily or capriciously exercise his judgment. If he violates his duty in this regard, a recovery may be had, in the absence of his approval, for the nonacceptance of the article furnished. 65 L. R. A.

But in the absence of fraud or bad faith in the conduct of such party in respect of his approval or the withholding of it, his judgment or determination is to be accepted as final and conclusive. No mere error or mistake of judgment will vitiate his determination, the object of his appointment being to prevent and exclude contention and litigation. Such is said to be now the settled doctrine touching this class of contracts in the courts both of this country and England. *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318, 3 Atl. 306, 65 Md. 226, 9 Atl. 126, 127. See also *Lynn v. Baltimore & O. R. Co.* 60 Md. 404, 45 Am. Rep. 741; *Kihlberg v. United States*, 97 U. S. 398, 24 L. ed. 1106; *Sweeney v. United States*, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035. We have had occasion to consider cases of the kind, of which *North Pacific Lumbering & Mfg. Co. v. East Portland*, 14 Or. 3, 12 Pac. 4; *Chance v. Portland*, 26 Or. 286, 38 Pac. 68, and *Vanderhoof v. Shell*, 42 Or. 578, 72 Pac. 126, are instances. In the latter case a building contract was involved, whereby it was stipulated that the builder should perform his work subject to the approval of the architect. Contracts of this nature are usual and frequent. The two former cases were concerning certain street improvements in the city of Portland, which were to "be completed to the satisfaction of the common council." In the first of these cases, Mr. Justice Thayer, commenting upon the effect of the contract, says: "I think there must be a distinction between a contract in which the work is not to be paid for until a certificate is produced from some third person, showing that it has been performed in accordance with the provisions of the contract, and one in which it is to be paid for upon its approval and acceptance by the party for whom it is performed. In the former case the production of such certificate is a condition precedent to the right to demand the payment, and the party seeking to enforce payment must aver and prove its performance. In the latter case it is the duty of the party to approve and accept the work, if performed substantially as required by the contract; for certainly the law will not permit such party to capriciously withhold his approval in such case, and thereby avoid the payment of a just claim." In *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318, 3 Atl. 306, 65 Md. 226, 9 Atl. 126, 127, the defendant agreed to furnish coal to the plaintiff of a quality that should be satisfactory to plaintiff's master of transportation and master of machinery, virtually its agent, and the stipulation was upheld,

which is coming very near to the condition of the present contract. But in *Campbell Printing Press Co. v. Thorp*, 1 L. R. A. 645, 36 Fed. 414, Mr. Justice Brown, who is now on the Supreme Bench of the United States, says: "We know of no reason of public policy which prevents parties from contracting that the decision of one or the other shall be conclusive;" and such was practically the case in *Fletcher v. New Orleans & N. E. R. Co.* 19 Fed. 731, and *Dustan v. McAndrew*, 44 N. Y. 72.

Within the undoubted doctrine of these cases, the contract under consideration was one which the parties had a right to enter into, and the clause leaving the quality and condition of the hops at the time of delivery to the judgment of the buyer does not render it void of mutuality. Livesley & Co. could not reject the hops upon mere whim or sheer volition, but must in good faith exercise an honest judgment in the premises, and unless they, by themselves or through their agent, so rejected them, they would nevertheless be bound for the price. Being a party and passing judgment upon their own case, good morals and decent propriety would suggest that they act with circumspection and a considerate regard for the rights of the seller as well as their own; and the law will look with greater scrutiny upon their determinations than if they were wholly disinterested arbiters. While this condition qualifies to a certain extent the promise to accept and pay for the hops, if choice in quality and in good condition, as agreed upon, it does not, by negation, destroy the efficacy of the promise. If the sale had been the ordinary one of goods or chattels, the buyer, as we have seen, would have exercised his judgment as to rejection at his peril, and the goods or chattels could be shown, notwithstanding, to be of the quality and condition agreed upon. In a sale like the one at bar, the buyer must also accept, unless in his honest judgment, exercised in absolute good faith, the commodity is not such as was contracted for. If so exercised, his determination becomes final, because the parties have so agreed; but if he exercises his judgment arbitrarily, capriciously, or fraudulently, with the sheer purpose of avoiding his obligation to accept, it will not avail him, as the actual quality and condition of the hops may then be inquired into, notwithstanding his adverse determination. The undertaking of Livesley & Co. is not, therefore, a mere option to take the hops or not, but a positive obligation to purchase, unless in their honest judgment, fairly exercised, they are not of the quality or in the condition contracted for. In the respect considered, we are firmly of the opinion that the contract is mutual and binding. If the hops are not, 65 L. R. A.

in their honest judgment, up to the agreed standard, then they are accorded the privilege or option of purchasing or not, as they may desire; and this provision, when compared with the one just discussed, indicates very clearly the distinction that exists, and that which the parties themselves declared, between the agreement to purchase and a mere option to purchase, as may suit the wish of the buyer. The same considerations apply alike to the obligation to advance picking money. It was not left to the mere option of Livesley & Co. to advance such funds as and when they saw fit, but they or their agent must pass an honest judgment as to whether or not the crop is in the proper condition; that is, for the production of such hops as is bargained for. The purpose of this stipulation is apparent. Livesley & Co. would hardly be expected to advance money upon a contemplated product when it was manifest that it would not come up to the standard in quality contracted for, and would furnish, at best, doubtful security for the repayment of the advances. But aside from these considerations, there is the obligation to advance \$250 on or about April, May, and June of each year for cultivating purposes, which is unconditional; and, when all the conditions are construed together, including the chattel-mortgage element, which is intended as security for repayment of advances made in case a sale is not consummated, we are impelled to the conclusion that the contract is mutual, and therefore valid and binding upon the respective parties. In view of these considerations, it is not necessary for us to determine whether or not, if the contract of Livesley & Co. was a mere option to purchase, it is supported by a sufficient consideration. Nor have we considered what would be the effect on the sale, had Livesley & Co. declined to advance picking money, as it does not seem to be involved in the present controversy.

The next question presented is whether a court of equity has jurisdiction to decree a specific performance, by requiring a delivery of the crop of hops produced for the year 1903, to the amount of 20,000 pounds. It may be said that equity will not ordinarily grant relief for the specific delivery of chattels, because it is generally considered that the plaintiff has a plain, speedy, and adequate remedy at law for damages for withholding them. The interposition of equity is not withheld except upon this particular ground, as its jurisdiction is as ample to decree the specific performance of an agreement relative to personalty as it is one relative to realty. *Sullivan v. Tuck*, 1 Md. Ch. 59; *Frue v. Houghton*, 6 Colo. 318; *Duff v. Fisher*, 15 Cal. 376; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152;

Mason v. Patterson, 74 Ill. 191; *Kirksey v. Fike*, 27 Ala. 383, 62 Am. Dec. 768; *Barnes v. Barnes*, 65 N. C. 261. The remedy at law, however, which will bar such relief, must be as practical and efficient to the ends of justice and its prompt administration as in equity, or, to employ the language of Mr. Chief Justice Fuller in *Gormley v. Clark*, 134 U. S. 338, 339, 33 L. ed. 909, 910, 10 Sup. Ct. Rep. 554, 557: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances." *South Portland Land Co. v. Munger*, 36 Or. 457, 54 Pac. 815, 60 Pac. 5; *Benson v. Keller*, 37 Or. 120, 60 Pac. 918; *Wollenberg v. Rose*, 41 Or. 316, 68 Pac. 804; *Brett v. Warnick* (Or.) 75 Pac. 1061. When, therefore, an award of damages would not put the party seeking equitable relief for the delivery of personalty in a situation as beneficial as if the agreement were specifically performed, or where compensation and damages would fall short of the redress to which he is entitled, the jurisdiction is properly invoked; otherwise not. *Frue v. Houghton*, 6 Colo. 318; *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317; *McGowin v. Remington*, 12 Pa. 56, 51 Am. Dec. 584. And it may be further observed that the insolvency of the party against whom relief is sought, standing alone, will not confer jurisdiction to enforce specific performance in this class of cases. There must be some other element or principle of equitable cognizance upon which the remedy is invoked. *Gillett v. Warren* (N. M.) 62 Pac. 975; *McLaughlin v. Piatti*, 27 Cal. 451; *Cincinnati & C. R. Co. v. Washburn*, 25 Ind. 259. The fact of insolvency, when combined with other causes for equitable interposition, may, however, become a potent, or even controlling, factor in determining the fact of jurisdiction. The principle is well stated by Mr. Justice Thompson in *Heilman v. Union Canal Co.* 37 Pa. 100, 104, as follows: "The fact, if it be so, that this remedy may not be successful in realizing the fruits of a recovery at law, on account of the insolvency of the defendants, is not of itself a ground of equitable interference. The remedy is what is to be looked at. If it exist, and is ordinarily adequate, its possible want of success is not a consideration. It is not intended here to say that insolvency is never a consideration moving a chancellor. It frequently does, but not alone. The equitable remedy must exist independently. In balancing cases, it is a consideration that gives preponderance to the remedy." To the same purpose, see *Clark v. Flint*, 22 Pick. 231, 33 Am. Dec. 733; *Parker v. Garrison*, 61 Ill. 250. Now, turning to the contract in question, and considering the situation

and relation of the parties, do we not find independent grounds for equitable interference to grant relief by way of specific performance? We have already discussed the salient features, terms, and conditions of the contract, and have found it to be valid and binding between the parties. It covers a period of five years, and was made at a time, presumably, when Johnston was obtaining fair value for his hops,—otherwise we must assume that he would not have entered into the relationship.—and there is only one reason at this date why it may be considered to be a hard contract as to him, and that is that hops are worth more now in the market than they were then. Another suggestion in this connection: The commodity fluctuates greatly in the market, and it may have been a controlling circumstance that Johnston considered that 9½ cents per pound for the hops raised by him during the five years designated would be a good average price for the time, and hence, upon the whole, a profitable undertaking. But the undertaking to produce the hops was not solely his own. Under the agreement, Livesley & Co. were to contribute to the expense of their production; that is to say, they were to advance money for the purposes of cultivating and picking, amounting to more than one half of the agreed value of the product, which was to become a lien thereon. In a sense, the venture was a joint one between the parties, where one was to provide the ground and bestow his labor, and the other to furnish the necessary funds for carrying it on; the latter to be reimbursed their advances, with interest, in any event, however. The condition suggests a trust relationship between the parties, whereby the producer becomes, in a manner, a trustee of the buyer for the delivery of the product of the joint enterprise to the amount designated, and the contract has reference to the specific property to be produced under its terms. Further than this, it is alleged that plaintiffs surrendered to Johnston his promissory notes to the amount of \$650 as part consideration for his entering into the contract, and an award of damages would not fully compensate them. Coupling these conditions with the fact alleged that the defendant is insolvent, so that a judgment at law against him would be bootless and utterly insusceptible of enforcement, we are constrained to resolve the question in favor of the equitable jurisdiction to enforce the specific performance of the contract.

It is further urged that the remedy is not reciprocal, and ought not, therefore, to be sanctioned. But it seems clear that Johnston would also have a remedy to enforce specific performance, should Livesley & Co. capriciously and fraudulently refuse to ap-

prove of the hops, as to quality and condition, or to accept them, as there would be involved the question of fraud, which is especially within the cognizance of equity, and the procedure would be more efficient to the ends of justice than an action for damages for a breach of their obligation.

We are not to be understood as holding that the defendant may be required to perform the labor or carry on the project of producing the crops, but, after they have been produced, and the plaintiffs have contributed to their production as required by the terms of the agreement, or have at all times been ready and willing to do so, and have only been deterred therefrom by the acts of Johnston, they are entitled to have specific performance in delivery of the amount of the crop so agreed to be delivered.

Another point is made,—that the complaint does not show that Johnston owned the land upon which the hops were grown, or held it under a lease, so as to give him a potential interest in the crop produced. But the reasonable inference is that he had it rented. The agreement shows that it was owned by Frank and Melane Chappelle and Peter Deltaur, and Johnston must have acquired some right from them to cultivate it,—presumably by lease.

And still another,—that the complaint does not allege that hops of the kind were grown or owned by the defendant Johnston. If, however, the plaintiffs are willing to accept the hops he has produced as of the quality and condition agreed upon, the defendants cannot be heard to complain.

In view of these considerations, *the decree of the trial court will be reversed*, the demurrer overruled, and the cause remanded for such further proceedings as may seem proper.

Petition for rehearing denied.

Newton HOOVER, Appt.,

v.

W. J. KING *et al.*, Respts.

(.....Or.....)

1. A judgment dismissing the action and assessing costs against plaintiff, entered upon a verdict for defendant in a suit to recover possession of real estate which involves two issues,—one as to plaintiff's title, and the other as to the right of possession,—without disclosing upon which the

NOTE.—The effect of a decision like that above, which does not specify on which of the issues the decision is based, is of considerable importance in all Code states. The question seems to be a novel one.

65 L. R. A.

judgment is based, will not bar a subsequent action for possession, although the statute contemplates that the title shall be tried in such actions, and makes the judgment conclusive as to the estate in such property and the right of possession thereof, so far as the same is thereby determined.

2. The appellate court will not, upon remanding a case after reversing a judgment because of the error of the trial judge in holding that it was barred by a former judgment, direct judgment to be entered upon a verdict rendered at the first trial of the action, where it was set aside and a new trial granted because the jury did not follow the instructions of the court as to the effect of such judgment, although a contrary verdict was rendered at the second trial by the direction of the court, which as the appellate court holds, was an error.

(June 29, 1903.)

A PPEAL by plaintiff from a judgment of the Circuit court for Harney County in favor of defendants in an action brought to recover possession of certain real estate. *Reversed.*

Statement by **Bean, J.:**

This is an action to recover possession of the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 8, township 25 S. of range 35 $\frac{1}{2}$ E., in Harney county, which plaintiff tried to recover possession of from the same defendants in an action begun in 1889, wherein he alleged in his complaint that he was the owner in fee simple and entitled to the possession of the property, and that the defendants and each of them wrongfully and unlawfully withheld possession from him. The defendants answered, denying the plaintiff's title or right to the possession, or that they wrongfully or unlawfully withheld possession from him, and for an affirmative defense pleaded title in the defendant Mrs. Alice L. Bartlett. A trial was had, and the jury returned the following verdict, omitting title: "We, the trial jury in the above-entitled action, find for the defendants Alice L. Bartlett and George W. Bartlett, and against the plaintiff, Newton Hoover." Upon motion of defendants for judgment on the verdict, it was "ordered and adjudged that said motion for judgment be, and the same is hereby, granted and allowed, and that plaintiff's complaint filed herein be, and the same is hereby, dismissed, and the defendants have and recover of and from the plaintiff their costs and disbursements herein, taxed at \$16." Thereafter the plaintiff commenced the present action. The complaint is in the usual form. The answer denies the material allegations thereof, sets up title in the defendant Alice L. Bartlett, and pleads as a bar the judgment in the former action. The court held the plea in bar good, and in-

structed the jury that the former judgment was a sufficient defense to this action. Notwithstanding this instruction, however, the jury found that the plaintiff was the owner in fee simple of the premises, in controversy, returned a verdict in his favor, and assessed his damages at \$700. The verdict was set aside on motion of the defendants, and a new trial ordered, upon which the jury, by direction of the court, returned a verdict in favor of the defendants. From the judgment entered thereon plaintiff appeals.

Messrs. Will R. King and John G. Saxton, for appellant:

In ejectment, a judgment failing to describe the nature of the estate, description of land involved, or ownership thereof, and which only gives judgment for costs and dismissal of the complaint, is not a bar to another action.

Bellinger & Cotton's Anno. Codes & Statutes, § 330; *Fitch v. Cornell*, 1 Sawy. 156, Fed. Cas. No. 4,834; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386; *Pensacola Ice Co. v. Perry*, 120 U. S. 318, 30 L. ed. 663, 7 Sup. Ct. Rep. 576; Black, Judgm. §§ 650, 682; *Pruitt v. Muldrick*, 39 Or. 358, 65 Pac. 20; *Hughes v. United States*, 4 Wall. 232, 18 L. ed. 303; *Oney v. Clendenin*, 28 W. Va. 34; *Asia v. Hiser*, 22 Fla. 378; *Long v. Linn*, 71 Ill. 152; *Rawlings v. Bailey*, 15 Ill. 178; 2 Enc. Pl. & Pr. p. 929; 7 Enc. Pl. & Pr. p. 348; *Lawless v. Barger*, 9 Bush, 666; *Runyon v. Darnall*, 10 Bush, 69; *Ross v. Adams*, 13 Bush, 370; *Gerlach v. Walsh*, 41 Ill. App. 83; *Kennedy v. Duncan*, Hardin (Ky.) 365; *Kelley v. McKibben*, 53 Cal. 13.

The act of the trial court in setting aside the verdict of the jury and granting a new trial being an error of law, the judgment appealed from should be reversed, and one entered for plaintiff on the first verdict herein, without the formality of a new trial.

Ruckman v. Ormond, 42 Or. 209, 70 Pac. 707; 2 Enc. Pl. & Pr. pp. 137, 415-417; 14 Enc. Pl. & Pr. pp. 930, 962, 981, 982; *Smith & K. Implement Co. v. Wheeler*, 27 Mo. App. 16; *Goodwin v. Conklin*, 85 N. Y. 21; *Manson v. Ware*, 63 Iowa, 345, 19 N. W. 275; *Schramm v. Southern P. Co.* 87 Cal. 425, 25 Pac. 481; *Burkhardt v. McClellan*, 15 Abb. Pr. 243, note; *Edmonston v. McLoud*, 16 N. Y. 545; *People v. Superior Ct.* 5 Wend. 114; *Tefft v. Marsh*, 1 W. Va. 38; *Pratt v. Pioneer Press Co.* 32 Minn. 217, 18 N. W. 836, 20 N. W. 87.

Messrs. Parrish & Rembold, for respondents:

Under our system, in an action of ejectment there are no fictitious parties as at common law, but it must be brought by and against the real parties in interest; and a judgment therein is conclusive against the

parties as to the estate in the property and the right of possession, so far as the same is thereby determined.

Bellinger & Cotton's Anno. Codes & Statutes, §§ 27, 326, 339, 745, 787; *Hill v. Oop-er*, 8 Or. 254; *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442; *Barrell v. Title Guarantee Co.* 27 Or. 84, 39 Pac. 992; 21 Am. & Eng. Enc. Law, p. 244; Freeman, Judgm. 3d ed. §§ 299, 300; Black, Judgm. § 655.

The verdict and judgment in the action of ejectment may be either special or general, as the case may require.

7 Enc. Pl. & Pr. p. 344; Bellinger & Cotton's Anno. Codes & Statutes, §§ 152, 154; *Hutton v. Reed*, 25 Cal. 479; *Joy v. McKay*, 70 Cal. 445, 11 Pac. 703.

The verdict of the jury having been general in favor of the defendants, it is conclusively presumed that they passed upon all the issues presented by the pleadings and submitted to them, one of which was ownership in fee simple.

Bellinger & Cotton's Anno. Codes & Statutes, § 152; *Cummings v. Peters*, 56 Cal. 593; *Hutton v. Reed*, 25 Cal. 479; *Johnson v. Visser*, 96 Cal. 310, 31 Pac. 106; Freeman, Judgm. 3d ed. §§ 251-253; Black, Judgm. § 682; *Belle v. Brown*, 37 Or. 588, 61 Pac. 1024; *Hall v. Zeller Bros.* 17 Or. 381, 21 Pac. 192.

A trial having been had by a jury of all the issues made by the pleadings, and a judgment having been rendered reciting that it was based on the verdict of the jury, which was a general verdict, and dismissing plaintiff's complaint, such judgment is on the merits of the case, and is conclusive and cannot be collaterally attacked.

Belle v. Brown, 37 Or. 588, 61 Pac. 1024; *Pruitt v. Muldrick*, 39 Or. 353, 65 Pac. 20; *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442; *Buck v. Collins*, 69 Me. 445; *Young v. Overacker*, 2 Johns. 191; *Elwell v. M'Queen*, 10 Wend. 519; Freeman, Judgm. 3d ed. § 246; *Belt v. Davis*, 1 Cal. 138; *Loring v. Illsley*, 1 Cal. 24; *Douling v. Polack*, 18 Cal. 625; 11 Enc. Pl. & Pr. pp. 925, 930; Black, Judgm. §§ 681, 703.

Bean, J., delivered the opinion of the court:

The only question presented by this appeal is whether the judgment in the former action is a bar to this. At common law, ejectment was a mere possessory action between fictitious parties. The judgment therein did not determine the estate or interest of the parties in the property, nor did it conclusively determine the right to possession. It therefore was not a bar to another or subsequent action to recover possession of the same property. 2 Black, Judgm. § 650. But in the majority of the states of

the Union the common-law action has been pruned of its fiction and artificiality, and made a simple remedy for the recovery of the possession of real property and the trial of the title thereto. It has generally been prescribed, either expressly or by necessary inference, that the judgment in such an action shall be conclusive between the parties and privies. Such are the provisions of our statute. Any person having a legal estate in real property and the present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law. *Bellinger & Cotton's Anno. Codes & Statutes*, § 326. The plaintiff is required to set forth in his complaint the nature of his estate, whether in fee, for life, or for a term of years, and for whose life, or the duration of such term. *Id.* § 328. The defendant is not allowed to give evidence of any estate in himself or another, or any license or right to the possession of the property, "unless the same be pleaded in his answer," with "the certainty and particularity required in a complaint." *Id.* § 329. The jury are required to find, if their verdict is for the plaintiff, "that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be;" and, if for the defendant, "that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property or part thereof, or license or right to the possession of either, established on the trial by the defendant, if any, in effect as the same is required to be pleaded." *Id.* § 330. The judgment "shall be conclusive as to the estate in such property and the right to the possession thereof, so far as the same is thereby determined, upon the party against whom the same is given, and against all persons, claiming from, through, or under such party, after the commencement of such action, except as in this section provided." *Id.* § 330. It is thus apparent that the statute contemplates that the title to land may be tried in an action to recover possession thereof, and that, so far as the same is tried and determined, the judgment therein is conclusive upon the party against whom it is given. *Barrell v. Title Guarantee Co.* 27 Or. 77, 39 Pac. 992; *Moore v. Moore*, 36 Or. 261, 59 Pac. 327. But it is only when it appears from the judgment that the title has in fact been tried and determined that it can have such an effect. At common law, the judgment in an action to recover real property was not con-

clusive upon the parties, nor is it conclusive under the statute, unless it is within the terms thereof. It is declared in express terms that the judgment is conclusive on the title only "so far as the same is thereby determined," and "that only is deemed to have been determined by a former judgment, decree, or order which appears upon its face to have been so determined, or which was actually and necessarily included therein or necessary thereto." *Bellinger & Cotton's Anno. Codes & Statutes*, § 748.

Now, looking at the verdict and judgment in the former action brought by the plaintiff to recover possession of the property now in controversy, all that appears to have been determined thereby is that the jury found "for the defendants," that the complaint was dismissed, and costs were awarded to the defendants. There is no finding by the jury nor adjudication by the court concerning the title, nor was it necessarily included in the judgment rendered, or essential thereto. There were two issues in the case,—one as to the plaintiff's title, and the other as to his right to the immediate possession of the property in controversy. A finding and judgment adverse to him on either issue would have defeated the action; but the record does not disclose whether the judgment was based upon the one or the other. The verdict affords no information on the subject. It contains no finding as to the title or right to the possession of the property. It does not conform to the requirements of the statute, and any judgment that might have been entered thereon would have been erroneous and reversible on appeal. *Long v. Linn*, 71 Ill. 152; *Pensacola Ice Co. v. Perry*, 120 U. S. 318, 36 L. ed. 663, 7 Sup. Ct. Rep. 576; *Oney v. Clendenin*, 28 W. Va. 34. If the jury had found that the plaintiff was not entitled to the possession of the property, and that Mrs. Bartlett was the owner in fee thereof and entitled to the possession as pleaded in the answer, a judgment entered thereon, merely dismissing the complaint and awarding costs, might, perhaps, have been construed as an adjudication of the title, and therefore a bar to a subsequent action. 2 Black, *Judgm.* § 703; *Amory v. Amory*, 26 Wis. 152; *Granger v. Singleton*, 32 La. Ann. 898. So, too, a judgment rendered on the verdict actually returned, determining the question of title, might, perhaps, have been sufficient on a collateral attack; but, when neither the verdict nor the judgment contains any finding or adjudication on such issue, it is not perceived on what theory the court would be justified, under our statute, in holding that the judgment is a bar to the present action. When there are two issues in a case, upon either of which the judgment may rest, one

going to the merits and the other not, its disposition will generally be considered as resting upon the latter; the merit remaining adjudicated, unless the judgment appears to have been upon the merits. 21 Am. & Eng. Enc. Law, p. 265. Now, the verdict in the former action was simply a finding in favor of the defendants, and the judgment merely dismissed the complaint and taxed costs and disbursements against the plaintiff. Only two points were thereby determined: (1) That the complaint should be dismissed, no grounds therefor being stated; and (2) that the defendants should have judgment for their costs. Neither of these questions necessarily went to the merits of the title. Either could properly rest on the failure of the plaintiff to show a right to the immediate possession of the property, and, in view of the rule stated, it will be so considered.

A judgment dismissing a complaint in an action at law is a proceeding unknown to the statute, and does not necessarily determine any of the issues involved. Costs are but an incident to the judgment, and do not add to its force or effect. A bill or suit in equity may be "dismissed," and such dismissal is an effectual bar to a subsequent suit for the same cause, unless given without prejudice. *Bellinger & Cotton's Anno. Codes & Statutes*, § 412. An action at law, however, is disposed of either by a judgment in favor of the plaintiff or defendant, or one of nonsuit. If the former, the cause of action is determined, and it is brought to an end. If the latter, only the pending action is disposed of, and another may be brought upon the same cause. *Hughes v. Walker*, 14 Or. 481, 13 Pac. 450. Since neither the verdict nor the judgment in the former action shows that the title to the property was tried and determined, the judgment can, in our opinion, have no more force than a nonsuit, and is not a bar to a subsequent action to recover possession of the same property. *Fitch v. Cornell*, 1 Sawy. 156, Fed. Cas. No. 4,834; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386. It is not the recovery by the defendants that constitutes the bar or estoppel, but the decision upon the merits of the question which is in dispute between the parties. *Dawley v. Brown*, 79 N. Y. 390; *King v. Townshend*, 65 Hun, 567, 20 N. Y. Supp. 602, 141 N. Y. 358, 36 N. E. 513.

It was insisted at the argument that, if the court should conclude that the court below was in error in holding the former judgment a bar, the cause should be remanded, with directions to enter a judgment on the verdict returned on the first trial of the present action. The verdict was contrary to the instructions of the trial court, for 65 L. R. A.

which reason it was set aside and a new trial awarded; and we do not think that we would be justified, under the circumstances, in so remanding the cause.

The judgment will be reversed, and a new trial ordered.

John H. DIGHT, Receiver, etc., of Duluth Dry Goods Company, *Appt.*,

v.

Simcoe CHAPMAN, *Respt.*

(.....Or.....)

1. A judgment determining the amount to be contributed by the stockholders of an insolvent corporation for the payment of its debts under constitutional and statutory provisions making stockholders liable for debts to the amount of the par value of the stock held by them renders the amount due from each stockholder a debt provable in bankruptcy proceedings against him, so as to be canceled by a discharge, although he did not appear in the proceeding against the corporation, where the judgment against the corporation is binding upon him.
2. A receiver appointed by the court to enforce payment of the statutory liability of stockholders of an insolvent corporation to contribute towards payment of its debts is a duly authorized agent of its creditors, within the meaning of the bankruptcy act, so as to be entitled to prove the claim against the estate of an insolvent stockholder.
3. Notice received by a receiver of an insolvent corporation of the insolvency of one of its stockholders, against whom a decree of court has established a statutory liability to contribute towards payment of the company's debts, while acting in his capacity as cashier of a bank, to which notice of insolvency proceedings against the stockholder was sent as one of his creditors, is binding on the creditors of the insolvent corporation, so as to conclude them by the stockholder's discharge, where it does not appear that the cashier was a stockholder in the bank, or interested to conceal the information so obtained.

(February 1, 1904.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in favor of defendant in an action brought to enforce the liability of defendant under a judgment fixing the liability of stock-

NOTE.—For other cases in this series as to what is a debt provable in bankruptcy, see *Noyes v. Hubbard*, 15 L. R. A. 394; *Barclay v. Barclay*, 51 L. R. A. 351; *Flite v. Flite*, 53 L. R. A. 265; and *McKittrick v. Cahoon*, 62 L. R. A. 757.

As to what constitutes a fixed liability as evidenced by a judgment or instrument in writing absolutely owing at the time of the filing of the petition in bankruptcy, see *Cobb v. Overman*, 54 L. R. A. 369, and *note*.

holders of an insolvent corporation for payment of its debts. *Affirmed.*

Statement by **Moore**, Ch. J.:

This is an action by a receiver of an insolvent foreign corporation to recover the par value of certain shares of stock in that corporation. The complaint states the facts constituting the plaintiff's right to maintain this action, and the defendant's liability for the sum demanded. The answer, after admitting almost all the allegations of the complaint, for a separate defense alleges that the defendant was duly adjudged a bankrupt, of which fact the plaintiff, as such receiver, had actual knowledge and notice, and that the defendant's discharge therefrom constitutes a plea in bar. The reply denies the allegation of new matter in the answer, and, the cause having been tried without a jury, the findings of the court are, in effect, that about September 1, 1890, the Duluth Dry Goods Company was incorporated in Minnesota under the laws thereof, and issued 1,309 shares of capital stock of the par value of \$100 each, for 50 shares of which the defendant subscribed and became the owner, paying therefor the sum of \$5,000; that under the Constitution and laws of that state a stockholder in such a corporation is liable for its debts to the extent of the par value of his stock, which obligation is enforceable by a receiver appointed for that purpose on behalf of the creditors of such corporation, who may recover such par value in the courts of any sister state that can secure jurisdiction of the person of such stockholder; that Luther Mendenhall, a creditor of the Duluth Dry Goods Company, in behalf of himself and of all other creditors who might join therein, instituted a suit in the state court of Minnesota against the corporation and its stockholders residing in that state; and, other creditors having intervened, a decree was rendered February 25, 1899, establishing the indebtedness of the corporation at \$81,717.76, and awarding a recovery against it for that sum, and against the stockholders severally for sums equal to the par value of the stock owned by each; that, in pursuance of the decree, the plaintiff herein was appointed receiver to collect the sums so awarded, and to enforce the liability against nonresident stockholders, and having duly qualified May 6, 1899, he has ever since been, and now is, such officer; that the defendant, at the time this suit was instituted, was a resident of Chicago, and, not having been made a party thereto, though the owner of stock in the corporation, he, on January 19, 1900, filed in a Federal court his petition in bankruptcy, together with a schedule of his

assets and liabilities and a list of his creditors, but failed to include therein his liability on account of such stock, or to name the creditors of the corporation; that he was thereupon adjudged a bankrupt, and on notice to creditors a trustee was elected, who, having duly qualified, took charge of and sold his assets, realizing therefrom a sum sufficient to pay his secured debts and to distribute the sum of \$10 among his other creditors, and, the estate having been settled, the defendant was discharged March 19, 1900; and that soon after filing the petition in bankruptcy, and during the pendency of the proceedings, plaintiff had actual knowledge and notice thereof, obtained while cashier of the First National Bank of Duluth, one of the defendant's creditors, by reading notices sent from time to time by the referee in bankruptcy to the bank. From these findings the court concluded that at the time the decree was rendered establishing the indebtedness of the corporation the defendant was liable to its creditors in the sum of \$5,000, which was a provable debt against his estate; that plaintiff's actual knowledge of the proceedings was equivalent to naming the creditors of the corporation in the schedule; that the defendant's discharge in bankruptcy released him from all liability on the obligation sued on; and that he was entitled to a dismissal of the action; and, judgment having been rendered in accordance therewith, plaintiff appeals.

Messrs. Dolph, Mallory, Simon, & Gearin and Green & Wood for appellant.

Messrs. Coovert & Stapleton, for respondent:

A creditor shall include anyone who owns a demand or claim, provable in bankruptcy; and may include his duly authorized agent, attorney, or proxy.

Bankruptcy Act, chap. 1, § 1, subd. 9.

It was the duty of Mr. Dight, as receiver, to present his claim against Chapman's bankrupt estate in January, 1900.

Irons v. Manufacturers' Nat. Bank, 17 Fed. 314.

The claim might have been proved by either the individual creditor or the receiver.

Irons v. Manufacturers' Nat. Bank, 27 Fed. 595.

Although a claim is not scheduled, yet, if the one whose duty it is to present it knows of the proceedings in time to participate, that knowledge answers the purpose of scheduling and notice.

Collier, Bankr. 128; *Re Beerman*, 112 Fed. 663; *Zimmerman v. Ketchum*, 66 Kan. 98, 71 Pac. 264; *Fider v. Mannheim*, 78 Minn. 309, 81 N. W. 2.

Knowledge is chargeable no matter in what capacity received.

Eggleston v. State, 37 Kan. 426, 15 Pac. 611; *Meus v. Bell*, 1 Hare, 88; *College Park Electric Belt Line v. Ide*, 15 Tex. Civ. App. 276, 40 S. W. 64.

Every debt recoverable either in law or equity is provable in bankruptcy.

Re Jordan, 2 Fed. 319.

The test is: Was defendant's undertaking such as to render it uncertain as to whether it would ripen into an actual liability, during the time the claim might be presented?

Riggin v. Magwire, 15 Wall. 549, 21 L. ed. 232.

If the insolvent stockholder procures his discharge in bankruptcy while the corporation is a going concern, and before a call is made by the company or by the court, in a winding-up process,—in other words, before the obligations of the corporation have become a fixed amount,—the bankruptcy discharge is no bar. But if the discharge is entered after the insolvency of the corporation has been determined, and the amount of its indebtedness has become fixed, thus definitely fixing the stockholder's liability, a discharge in bankruptcy would be a bar.

3 Clark & M. Corp. § 826; *Glenn v. Abell*, 39 Fed. 10; *Irons v. Manufacturers' Nat. Bank*, 17 Fed. 313, 27 Fed. 592; *Marr v. Bank of West Tennessee*, 4 Lea, 588; *Carey v. Mayer*, 25 C. C. A. 239, 51 U. S. App. 184, 79 Fed. 926; *Glenn v. Howard*, 65 Md. 40, 3 Atl. 895; *Sayre v. Glenn*, 87 Ala. 631, 6 So. 45.

Moore, Ch. J., delivered the opinion of the court:

Section 17 of the act of Congress to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898 (30 Stat. at L. 550 *et seq.*, chap. 541, U. S. Comp. Stat. 1901, p. 3428), is, so far as material herein, as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor. If known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." The first inquiry presented is whether or not the claim here sought to be enforced is a debt "provable" against the bankrupt's estate, within the meaning of the term as used in the statute. To answer the question necessitates an examination of the Constitution and laws of Minnesota in respect to the liability of stockholders of insolvent corporations in that state. "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manu-

facturing or mechanical business) shall be liable to the amount of stock held or owned by him." Minn. Const. art. 10, § 3. The statute of that state regulating proceedings to enforce the liability of stockholders of an insolvent corporation, as stated in the findings and admitted by the pleadings, is, in substance, as follows: Whenever a creditor of any corporation seeks to charge the stockholders thereof with any liability created by law, he may maintain an action for that purpose, and secure an order requiring all creditors to exhibit their claims and become parties within a reasonable time; and, if it appear that the corporation is insolvent, the court may ascertain the liabilities of the respective stockholders, and adjudge the sum payable by each, and, when necessary, may appoint one receiver to take charge of the assets of the corporation, and another to enforce the liability of stockholders. The statute of Minnesota denominates the procedure specified "an action," but, as the distinction between suits and actions has been abolished in that state, it is evident that the mode prescribed partakes of the character of a suit in equity. *Allen v. Walsh*, 25 Minn. 543; *Johnson v. Fischer*, 30 Minn. 173, 14 N. W. 799; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254. The findings admit that the decree of the Minnesota court established the insolvency of the corporation, the amount of its indebtedness, and the number of shares of capital stock issued by it, from which it follows that a payment by each stockholder of 62½ per cent of his capital stock, if solvent, would have discharged the entire indebtedness, notwithstanding which he was required to pay a sum equal to the par value thereof. Though the defendant was not a party to the decree rendered against the corporation, he cannot, in his own defense, deny such liability, for a judgment against the corporation is, in effect, a judgment against the stockholder. *Holland v. Duluth Iron Min. & Development Co.* 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; *Holyoke Bank v. Goodman Paper Mfg. Co.* 9 Cush. 570; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254. Such decree, however, as to the ultimate question of a nonresident stockholder's liability and the measure thereof, is not conclusive as against such stockholder who was not made a party to the suit, and will be regarded as open in the trial of an ancillary action based on the decree. *Hale v. Haddon*, 37 C. C. A. 240, 95 Fed. 747. Under the Constitution and statute of Minnesota, stockholders of corporations in that state occupy a relation tantamount to sureties to its creditors for the payment of its debts, for which each stockholder is severally liable to the extent of the par value of his

stock. *Allen v. Walsh*, 25 Minn. 543; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069. "Such liability," says Aldrich, J., in *Hale v. Hardon*, 37 C. C. A. 248, 95 Fed. 755, in construing the law of Minnesota, "is not like that of being assessed for nonpayment of the full amount of subscription to stock, for the reason that it is not an asset of the corporation." The measure of the corporation's indebtedness properly chargeable to the defendant is proportionate to the number of shares of stock owned by others from whom the *pro rata* share, augmented by the insolvency of others, could have been collected. This ratio must remain uncertain until it is determined who cannot pay their just proportions, thereby imposing upon the solvent stockholders the burden of discharging the entire obligation if the par value of their stock equals a sum sufficient for that purpose. Such uncertainty, however, does not prevent the Minnesota court from rendering a decree against each stockholder for a sum equal to the par value of his stock, though the aggregate awarded exceeds the amount of the indebtedness of the insolvent corporation. *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069. In that case, Mr. Justice Canty, in speaking upon this subject, says: "Then one of two propositions must be true: First, the creditors are entitled to successive judgments for successive assessments until the full limit of such statutory liability is exhausted, if such successive assessments and judgments are made necessary by reason of the insolvency of stockholders; or, second, the creditors are entitled to one judgment for the full amount of such statutory liability. We are of the opinion that the latter is the proper method of procedure, and that but one judgment should be rendered, which should cover the utmost possible liability of each stockholder to the creditors." The liability assumed by a person when he secures stock in a Minnesota corporation is to pay, in case of its insolvency, a ratable share of its indebtedness; but, as its creditors ought not to be subjected to unnecessary delay in the collection of their demands, this liability, in an ancillary action based on the decree establishing the indebtedness of an insolvent corporation, is measured by the par value of the stock issued, and if any sum remains after the creditors have been fully paid, the ratable part thereof can be returned to the stockholders who have contributed more than their just proportion. *Allen v. Walsh*, 25 Minn. 543; *Marr v. Bank of West Tennessee*, 4 Lea, 578. Mr. Chief Justice Start, in *Hanson v. Davison*, 73 Minn. 462, 76 N. W. 254, in speaking of this method of enforcing payment of the par value of stock from a nonresident holder

thereof, says: "The only objection, in justice, such stockholder could make to such a procedure, would be that his right of contribution could not be worked out in such ancillary action. If he were called on to pay only his *pro rata* share of the deficiency, treating all the stockholders as solvent, the objection would wholly fail; but it would seem that his right to contribution, in case he was required to pay more than his share as between himself and the other stockholders, is subordinate to the equities of the creditors, as he can secure such contribution by appearing in the original action." It will be remembered that the defendant did not appear in the original suit, but, as the decree in that case was rendered prior to his being adjudged a bankrupt, whereby all the stockholders were required severally to pay a sum of money equal to the par value of their stock, such decree resolved the uncertainty, imposed the contractual liability, and, in our opinion, rendered the sum so awarded a "provable" debt within the meaning of the bankruptcy act. *Riggin v. Maguire*, 15 Wall. 549, 21 L. ed. 232; *Re Fife*, 109 Fed. 880.

The next question to be considered is whether or not plaintiff was such a representative of the creditors of the insolvent corporation as to authorize him to prove the indebtedness so established against the bankrupt's estate. The act of Congress of July 1, 1898, § 7, subd. 8 (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3425), requires a voluntary bankrupt to make under oath and file in court, with his petition, a schedule of his property and a list of his creditors, etc. This act, in construing the meaning of certain words therein used, contains the following declaration: "'Creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy." Section 1, subd. 9 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3419). Bouvier, in his Law Dictionary, in defining the term "creditor," says: "He who has a right to require the fulfilment of an obligation or contract." See also 8 Am. & Eng. Enc. Law, 2d ed. p. 240. If the definition of this distinguished lexicographer be accepted as correct, plaintiff is the creditor, for his appointment vested in him the right to require the fulfilment of the defendant's obligation. However, the word "creditor" may be defined in other cases, Congress, in proceedings of this kind, has limited it to one owning a demand or claim provable in bankruptcy. It cannot be consistently contended that plaintiff was the owner of the claims which formed the basis for determining the amount of the corporation's indebtedness, and hence he is

not a creditor within the meaning of the act under consideration. The word "creditor," as defined by Congress, also includes his duly authorized agent, attorney, or proxy. None of the debts against the bankrupt's estate being owned by plaintiff, so as to make him a creditor, it is proper to consider whether or not, by reason of his appointment as receiver, he represents the creditors, and comes within any one of the included classes. Section 56a of the bankruptcy act (30 Stat. at L. 560, chap. 541, U. S. Comp. Stat. 1901, p. 3442) is as follows: "Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided." A text writer, in construing the language quoted in connection with a prior clause of the act says: "By § 1, subd. 9, it is declared that the term 'creditor' shall include, not only the owner of the demand himself, but 'his duly authorized agent, attorney, or proxy.' Any person, therefore, who assumes to represent a creditor in the functions referred to in § 56a, must be a 'duly authorized agent, attorney, or proxy' of the creditor. By General Order 21, subd. 5 [32 C. C. A. xiii. 89 Fed. x.], it is provided what such due authorization shall consist of, as follows: "The execution of any letter of attorney to represent a creditor . . . may be proved or acknowledged before a referee or a United States commissioner or a notary public.'" Collier, Bankr. 3d ed. 304. Section 30 of the bankruptcy act (30 Stat. at L. 554, chap. 541, U. S. Comp. Stat. 1901, p. 3434), is as follows: "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." That court having prepared forms to evidence the appointment of representatives of creditors, it was held in *Re Henschel*, 51 C. C. A. 277, 113 Fed. 443, that, when the acknowledgment attached to a proxy conformed literally to the form so prescribed, it was not defective because it contained no venue; Wallace, J., saying: "We agree with the circuit court of appeals for the sixth circuit that of the creditors giving proxies those only are to be counted whose powers of attorney were regarded as authorizing the attorney to appear and participate in the meeting." Forms Nos. 20 and 21 (172 U. S. 693, 694, 43 L. ed. 1213, 1214, 18 Sup. Ct. Rep. xxvii, xxviii), prepared by the Supreme Court of the United States, prescribe the mode of constituting general and special attorneys, respectively, and form No. 35 (172 U. S. 703, 43 L. ed. 1218, 18 Sup. Ct. 65 L. R. A.

Rep. xxxiv) indicates the manner of making proof in support of a claim by such attorney for a creditor. *Brandenburg, Bankr. 2d ed. 869 et seq.* From the rules and forms mentioned it might seem that an agent or proxy could not be "duly authorized" to prove a creditor's claim in bankruptcy, except on the production of a power of attorney executed and acknowledged in the manner indicated; and, if this be so, plaintiff did not sustain that relation to the creditors of the Duluth Dry Goods Company. Such cannot be the rule, however, for creditors of a bankrupt who are infants or lunatics, and therefore incompetent to appoint a representative to prove their claims against his estate, are not to be denied the right to share in the distribution of the fund because of their minority or mental infirmity. Guardians, administrators, executors, and other legal representatives, who have been appointed by competent authority to prove claims against a bankrupt's estate, must necessarily be the "duly authorized" agents, etc., within the meaning of the act of Congress under consideration. Rule 38, promulgated by the Supreme Court of the United States (172 U. S. 666, 43 L. ed. 1194, 18 Sup. Ct. Rep. x) provides that the forms prescribed shall be observed and used, "with such alterations as may be necessary to suit the circumstances of any particular case." Thus provision has been made in these instances for proving claims against a bankrupt's estate; and to assume that Federal or state courts would not, in such cases, consider the appointee "duly authorized" is to imply a denial of justice. Whether or not the plaintiff was "duly authorized" to represent the insolvent corporation's creditors must depend upon the duty his appointment imposed on him, and the relation he sustained to them. It is impossible to determine whether the Minnesota statute in relation to the duties of a receiver appointed to enforce a stockholder's liability was offered in evidence, for the bill of exceptions contains none of the testimony given at the trial; but the pleadings admit, and the court finds, that the substance of that law, from which it appears that plaintiff was authorized to collect from the resident stockholders of that state, who were parties to the decree, sums equal to the par value of their stock, and also empowered to maintain actions for that purpose in sister states against nonresident stockholders. In *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747, in construing the Minnesota statute a distinction between a general receiver and a person appointed to enforce, in a foreign jurisdiction, payment of the par value of stock, is observed; the court holding that neither, unless expressly authorized by statute, was

empowered to enforce the individual liability of stockholders for the purpose of paying the debts of the corporation. In that case, Aldrich, J., in speaking of the title of a person appointed under the Minnesota statute to enforce such payment, and of the duties enjoined upon him, says: "It is of little consequence whether the person designated as the instrument of conduit through which equity runs from the court to the stockholders, and from recovery from the stockholders to the creditors, is called a receiver, an agent, a trustee, or an assignee. If some legal and equitable means of recovery was intended and reasonably described, and the statutory agency called a 'receiver' is a convenient, safe, and reasonable agency to that end, it is of little consequence whether his duties here, as to the newly created statutory right, are precisely those which have been heretofore exercised and discharged by the ordinary common-law or equity receiver; provided, of course, he may be said to fairly represent the legal and equitable idea intended by the statute. If a receiver, or this agency for this purpose, answers the statute, and the name does not offend the general law to such extent that the manifest intended statutory relief should be denied, the action should be upheld in his name and for the benefit of the creditors." Elsewhere in the opinion, after examining the law of that state in respect to the authority conferred upon such agent, it is said: "Therefore, by virtue of the law of Minnesota and the insolvency proceedings in that state, the court and its proceedings were subrogated to the rights and interests of all the creditors, and their right to sue stockholders, if an independent right to sue ever existed under this statute, was, at least for the time being, merged or suspended by operation of the law which involved their interest in such proceeding." The pleadings admit that Mendenhall, having secured a judgment against the Duluth Dry Goods Company for the sum of \$12,808.76, caused an execution to be issued thereon which was returned wholly unsatisfied, whereupon, in behalf of himself and all other creditors who might join therein, he instituted a suit against the corporation and its resident stockholders, resulting in a decree in their favor for the sum of \$81,717.76. Though this decree evidently awarded a specific sum to each creditor, the right to control the subsequent proceedings was vested in the court. *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331. In that case Mr. Chief Justice Start, speaking on this subject, says: "While the liability of the stockholders must be enforced on the application of creditors, and not on that of the receiver, ex-

cept in cases where the statute otherwise provides, yet it does not follow that the trial court has not the same control of the litigation as if it was conducted by the receiver. The creditor who first takes action to have such liability enforced, whether he is plaintiff or subsequently comes into the action, has no exclusive right to control the litigation; and whenever the stockholders are once brought into the action the trial court should so far control the conduct of the litigation as to conserve and protect the rights and equities of both creditors and stockholders." The defendant's liability was limited in amount, and not to any particular creditor, but in favor of all creditors of the insolvent corporation (*Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254), and, though the debt of each was evidently distinguishable in the decree, the several debts were nevertheless embraced in the aggregate sum, thereby extinguishing the authority of an individual creditor to prove his claim against the bankrupt's estate. But as the right to share in the distribution thereof should not be denied him, the plaintiff, as the representative of the court appointing him, and also of all the creditors, was, in our opinion, the "duly authorized" agent within the meaning of the act of Congress of July 1, 1898, and therefore the only person empowered to prove the debt evidenced by the decree in favor of all the creditors and against the defendant's estate. This conclusion is fortified when it is remembered that plaintiff was appointed to enforce the liability of the stockholders, and, as such obligation had become fixed by the decree, thereby constituting it a debt, it could have been proved against the bankrupt's estate, which was one of the means provided for the collection thereof; and it was just as incumbent on plaintiff to pursue this remedy, if the schedule had named the entire list of creditors, as it was to institute the action in the case at bar.

The remaining question is whether or not plaintiff's knowledge of the bankruptcy proceedings, acquired while cashier of a bank which was also a creditor of the defendant, was received under such circumstances as to impute notice thereof to the creditors of the Duluth Dry Goods Company. The general rule is that knowledge of an agent, acquired while acting within the scope of his authority, relating to matters intrusted to him and over which his authority extends, is constructive notice to his principal. *Story, Agency*, 9th ed. § 140; *Angell & A. Corp.* § 305; *Wood v. Rayburn*, 18 Or. 3, 22 Pac. 521; *Rayburn v. Davisson*, 22 Or. 242, 20 Pac. 738; *Willis v. Vallette*, 4 Met. (Ky.) 186; *National Security Bank v. Cush-*

man, 121 Mass. 490. The reason for this rule is based on the theory that it is incumbent on the agent to impart to his principal all information that he may obtain which would affect his interests; and by invoking the presumption that such obligation has been performed the conclusion is reached that the principal is chargeable with notice thereof. *Pennoyer v. Willis*, 26 Or. 1, 46 Am. St. Rep. 594, 36 Pac. 568. There are several well-recognized exceptions, however, to this general rule. Thus, if the agent sustain a confidential relation to a third party, knowledge which he may obtain from the latter, and which it is his duty not to disclose, will not be imputed as notice to his principal. *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388; *Ford v. French*, 72 Mo. 250; *Hood v. Fahnestock*, 8 Watts, 489, 34 Am. Dec. 489; *The Distilled Spirits*, 11 Wall. 356, 20 L. ed. 167. If the agent conspire with a third party to defraud his principal, or if on his own behalf he intends to do so, the knowledge which he may obtain, and which it was his duty to disclose to his principal, will not be imputed to the latter. *Platt v. Birmingham Axle Co.* 41 Conn. 255; *Thomson-Houston Electric Co. v. Capitol Electric Co.* 12 C. C. A. 643, 22 U. S. App. 669, 65 Fed. 341; *Dillaway v. Butler*, 135 Mass. 479; *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; *DeKay v. Hackensack Water Co.* 38 N. J. Eq. 158; *National L. Ins. Co. v. Minch*, 53 N. Y. 144. So, too, if an agent has an interest to subserve that is adverse to his principal, any knowledge that he may have acquired from a third party during the time of and relating to the matter of the agency will not be imputed to his principal. *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758; *Wickersham v. Chicago Zinc Co.* 18 Kan. 481, 26 Am. Rep. 784; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 545; *Winchester v. Baltimore & S. R. Co.* 4 Md. 231; *Stevenson v. Bay City*, 26 Mich. 44; *Barnes v. Trenton Gaslight Co.* 27 N. J. Eq. 33. The reason upon which these exceptions rest is founded on the assumption that an agent is not supposed to communicate any knowledge he may have received, when by doing so he would betray a confidence reposed in him, reveal an intent to defraud his principal, or disclose an interest adverse to him; for, unless it can be presumed, in the light of attending circumstances, that an agent will impart the knowledge so secured, the law will not impute notice thereof. It will be remembered that notice of defendant's bankruptcy was sent to his creditor, the First National Bank of Duluth, of which the plaintiff was cashier. If this bank had been appointed the statutory 65 L. R. A.

agent to enforce the liability of the stockholders of the insolvent corporation, it would undoubtedly have been to its advantage to secure for itself as large a percentage of the bankrupt's estate for distribution as possible. By neglecting to prove the claims of creditors of the corporation, the bank would thereby augment the ratio to which it was entitled; and on account of its adverse interest no presumption can be indulged that it would communicate to them the knowledge of the defendant's bankruptcy which it has obtained, and hence notice thereof would not be imputed to them. The findings do not show that plaintiff was a stockholder of the bank, and therefore indirectly interested in pursuing the course which is assumed it might have adopted, but, so far as it can be discovered, he had no personal interest either in the bank or in the creditors of the corporation, and owed to each a corresponding duty that imposed on him the obligation to disclose to the court and to such creditors the knowledge he had obtained, thereby imparting to it and them notice of the defendant's insolvency, whereby the latter's discharge in bankruptcy liberated him from their claims.

The findings of the court being sufficient to support the judgment, it is affirmed.

M. Merriman HOUSTON *et al.*, *Respts.*,
v.

John A. ZAHM, Impleaded, etc., *Appt.*

(.....Or.....)

1. A covenant on the part of a vendor of land, which forms part of the consideration of the grant, to open a way through another tract which he does not at the time own, but contemplates purchasing, does not run with the latter tract after it comes into possession of the vendor; and it cannot, therefore, be enforced against his grantee.
2. An easement of way cannot be imposed upon a tract of land by one who has not at the time of the agreement acquired title to it, although he undertakes to do so as part of the consideration of another tract conveyed to him, and he at the time contemplates acquiring title to the parcel to be affected, and afterward in fact does so.

NOTE.—As to easements appurtenant, see, in this series, note to *Hagerty v. Lee*, 20 L. R. A. 635; also *Peabody Heights Co. v. Willson*, 36 L. R. A. 393.

As to distinction between personal covenant and easement appurtenant, see *Clapp v. Wilder*, 50 L. R. A. 120.

As to easement in gross, see *Fisher v. Fair*, 14 L. R. A. 333, and note.

For a case holding that a covenant for the mere use of water does not run with land, see *Lawrence v. Whitney*, 5 L. R. A. 417.

3. A personal covenant on the part of a landowner to locate a way across the land is not binding upon his grantee without notice.
4. A grantee of land is not charged with notice of an agreement by his grantor to open a road across it by the recording of the option contract under which the latter acquired title to the tract, which bound him to open the way, where the recorded conveyance contained no reference to the agreement.

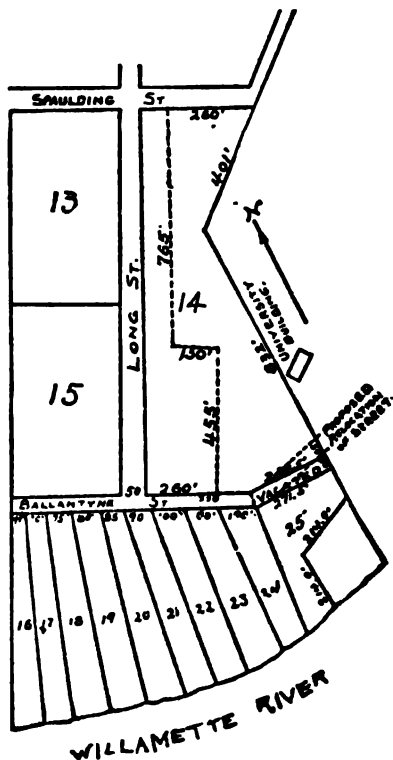
(April 18, 1904.)

A PPEAL by defendant Zahm from a decree of the Circuit Court for Multnomah County in favor of plaintiffs in a suit to compel specific performance of a contract to open and maintain a highway. *Reversed.*

Statement by **Wolverton, J.:**

This is a suit to compel the specific performance of a contract to open and maintain a highway, made and entered into February 25, 1891, between L. D. Brown, Sherman D. Brown, and the Peninsular Real Estate Company on the one part, and the Portland University on the other. The contract, so far as it is important for consideration, reads as follows: "That in consideration of the party of the second part locating its university buildings on the southeast part of the John Waud donation land claim in T. 1 N., R. 1 E., in Multnomah county, Oregon, and opening and maintaining a good highway at least 60 feet wide from the east end of Ballantyne street, in the plat of Melvin (after the said east end of said Ballantyne street shall have been moved 60 feet north of its present location, and said street extended westerly in a straight line from such east end after so removed to the present bend or crook in said street) to Spaulding street or an easterly extension thereof, the parties of the first part agree to sell and convey to the party of the second part, at its option, the south half cut off by a line parallel with Spaulding street of that part of tract numbered 14 in Melvin, which belongs to the parties of the first part or either or any of them, and lying north of said Ballantyne street after so moved for the price of \$1,100 per acre. . . . And the parties of the first part further agree to consent to and use their best endeavors to procure the vacation of Long street in Melvin from Ballantyne to Spaulding street." At the time of entering into the contract or agreement the first parties were the owners of lots Nos. 16 to 23, inclusive, and lot No. 25, in Melvin, as well as the easterly portion of tract No. 14. To indicate more clearly the situation and the holdings of the parties, a plat of a part of Melvin is subjoined, that part of tract 14 then owned by the first parties be-

ing indicated as lying easterly of the dotted line running lengthwise through it.



The plaintiff the Tyler Investment Company has succeeded to the title to an undivided one-half of lots 16 to 20, inclusive, the Columbia Real Estate Company to the title of lots 21 to 23, and M. Merriman Houston to that of lot 25. The Portland University, at the time of the execution of the contract, was not the owner of the land upon which the university building was subsequently located as shown by the plat,—the tract containing 15.77 acres, and extending from Spaulding street, if extended easterly, south to the southern boundary of Melvin. The university obtained the title later, however, on May 29, 1891, and it also became, or was, the owner of the land in Melvin lying west of said easterly portion of tract 14. On April 30, 1891, Sherman D. Brown and the Peninsular Real Estate Company conveyed the whole of said easterly portion of tract No. 14 to the Portland University by deed, with full covenants of warranty, without reservation of any kind, and by ordinance passed July 5, 1893, and approved the following day, petitioned for by the Portland University and Sherman D. Brown, the whole of Ballantyne street from the angle to the easterly end thereof was vacated. About the same time, or shortly afterward,

the university deeded to Brown a triangular tract, beginning at the angle in the south line of Ballantyne street, and running thence easterly along the south line thereof to the east boundary of Melvin; thence north along the said east boundary 50 feet; thence southwesterly to the place of beginning. Long street was also vacated, but at what time is not shown. The defendant John A. Zahm has succeeded to all the interest of the Portland University in and to all its lands and premises. Plaintiffs allege that the first parties to the contract have fully performed all the terms and conditions thereof on their part; that the Portland University subsequently, about April, 1893, allowed the premises, which would have been occupied by Ballantyne street if it had been relocated as agreed, to be used as a highway by plaintiffs and other persons, and also opened a highway 60 feet in width from the east end of Ballantyne street as agreed to be relocated to Spaulding street and streets connecting therewith; that plaintiffs and the public were in the use of the highways, and continued so to use them with the knowledge and consent of defendants, subject only to such temporary gates and fences as were satisfactory to all parties, up to the 1st day of January, 1900; that neither the Portland University nor any of its successors or assigns has ever formally dedicated, or caused to be dedicated, said portion of Ballantyne street agreed to be relocated or said highway upon the public records, and has latterly forbidden plaintiffs the use thereof, and threatens to close the same to plaintiffs and the public; that the Portland University is insolvent, and that John A. Zahm purchased and now owns said land, with full knowledge of the agreement and the acts done in pursuance thereof. The answer sets up an abandonment by the parties of the contract in question, and controverts the legal right of plaintiffs to a specific performance. A decree having been rendered in accordance with the prayer of the complaint, defendant Zahm appeals.

Messrs. R. Williams and E. B. Williams, for appellant:

This suit is based upon the terms of an option.

Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469.

Appellant is not affected by equities created by the parties to the option of which he had no notice.

Rawle, Covenants for Title, 5th ed. § 222; *Suydam v. Jones*, 10 Wend. 181, 3 Am. Dec. 307.

The provision in the option referring to the highway is not a covenant running with the land.

65 L. R. A.

Garrison v. Rudd, 19 Ill. 558; Washb. Easements, 3d ed. p. 161; *Brown v. Southern P. Co.* 36 Or. 128, 47 L. R. A. 409, 78 Am. St. Rep. 761, 58 Pac. 1104.

Failure to describe the dominant or servient estate is fatal to plaintiffs' contention that the provision in the option relating to the highway is a covenant running with the land.

Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; *Skinner v. Shepard*, 130 Mass. 180; *Hemsley v. Marlborough Hotel Co.* 62 N. J. Eq. 164, 50 Atl. 14.

The option is not notice to appellant of any right of way or easement over the premises. He is a purchaser in good faith, without notice.

3 Pom. Eq. Jur. §§ 654, 655.

The consideration received, and the covenants of warranty and against encumbrances, in the deed of April 30, 1891, by which the land reserved by the option for the east end of Ballantyne street was conveyed to Portland University, and the long delay in asserting their claim, estop plaintiffs from claiming the re-establishment of the east end of Ballantyne street, which is a condition precedent to the highway.

De Rochemont v. Boston & M. R. Co. 64 N. H. 500, 15 Atl. 131; *Dobbins v. Cruger*, 108 Ill. 188; *Carbey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688; *King v. Kilbride*, 58 Conn. 109, 19 Atl. 519; *Wilson v. McEwan*, 7 Or. 87; *Taggart v. Risley*, 4 Or. 235; *Jones v. King*, 25 Ill. 383; *Herman, Estoppel*, § 680; *Bellinger & C. Anno. Codes & Statutes (Or.)* subdiv. 3, § 787.

The option was abandoned, or merged in the deed of April 30, 1891.

Horner v. Lowe, 159 Ind. 406, 64 N. E. 218; *Clifton v. Jackson Iron Co.* 74 Mich. 183, 16 Am. St. Rep. 621, 41 N. W. 891; *Slocum v. Bracy*, 55 Minn. 240, 43 Am. St. Rep. 499, 56 N. W. 827; *Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753; *Bryan v. Swain*, 56 Cal. 616; *Houes v. Barker*, 3 Johns. 508, 3 Am. Dec. 526; *Davenport v. Whisler*, 46 Iowa, 287; *Williams v. Hathaway*, 19 Pick. 387; *Gibson v. Richart*, 83 Ind. 313; *Fredrick v. Youngblood*, 19 Ala. 680, 54 Am. Dec. 209; *Carter v. Beck*, 40 Ala. 599; *Jones v. Wood*, 16 Pa. 25; *Cronister v. Cronister*, 1 Watts & S. 442; *Douglas v. Union Mut. L. Ins. Co.* 127 Ill. 101, 20 N. E. 51; *Rawle, Covenants for Title*, 5th ed. § 320, p. 535; *St. Philip's Church v. Zion Presby. Church*, 23 S. C. 297.

Messrs. Thomas N. Strong and J. V. Beach for respondents.

Wolverton, J., delivered the opinion of the court:

The questions of fact involved relate to

the alleged abandonment of the contract and the opening by the university of the east end of Ballantyne street as agreed to be relocated, and a 60-foot highway to Spaulding street, or an easterly extension thereof. Sherman D. Brown testifies that the contract was entered into for the purpose of giving more space to tract numbered 25 on high ground between Ballantyne street and the edge of the bluff, the first parties being the owners at that time of the tract; that at the time the deed was executed and delivered to the Portland University the secretary of the corporation gave to him a memorandum as follows: "Sh. D. Brown & Peninsular R. E. Co. have this day delivered to Portland University Co. deed for land in Melvin, Ballantyne street in said tract is to be moved as agreed upon. This is part of consideration,"—saying to him "that the original agreement should be carried out;" that the highway mentioned in the agreement, from the end of Ballantyne street as it was agreed to be relocated to Spaulding street, was opened nearly to the head of Olin street immediately after the deeds were executed and work was begun on the university building, and was used by plaintiffs and everyone for five or six years; that the grounds were all cleared off, the highway being well graded, but that a fence and gateway were put in some two or three years ago, the recollection of witnesses being indistinct as to the time of their construction. Mr. Robert C. Huston testifies that he was over the ground about a month before he was called as a witness, and that there were some indications of an old road leading from the gate near Olin street along the top of the bluff in front of and beyond the university building. D. C. Hoyt, that he has known the premises since 1881; that Mock formerly had a wood road immediately in front of where the university building now stands; that it was used by him and other parties desiring to go through that way, and to the present time it is used by people going to and from the building; that it was the only immediate highway that the Portland University people had to their grounds; that for years before the Portland University discontinued the school it put a fence along Spaulding street, but made no restrictions against anyone going through. On cross-examination he continues that the way used by Mock was a private road. A. C. Fairchild, that the premises that are now the university campus were inclosed by a fence about five years ago, up to which time they were open; that near the bluff, and near the road running down to Mock's wharf, there was a roadway leading in front of the university, which was used for all purposes connected with the institution; and that he

knew of no restrictions put upon the use of it until the gateway was provided. John Mock testifies that he sold the land upon which the building stands to the university, and that he had a wood road, a private way, running along the bluff in front of the building in an early day; and Merriman Houston, that he lived adjoining the university premises for eleven years, that when he first knew them they were all open from Spaulding to Ballantyne street, that an old road extended from near the end of Olin street along the bluff into the grove to the rear of the site of the university building, that the university campus was inclosed in the year 1897 or 1898 and a gateway was put in from Spaulding street. P. L. Willis testifies in behalf of the defendants that the Portland University had an option (referring to the agreement of February, 1891) to buy from Brown all his interest in tract 14 lying north of a point 60 feet north of Ballantyne street; that the agreement was afterward abandoned, and that he deeded to the university the whole of the tract down to Ballantyne street; that Brown's idea in holding the remainder of the land was to sell at a large figure, and that from his conversation with Brown the idea of the right of way from Ballantyne street did not strike him as of much importance, or that Brown placed any importance upon it at all; that the fence along Spaulding street extended, which has since come to be known as "Willamette boulevard," has been there practically ever since the university building was located; that when the boulevard was widened the old fence was torn away, and another put up in its stead, which was about the year 1894 or 1895, and that it has been there continuously ever since; that there was an old road—the Mock wood road—extending from the gateway around near the building to where Mock had a chute to carry wood down to his dock, but that the use for that purpose has long since been discontinued, and that there never has been any road leading from the east end of Ballantyne street to the gateway,—at least not for a great many years. F. I. McKenna testifies that he has known the premises for thirteen years; that when the university building was first located the campus was all in a sort of wilderness, with some wood roads running through it; that there was a wood road running along the bluff that came in through the gate; that the first fence was built along Spaulding street in 1891 or 1892; that the present fence was built in the spring of 1894; and that the first fence either had a gate or bars,—something to keep the stock out. Other witnesses testify that a driveway existed from the gate to the university building, but that it was used only in connection with the

school, and did not extend beyond the building.

It is quite apparent from a careful survey of this testimony that the Portland University never opened a highway of any kind from the east end of Ballantyne street, as agreed to be relocated to Spaulding street. Formerly a wood road ran along the bluff from very near the gateway to, and perhaps beyond, the site of the university building; but this was only used for private purposes while it existed. When, however, the university people assumed control, the premises were wholly inclosed, and a gateway provided at Spaulding street for entrance to and exit from the building, and the roadway was never used for general public purposes, nor ever in any sense became, or was allowed to be used or traveled as, a public thoroughfare, so that the university never opened up a highway—that is, a public thoroughfare—between the points designated, either in pursuance of the agreement or otherwise. The same may be said of the east end of Ballantyne street as agreed to be relocated.

As to the waiver on the part of Brown and the Peninsular Real Estate Company of a performance of the conditions of the agreement upon the part of the university, some things that happened would indicate that such was their purpose,—as, the execution by them of the deed to the university without reserving the space to be occupied by the relocation of Ballantyne street; the vacation of the whole of Ballantyne street from the angle easterly, when it was unnecessary to vacate a portion of it if a change was still intended; and the deeding of the triangular piece, which was virtually half of the street, by the university to Brown. The memorandum given to Brown by the secretary of the university, however, would seem to indicate that it was still the purpose of the parties to conform to the agreement, and, upon the whole, we cannot say that there has been a waiver or abandonment of its conditions or obligations.

We come now to the legal effect of the contract. It was primarily an option accorded the university to purchase the property therein described; but when it acted upon the option, and took over the title, there was such a performance on the part of the first parties as required the university to perform the further obligations entered into upon its part, those remaining being to open up Ballantyne street as agreed to be relocated, and to open and maintain a good highway 60 feet in width from the end of Ballantyne to Spaulding street, or an extension thereof. It may well be doubted whether the stipulation with reference to the location of the highway is of such a definite

and certain character as to be susceptible of enforcement. But it may be conceded for the purposes of this case that it might have been enforced by the first parties to the contract as against the university personally. The purpose of the agreement was, no doubt, to create an easement over the premises thereafter to be, and which were, acquired by the university, and now constitute a part of the college campus. As to the nature of the easement, plaintiffs' counsel urge with signal ability that it is appurtenant, or at least such as a court of equity will enforce in favor of the grantees or successors in interest of the first parties as against the successors in interest of the second parties; while, upon the other hand, it is argued with equal skill that the easement, if any such was created, was in gross, personal to the grantees, and not assignable or inheritable; consequently, that it is insusceptible of enforcement by the successors or assigns of the first parties, and especially may it not be enforced as against a successor to the Portland University, who it is claimed purchased without knowledge of the agreement. Mr Justice Rhodes well indicates the distinction between an easement appurtenant and one in gross in *Wagner v. Hanna*, 38 Cal. 111, 118, 99 Am. Dec. 354, where he says: "To the creation of a right of way that amounts to an easement, and not merely to a right of way in gross, two tenements are necessary,—the dominant, to which the right of way belongs; and the servient, upon which the obligation rests. . . . The principal distinction between a right of way in gross and an easement is found in the fact that in the first there is, and in the second there is not, a dominant tenement. The right of way is in gross, and personal to the grantee, because it is not appurtenant to other premises. The owner of premises may grant the right of way in either form, and if it is the intention to grant a right of way in gross, there is no mention of dominant premises. If the grant is of an easement, it is always made for the benefit of other premises, and the premises to which the way becomes appurtenant are described in the grant." The learned authors of the *American and English Encyclopædia of Law*, 2d ed. vol. 10, p. 403, make practically the same distinction. They say: "An easement appurtenant is an incorporeal right, which, as the term implies, is attached to and belongs to some greater or superior right; something annexed to another thing more worthy, which passes as incident to it. . . . Under the rule that there can be no easement without a distinct dominant tenement, there can, in strictness, be no such thing as an easement in gross. There is, however, a class of rights which are impressed upon the

land of one person in favor of another person or other persons, and not in favor of another tract of land, and these rights are sometimes spoken of by courts and legal writers as 'easements in gross.' For further illustration, see *Garrison v. Rudd*, 19 Ill. 558. As a rule of construction in determining whether in a given case an easement is appurtenant or in gross, courts favor the former, and, if the right in controversy is in its nature an appropriate and useful adjunct to the land conveyed, having in view the intention of the grantee as to its use, there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant, and not in gross, the presumption therefore being in favor of the former where there is a doubt as to the real nature of the grant. 10 Am. Eng. Enc. Law, 2d ed. p. 405; *Wagner v. Hanna*, 38 Cal. 111, 116, 99 Am. Dec. 354. Another legal principle is involved: That the quality of running with the land may be impressed upon a covenant, it is not sufficient that it be made concerning land, but there must be a privity of estate between the contracting parties, and the covenant must have relation to an interest created or conveyed in order that it may pass to the grantee of the covenantee. It will suffice if the covenantor have an equitable interest merely (8 Am. & Eng. Enc. Law, 2d ed. p. 149), there being a distinction to be noted between those rights which run only with the estate in the land and those which are said to be attached to the land itself. *Norcross v. James*, 140 Mass. 188, 2 N. E. 946. A covenant for title may be instanced as belonging to the former class, so that he who stands in privity with the estate with reference to which the covenant was made, by descent or purchase from the grantee or covenantee, is entitled to the benefit of the covenant. The covenant pertaining to the other class partakes of the nature of a grant or reservation, which carries with it an interest in the land itself, or becomes attached to and qualifies the estate, and it goes with the land, irrespective of privity. An easement appurtenant is of this latter class. It is a part of the dominant estate, and remains a servitude upon the servient estate into whosoever hands the former may come. So, "an owner," as is said in *Columbia College v. Lynch*, 70 N. Y. 440, 449, 26 Am. Rep. 615, "may subject his lands to any servitude, and transmit them to others charged with the same; and one taking title to lands, with notice of any equity attached thereto, or any outstanding right or claim affecting the title or the use and enjoyment of the lands, takes subject to such equities and such right or claim, and stands, in the place of his grantor, bound

to do or forbear to do whatever he would have been bound to do or forbear to do. . . . The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which would be enforced in equity against him, takes the title subject to all easements, equities, and charges, however created, of which he has notice." And "a personal covenant or agreement," says Mr. Justice Bigelow in *Whitney v. Union R. Co.* 11 Gray, 359, 364, 71 Am. Dec. 715, "will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." See also *Phenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 400. But where a person covenants with another in respect to land, and at the same time, with and as a part of making the covenant, neither parts with nor receives any title or interest in the land, nor creates an easement or right in the nature of an easement for the benefit thereof, such a covenant is at least but a mere personal contract, and wholly collateral to the land, and, of course, could neither run with the land nor become attached to or a part of it so as to qualify the estate. *Hurd v. Curtis*, 19 Pick. 459; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *King v. Wight*, 155 Mass. 444, 29 N. E. 644. Measured by these principles, we are to determine whether plaintiffs have a cause of suit against defendant Zahm, the Portland University not being a contestant here. At the time of entering into the contract or agreement upon which plaintiffs base their cause, the Portland University had no interest whatever, either legal or equitable, so far as the evidence shows, in the property through which it agreed to open the 80-foot highway; and, there being no privity of estate between the contracting parties, its covenant in that regard could not, therefore, run with the land. This much is very clear. The agreement or the covenant on the part of the university, if it may be so styled, had no relation to any interest in land created or conveyed, and there was no privity of estate between the parties. It is not sufficient, as we have seen, that it be concerning land; and that is all it is,—a mere undertaking, we may say, executory in character, to dedicate an easement through land that the university did not at the time own. The contract is therefore devoid of that absolutely essential requisite to endow it with that peculiar charac-

teristic of a covenant running with the land. Upon the other hand, the university was clearly not in a position to burden the land with an easement, having no estate therein to grant. Not being the owner, it could not create any servitude upon it, hence its agreement to open out a highway through it could not affect the land itself, or qualify the estate therein. There was no attempt to designate or describe the dominant tenement, but, if it could be otherwise shown that the land then owned by the first parties was intended as such, it could not aid the plaintiffs, as the university could not then annex the easement contended for. Carrying the logic of the authorities still further, the university did not, by the agreement, even so much as create an easement in gross. Not having an estate in the land at the time, it was an executory undertaking, wholly collateral to the land, and entirely personal in its portent and bearing. As is indicated by the cases, a person may subject his lands to any servitude, and transmit them to others charged with the same, but he cannot subject those belonging to others to any servitude whatever, and if he covenants respecting them it is an altogether personal undertaking, which does not in any manner affect the lands themselves. So, if a person be the owner when he covenants to burden lands with an easement or a servitude, equity, regarding that as done which ought to be done, will impress the burden upon the property coming into other hands with knowledge of the covenant. It does this because the covenant has been so impressed in the first instance, but it may be questioned whether equity will so treat a covenant that is made concerning land only, and does not at the same time create an interest or estate in the land, either legally or equitably, because of the want of ownership therein at the time. Whatever way we may turn the proposition, however, the agreement or covenant with reference to the establishment of the 60-foot highway to Spaulding street was

a mere personal covenant, wholly collateral to the land, and not assignable. But, if it be conceded that plaintiffs have a standing to enforce the agreement by reason of yet having an undivided one-half interest in the title to lots 16 to 20, inclusive, they cannot enforce it as against Zahm, the successor to the university, as it is not shown that he took with notice or knowledge thereof, and the covenant of the university is therefore not binding upon him in any sense. As the agreement affects the tract upon which the university was given an option to purchase, it was such, perhaps, as would have bound the university in equity to grant the easement. The first parties thereby, in effect, reserved the right to have that part of Ballyntyne street from the angle east changed or relocated; and, if the deed had been made in accordance therewith, it would have amounted to a reservation in the grant, or, as is sometimes construed, a grant by the university, and that would have been the end of the matter so far as that particular tract is concerned, and the easement would have been impressed upon the estate. But the deed was to the whole tract, with a collateral undertaking on the part of the university, if the memorandum of its secretary may be so construed as continuing the original agreement still to relocate the street as stipulated. This undertaking, however, so far as the record discloses, was wholly unknown to Zahm, and he could not be bound by it. Nor did the recording of the original agreement serve to notify him constructively, as at the time he purchased the title to the latter tract had apparently been conveyed by the first parties to the university without reference to the agreement, so that he may well have supposed that it had been abandoned, and that his title was good.

It follows from these considerations that *the decree of the trial court must be reversed*, and the complaint dismissed, and it is so ordered.

TEXAS SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,

v.

UVALDE NATIONAL BANK.

(.....Tex.....)

1. A telegraph company does not, by

NOTE.—*Liability of telegraph company for transmission or delivery of forged message.*

1. *Liability of company when its agent is deceived.*

a. *Liability to addressee*, 806.

b. *Liability to stranger*, 806.

65 L. R. A.

delivering a telegram, vouch for its authenticity, and is not bound to make good absolutely the truth of the representation, or to compensate for loss occasioned by its falsity.

2. *In the absence of negligence on its part, a telegraph company is not liable, by the mere fact of delivering a fraudulent telegram sent by one who tapped*

11. *Liability of company when its agent perpetrates the fraud*, 807.

This note includes cases where the message sent was intentionally false or fraudulent, but excludes those in which the falsity was due to inadvertence or mistake.

the company's wires, to make good the loss resulting from the sendee's reliance upon the faith of its authenticity.

3. A telegraph company which delivers a fraudulent message transmitted by a stranger tapping its wires does not exculpate itself from the charge of negligence by showing merely that the message was put upon the wire by the stranger, and deceived its agents; but it must further show that this was accomplished despite the exercise of the care incumbent on it under the circumstances.
4. A telegraph company which delivers a fraudulent message put upon its wires, by one who tapped them for that purpose, to one who suffers loss by acting upon its apparent authenticity, may be found negligent in failing to take any precautions to guard against such frauds.

(December 21, 1903.)

ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Uvalde County in plaintiff's favor, in an action brought to recover damages for the negligent delivery of a telegram. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Norman G. Kittrell and Webb & Finley, for plaintiff in error:

The uncontradicted evidence introduced by the plaintiff failed to show that the defendant was guilty of any negligence in the transmission and delivery of any or either

of the telegrams about which the plaintiff complains in its petition.

Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140; *Lowery v. Western U. Teleg. Co.* 60 N. Y. 198, 19 Am. Rep. 154; *First Nat. Bank v. Western U. Teleg. Co.* 30 Ohio St. 555, 27 Am. Rep. 490; *Joyce. Electric Law*, §§ 16, 17, 775; *Western U. Teleg. Co. v. Neill*, 57 Tex. 288, 44 Am. Rep. 589; *Thompson, Law of Electricity*, §§ 137-139; *Shearm. & Redf. Neg.* 5th ed. § 537; *Western U. Teleg. Co. v. Rosenstreier*, 80 Tex. 416, 16 S. W. 25.

When the plaintiff's testimony shows beyond controversy that it sustained loss through its own fault or contributory negligence, it becomes the duty of the court to instruct a verdict in favor of the defendant.

Pacific Exp. Co. v. Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795; *United States v. National Exch. Bank*, 45 Fed. 163; *People's Bank v. Franklin Bank*, 88 Tenn. 299, 6 L. R. A. 724, 17 Am. St. Rep. 884, 12 S. W. 716; *Deposit Bank v. Fayette Nat. Bank*, 7 L. R. A. 849, and note, 90 Ky. 10, 13 S. W. 339; *Land Title & T. Co. v. Northwestern Nat. Bank*, 50 L. R. A. 75, and note, 196 Pa. 230, 79 Am. St. Rep. 717, 46 Atl. 420; *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141; *Robertson v. Coleman*, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619; *Joyce, Electric Law*, §§ 773, 774, and notes; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 441, 24 L. ed. 507.

I. *Liability of company when its agent is deceived.*

a. *Liability to addressee.*

A telegraph company which negligently transmits or delivers a forged message is liable to the addressee for the damage sustained.

Thus, in *Strause v. Western U. Teleg. Co.* 8 Blas. 104, Fed. Cas. No. 13,531, a telegraph company was held liable to the addressee for the loss suffered, where the messenger of the company, instead of delivering the genuine despatch received, carelessly permitted a false and forged message to be substituted therefor and delivered, in reliance on which the addressee paid out a large sum of money.

A telegraph operator who sends a message purporting to be signed by the cashier of a bank and addressed to another bank, whereby the sender is held out as entitled to credit for a large amount, is guilty of such gross negligence, in the direct course of his employment, as will render the telegraph company liable for loss thereby sustained by the addressee, where the sender is known to the operator not to be the person whose name is signed to the despatch, and he produces no evidence of his authority to use the name of the cashier. The court said: "The agent was placed in the office, and in the control of the instruments, to use them in transmitting messages for a compensation. 65 L. R. A.

If the agent performed that duty in a negligent manner, whereby the plaintiff was injured, the principal is clearly liable. Transactions of the most important character are daily carried on by means of telegraphic communication, and the confidence which the public is invited to, and does, repose in the care with which the proprietors of these lines conduct the business, is a source of large remuneration to such proprietors. They incur a corresponding degree of responsibility, and must be held to the exercise of such care and caution as it is in their power to employ, in order to avoid being made the instruments of deception and fraud." *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140.

But a telegraph company which transmitted a message for pecuniary relief, from a stranger representing himself to be unfortunate, to a person supposed to be his uncle, is not liable to the latter, who sent the sum requested by telegraph, where the person receiving it proved to be an impostor, when there was nothing in the circumstances to create suspicion in the minds of the company's agents. *Western U. Teleg. Co. v. Meyer*, 61 Ala. 158, 32 Am. Rep. 1.

b. *Liability to stranger.*

A telegraph company which transmits a fraudulent despatch, stating that a specified bank will honor the draft of a certain person

The telegraph company, not being a common carrier, has the legal right to establish rules and regulations limiting its liability; and the printed stipulations on the back of the telegrams constitute a part of the contract.

Western U. Teleg. Co. v. Rosenstreter, 80 Tex. 416, 16 S. W. 25; *Western U. Teleg. Co. v. Edsall*, 63 Tex. 674; *First Nat. Bank v. Western U. Teleg. Co.* 30 Ohio St. 555, 27 Am. Rep. 485; *Joyce*, *Electric Law*, § 708; *Shearm. & Redf. Neg.* §§ 537, 539; *Thompson, Law of Electricity*, § 207.

If defendant's agent and operator at Uvalde station exercised ordinary care in receiving the message from San Antonio, purporting to have been sent by John Woods & Sons, saying that they would cash Fisher's draft; and, after so using ordinary care, he believed in good faith that the message was genuine, and, so believing, received and transmitted it to the office of the Uvalde Telegraph Company of Uvalde, defendant was not liable.

Smithwick v. Andrews, 24 Tex. 488; *Western U. Teleg. Co. v. Andrews*, 78 Tex. 305, 14 S. W. 641; *McGown v. International & G. N. R. Co.* 85 Tex. 289, 20 S. W. 80; *Leach v. Wilson County*, 68 Tex. 353, 4 S. W. 613.

Mr. M. S. Haltom also for plaintiff in error.

Messrs. Ellis, Garner, & Love and R. L. Ball, for defendant in error:

That defendant was negligent is shown by

for a designated sum, is not chargeable with notice that some one other than the addressee intends to act upon the information contained in the message, so as to render it liable to a stranger to whom the telegram is exhibited, and who, relying upon it, acts to his injury. *Western U. Teleg. Co. v. Schriver*, 129 Fed. 344.

II. Liability of company when its agent perpetrates the fraud.

If the agent of a telegraph company knowingly transmits a forged despatch, he renders the company liable for the damage thereby occasioned. The company is liable because it has failed in the performance of its duty through the neglect or fraud of its agent whom it has delegated to perform it. It is also liable on the principle that, if one of two innocent persons must suffer loss by the act of a third, he who put it in the third person's power to do the act should sustain the loss occasioned by its commission.

Hence, a telegraph company is liable for the fraud and misfeasance of its local agent, who was also the agent of an express company at the same place, and who sent a forged despatch to a merchant in a neighboring city, requesting him to forward money to his correspondent at the former place, to use in buying grain, where the same was duly received and the money in good faith forwarded by express in response to the telegram, but was intercepted and con-

verted to his own use by the agent. *McCord v. Western U. Teleg. Co.* 39 Minn. 181, 1 L. R. A. 143, 12 Am. St. Rep. 636, 39 N. W. 315.

the fact that its wires were tapped. Information was furnished to Fisher's confederate, which at least rendered the work of these impostors more easily done, and less liable of detection. These impostors and robbers were actually seen performing their nefarious work, by one of defendant's agents and employees.

There is not a particle of evidence tending to show that defendant has ever adopted any rules, devices of any kind, or any precautions of any nature whatever, to prevent the interference with its wires.

Defendant's agent at Uvalde station could, and should, have known that the message sent by the president of plaintiff bank did not reach its destination.

Gray, Communication by Telegraph, p. 130; *Thompson, Law of Electricity*, p. 169; *Strause v. Western U. Teleg. Co.* 8 Biss. 104, Fed. Cas. No. 13,531; *Western U. Teleg. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4; *Western U. Teleg. Co. v. Yopst*, 118 Ind. 248, 3 L. R. A. 224, 20 N. E. 222; *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140; *Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto*, 54 L. R. A. 711, 48 C. C. A. 413, 109 Fed. 369; *Bank of California v. Western U. Teleg. Co.* 52 Cal. 280.

A telegraph company which has been granted valuable franchises and privileges by the public, and which holds itself out to the public as a transmitter of messages, for which service it receives a valuable and ade-

quate consideration, is liable to the public for the loss of a message, if the company's agent, in the course of his duty, converts the message to his own use by the agent. *McCord v. Western U. Teleg. Co.* 39 Minn. 181, 1 L. R. A. 143, 12 Am. St. Rep. 636, 39 N. W. 315.

A bank which, on the strength of a forged telegram, purporting to be from the cashier of another bank, paid out money to one employed by an operator to transmit messages for him, and who fraudulently sent the message in his own behalf, may recover from the telegraph company, where the identity of the payee was vouched for by a reputable person, not a party to the fraud. *Bank of California v. Western U. Teleg. Co.* 52 Cal. 280.

Likewise, a telegraph company is liable for losses caused by a false telegram wilfully transmitted by an operator employed in its office, directing a bank to pay money to a designated person on account of a correspondent bank. *Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto*, 54 L. R. A. 711, 48 C. C. A. 413, 109 Fed. 369.

A telegraph company is liable for the wrongful act of its agent, who sent a forged telegram, purporting to be signed by an unmarried woman, addressed to an unmarried man, with whom she had only a casual acquaintance, requesting him to meet her at a certain town, where the agent, after transmitting the despatch, openly and publicly boasted of having sent it, and paraded its contents to the public. *Magonirk v. Western U. Teleg. Co.* 79 Miss. 632, 89 Am. St. Rep. 663, 31 So. 206.

A. W. R.

quate consideration, should be held, on the ground that public policy requires it, to be an insurer of the identity of the persons from whom, and the office from which, all messages involving cash transactions purport to come.

Joyce, *Electric Law*, §§ 18, 19; Gray, *Communication by Telegraph*, pp. 16, 130; Thompson, *Law of Electricity*, p. 169; *Western U. Teleg. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4; *Western U. Teleg. Co. v. Yopst*, 118 Ind. 248, 3 L. R. A. 224, 20 N. E. 222; *Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto*, 54 L. R. A. 711, 48 C. C. A. 413, 109 Fed. 369; *Bank of California v. Western U. Teleg. Co.* 52 Cal. 280.

Williams, J., delivered the opinion of the court:

The judgment brought in review by this writ of error was recovered by the bank against the telegraph company upon the facts which are stated in detail in the opinion of the court of civil appeals. In substance, they are that two impostors, calling themselves Fisher and Rief, conspired together to obtain money from the bank by means of forged telegrams sent over the defendant's telegraph lines. Fisher had been around Uvalde for some days, and had made the acquaintance of some of the employees of the bank, and claimed to have been buying cattle at Cline. On August 16, 1900, Rief tapped the wire at a point near Uvalde station, and between it and San Antonio, and, by means of other wires connected with it, attached an instrument in such way as to enable him to send messages to Uvalde, and to intercept and receive messages from that place intended for San Antonio. He then sent to Fisher, in care of the bank at Uvalde, this message, purporting to come from San Antonio, dated August 15th: "We will advance forty-five hundred your wire Cline. [Signed] Jno. Wood's Sons." The firm whose name appeared signed to the message were bankers in San Antonio. This message passed over defendant's wire to its office at Uvalde station, was received by the telegraph operator, and, through a private telegraph line operating between the station and the town of Uvalde, was transmitted to and delivered to the president of the bank. Within a few minutes after its receipt Fisher inquired of the president for a telegram to himself, and, upon receiving this one, opened and showed it to the president and proposed to draw upon John Wood's Sons for \$4,500. This the president refused to permit him to do without confirmation of the message. The president then wrote out and delivered to the owner of the private telegraph line connecting with

defendant's office at the station this message:

Uvalde, Texas, Aug. 16, 1900.

John Wood's Sons,

San Antonio, Texas.

Will you pay draft of C. W. Fisher \$4,500? Answer quick.

Uvalde National Bank.

This was transmitted to and received by defendant's agent at the station, and he undertook to send it on to San Antonio, but it was intercepted by Rief, and never reached that place. Before any answer to it was received, Rief sent this telegram:

Kansas City, Mo., 15th.

To Bank of Uvalde, Texas,

Uvalde, Texas.

If our representative Mr. Fisher calls, please notify go ahead and contract for balance of Moore cattle.

[Signed]

Scruggs Hall Co.

—which was duly received by the bank. Later, Rief also sent the following message in answer to that from the bank to John Wood's Sons:

San Antonio, Texas, Aug. 16th.

To Uvalde National Bank,

Uvalde, Texas.

Yes we will honor C. W. Fisher's draft for forty-five hundred.

[Signed]

John Wood's Sons.

The bank thereupon received Fisher's draft on the San Antonio bankers for \$4,500, paid him \$1,200, and gave him a letter of credit for the remainder. All of the messages received by the bank were, of course, forgeries, and on the next day the fraud was discovered.

The evidence justified the conclusion of the court of civil appeals that the operation of tapping the wire commenced as early as 7:40 A. M. of August 16th, and that about four hours elapsed between that time and the receipt of the last message. It also appears that each of the offices of the defendant is designated in sending telegrams by what is termed a "call," consisting of certain letters, and each of its operators has a private signature used in telegraphing, which is also a letter. The call for San Antonio was "S. A." and that for Uvalde station was "D. A." In sending a telegram from the former to the latter place, the sending operator would call, "D. A." and sign, "S. A.," and add his private signature. This custom was observed by Rief in sending the messages in question, the call and signature being correctly given. How he learned the

private signature of the operator at San Antonio is unexplained, but the evidence indicates that this is not ordinarily of much importance, as operators along the line are not acquainted with the signatures of all others, and pay little attention to them. It does sufficiently appear, however, that knowledge of the call for Uvalde station was essential in order to reach it by wire, and that it was communicated to Rief by defendant's operator at a neighboring station a few days before the fraud was perpetrated. Whether these signals were in use as a precaution against impositions such as that in question, or were merely employed for brevity and convenience in conducting the business, is not clearly revealed by the evidence. So far as it goes, the evidence rather tends to raise the inference that they were not regarded by the employees as a safeguard, and that they would be ineffectual, as such, to prevent such frauds. The operator who disclosed the call to Rief states that there was nothing unusual in giving such information to a casual inquirer professing, as Rief did, to be an operator; and both he and the only other witness who testified on the subject state that anyone acquainted with telegraphy, listening about the station, could learn the calls from the sound of the instrument. There is no evidence that employees were required to keep these things secret. At the same time one of them states: "The system we used was an up-to-date system. As far as I can say, I think the methods used by the telegraph company since I have been an operator have proven sufficient for all practical purposes to transact the business by telegraph for the public." Unless the usages described are such, the evidence shows that no precautions are taken by the company by which the genuineness of messages passing over its wires may be tested and forgeries detected, although the witnesses say that it is within the power of any expert operator at any time to tap the wires and send and control messages, as was done by these swindlers; and that no operator can tell where a message goes or whence it comes, except from what they are told by those controlling the wire and manipulating the instrument. The evidence as to the practicability of devising safeguards against such abuses of the telegraph is meager and unsatisfactory. Both of the operators say they know of no method in use. One of them says: "Nothing could be done which would make it very difficult for parties like this man to perpetrate these frauds, because that man was in a position to learn all such signals. I do not know that they could devise means as against everyone except telegraph operators by which it would be almost impossible to

perpetrate these frauds. I suppose they could." The other, for forty years an operator, says: "I think there could be a code of signals adopted by which messages could be identified as coming from the station from which they purport to come; I never thought of the matter before, but still I think there could be."

This cause was so tried in the district court as to make the decision here depend upon the broad question whether or not there is in the facts any basis for the judgment holding the telegraph company liable for the loss of the \$1,200 sustained by the bank. Some complaints are made of rulings of the trial court on incidental questions, but we find nothing in them requiring any addition to what the court of civil appeals has said, and we shall confine our discussion to the fundamental question just stated.

The charge of the trial judge made the right of plaintiff to recover depend upon a finding of negligence on the part of defendant; but counsel for plaintiff contend for a more stringent rule, under which defendant would be treated as having represented to plaintiff the authenticity of the message that caused the damage, and held bound absolutely to make good the truth of such representation, or to compensate for the loss occasioned by its falsity. We are unable to sustain this view, regarding it as not only unsupported by correct authority, but as contrary to the principles established by this and other courts, governing the responsibility of telegraph companies. The English courts directly and distinctly repudiate the idea that the delivery of a message by a telegraph company constitutes a representation to the person to whom it is delivered of authority from the person whose name is signed to it. *Playford v. United Kingdom Electric Teleg. Co.* L. R. 4 Q. B. 706, 10 Best & S. 759, 38 L. J. Q. B. N. S. 249, 21 L. T. N. S. 21, 17 Week. Rep. 968; *Dickson v. Reuter's Teleg. Co.* L. R. 2 C. P. Div. 62, same case on appeal, L. R. 3 C. P. Div. 1, 47 L. J. C. P. N. S. 1, 37 L. T. N. S. 370, 26 Week. Rep. 23. Those cases also hold that the addressee of a message has not, merely as such, any cause of action against the telegraph company for negligence in its transmission and delivery. This is based upon the propositions that the contract is wholly between the company and the sender of the message, where he is not the agent of the addressee, and that there is no privity of contract between the company and the addressee; that the duty of the company is wholly contractual, and not imposed by law; and that, as breach of a duty is essential to actionable negligence, the addressee cannot hold the company liable on the ground of negligence. This is

not the law as established in the United States generally and in this state. Telegraph companies, as they exist here, are charged by law with the performance of duties to those who employ and rely on them, and are alike responsible to the senders and addressees of messages for losses resulting from their failure to properly discharge that duty. With this duty in mind, we do not see how it can be truly said that there is no representation at all in the delivery by such a company to one person of that which purports to be a telegraphic message from another. The act of delivery does contain an assertion that the message was received by the company, at the point from which it purports to come, from him who appears to be the sender, and that it was transmitted by the company over its wire to the place of delivery. This much is, it seems to us, necessarily true, because the receipt, transmission, and delivery of messages are precisely the service which the company holds itself out as performing, and this is what the delivery imports to those accustomed to rely upon such means of communication. But is the representation absolute and unqualified?

In *May v. Western U. Teleg. Co.* 112 Mass. 90, a declaration, considered on demurrer, in one count alleged, in substance, that the defendant negligently delivered to plaintiff a telegram purporting to have been sent by certain persons, which had not in fact been so sent, by reliance and action on which plaintiffs sustained loss; and in another count alleged that defendant falsely represented to the plaintiffs that it was authorized to send the message, whereas it was not authorized. Both counts were held good. Little is said in the opinion about the first count. As will be observed, it charged negligence on the part of the company in the delivery of a message never sent, and was held good for that reason; and the ruling upon it is not authority for the proposition that a delivery of a message, never sent by him whose name is signed to it, without negligence on the part of the company, would render it liable. Of the other count the court said: "In an action against a telegraph company for delivering a message never sent, and alleging that the defendant falsely represented that it was authorized to deliver such a message, and thereby caused the plaintiff to send goods and suffer damages, it is not necessary to allege that it was done with intent to deceive, or that it was false within the knowledge of the defendant. It is not an action for deceit. It is an action in the nature of a false warranty against one acting as agent, who represents that he has authority when he has not. Whether such represen-

tation is made in terms, or tacitly and impliedly, he supposing, but not knowing, the fact to be true, he is liable to the person misled. *Jefts v. York*, 10 Cush. 392; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; and cases cited. Nor in such an action for false representations is it necessary for the plaintiffs to allege that they used due care and diligence to ascertain if the representations were true. Nor do any presumptions arise in this case, from the subject-matter of the alleged false representations, that make such an allegation necessary." This is not a holding that the mere delivery of a false message constitutes an absolute representation or warranty that it is true, or is what it purports to be. The allegation was that the company represented that it was authorized, etc. This could have been sustained by proof of an actual representation of authority, in addition to the mere delivery of the message. The decision, therefore, rests upon the principles of law concerning liability for false representations of agency, or of other facts, which need not be discussed at length. They are stated in many authorities, of which the following give condensed and accurate summaries: *Bishop, Noncontract Law*, §§ 330, 1211, 1212; *Smout v. Ilbery*, 10 Mees. & W. 1, 12 L. J. Exch. N. S. 357.

Many cases have occurred in which telegraph companies have been required to compensate persons damaged by reliance on false and fraudulent telegrams, all of them based upon an express finding of negligence, which would have been superfluous had there existed so stringent a rule as that contended for by the plaintiff in this case. *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140; *Bank of California v. Western U. Teleg. Co.* 52 Cal. 280; *Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto*, 54 L. R. A. 713, 48 C. C. A. 413, 109 Fed. 369; *McCord v. Western U. Teleg. Co.* 39 Minn. 181, 1 L. R. A. 143, 12 Am. St. Rep. 636, 39 N. W. 315; *Strause v. Western U. Teleg. Co.* 8 Biss. 104, Fed. Cas. No. 13,531. In none of these cases was it asserted that the telegraph company, by delivering a message, warranted its integrity, or represented, absolutely and unconditionally, that it was sent by the person who appeared to be its sender; but in all of them negligence was assumed, and in some of them declared, to be an essential element. That such companies are not insurers of the accuracy of messages delivered by them has passed into a truism. It has generally been affirmed as applicable to mistakes and alterations occurring in transmission; but we cannot see why it is not equally applicable here. A message delivered by a telegraph company, which, through error in transmission, differs materially from one actually

delivered to the company to be sent, is, in law, as truly a message never sent by the person purporting to be its sender as that here in question. If it be found that there was no fraud or negligence in either case, why should a guaranty of accuracy or authenticity be implied in one case more than the other? The reason given why mistakes in transmission, without negligence, do not give rise to liability, is that the media through which telegraph companies must perform their duty are uncertain and sometimes uncontrollable in their action, and the process of telegraphing is such that excusable mistakes on the part of the agents transmitting and receiving easily occur; which considerations have been thought to make it unjust to require more of such companies than that they avoid miscarriages and mistakes so far as, with proper care and circumspection, it is practicable to do so. The subject of interferences with their apparatus by strangers does not appear to have received much discussion, probably for want of occasion. In stating the reasons why the responsibility of insurers is not imposed, the court of appeals of Kentucky, in *Smith v. Western U. Teleg. Co.* 83 Ky. 104, 4 Am. St. Rep. 126, uses this language: "The wire is exposed to the interference of strangers; a surcharge of electricity in the atmosphere, or a failure of or irregularity in the electrical current, may stop communication; and it is continually subject to danger from accident, malice, and climatic influence when the company has not the actual, immediate custody of the message, as the common carrier has of the merchandise it carries; and it should not, therefore, like a common carrier, be treated, not only as a bailee, but as an insurer. *Western U. Teleg. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480, and cases there cited." It is doubtless true that, although it is sometimes impossible, with all the care that can be applied, to foresee and avoid errors in transmission, it is usually within the power of the agents of the telegraph companies to ascertain the identity of persons delivering messages for transmission; but this only makes it easier to impute negligence in the latter case than in the former, and constitutes no reason why there should be a warranty in one case and not in the other. Negligence and fraud aside, there is no better reason for a liability in one case than in the other; for, except as proper care may guard against them, the actions of strangers to their business are as much beyond the control of telegraph companies as are the influences which cause mistakes. The dangers to be apprehended from fraud and collusion of servants also exist in one instance as well as in the other. A rule which would re-

quire an absolute warranty of the genuineness of telegrams would necessarily make it the duty of telegraph companies to ascertain the identity of every person who tenders a message, and must, in justice, authorize them to refuse to receive a message without such identification. This would hardly be consistent, in many supposable cases, with the duty which they owe to the public to receive and promptly send telegrams tendered to them. They are, of course, neither bound nor authorized to send forged telegrams, but, as it is true that in some cases they cannot, while in others they can, with proper care, distinguish the genuine from the false, the true ground of liability must be negligence. Such representation as there was in the delivery of the telegram of plaintiff was therefore not broader nor more absolute than the duty which rested on the defendant. It was qualified by the nature of the service which defendant undertook to perform, and meant only that, so far as, by the exercise of proper foresight and care, defendant could know, the message came from John Wood's Sons. As the defendant and its servants did not know of the fraud, the case comes down to the question whether or not they were guilty of negligence in allowing themselves to be thus deceived by the use of their own apparatus; in other words, Were they guilty of negligence? Both the district court and the court of civil appeals so held, and the remaining question for us to consider is whether or not there is evidence of negligence to support the verdict of the jury.

When the plaintiff proved the delivery of the message, the loss resulting from reliance and action on it, without negligence on its part, and that no such message had ever been sent by John Wood's Sons, it made out a case calling for the production of evidence from the defendant to exculpate itself. *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140; *Turner v. Hawkeye Teleg. Co.* 41 Iowa, 461, 20 Am. Rep. 605; *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589. The defense offered is that the defendant had itself been imposed upon and made the innocent medium through which a false representation was made to plaintiff. The deception was practised partly by means of defendant's own wires, instruments, and servants, of which it should have had exclusive control. Under the circumstances, and in view of the duty of defendant to exercise, in the organization and conduct of its business, a degree of foresight and care adequate to give reasonable protection to the immense interests daily dependent on the reliability of the intelligence it carries, we are of the opinion that the defense was not complete with the mere

showing that the false message was put upon its wires by strangers and deceived its servants, and that it was incumbent on the defendant to make it appear that this was accomplished despite the exercise of the care incumbent on it. Nor is this met by proof that the agent at Uvalde was not in fault. Admitting that he was without fault, the question still remains, Was it not in the power of the defendant, had it exercised reasonable foresight, to have prevented the fraud by furnishing him and its other agents with means of detecting it? The evidence shows that this business is open to the perpetration of such frauds at any time by a device so well known that one of the defendant's operators was able to describe, without having seen, the method by which it was perpetrated. If this is true to-day, it has been true for all the time telegraphs have been in use. The evidence suggests that the weakness consists in the absence of any means by which one operator may be enabled to determine whether a message comes from another office. The question at once arises whether or not, with proper foresight, some regulation might not have been devised to remedy this, and prevent, or render more difficult, the accomplishment of the designs of swindlers. So far as the evidence goes, it tends to answer this question in the affirmative. If the defendant had made any regulation, or adopted any code of signals, or made any provision against this known danger, the evidence fails to disclose the fact, unless the signals stated at the outset constituted one. If these were designed for this purpose, which is not shown, then the servant of the company was in fault in defeating that purpose by disclosing the call for Uvalde, and it would be difficult to answer the view of the court of civil appeals that this was, of itself, sufficient evidence of negligence. It is reasonably apparent, however, that the agents did not treat these matters as having any such signification, and we are inclined, upon the whole evidence, to accept their view. The case then stands in this attitude: The defendant is engaged in the business of conveying from place to place intelligence, often of vast importance in business and other affairs; it invites the confidence of the public that its service is as reliable as the exercise of care and foresight, commensurate with the importance of the interests involved, can make it; at the same time it is, to its knowledge, exposed to a constant danger of being made,

65 L. R. A.

through the use by swindlers of its own appliances and servants, the instrument of fraudulent deceptions upon its patrons; and when such a deception has been accomplished upon one, it does not show that it had taken any precaution against it, or that none was practicable. We are unwilling to establish the first precedent that a defense going no further than this is sufficient, and to hold that the jury were not warranted in this state of the evidence in finding that defendant was guilty of negligence. If it be urged that the burden was on plaintiff to show negligence, the answer is that it did show that the company was apparently in the wrong in delivering a false telegram. The defendant, charged with the duty which, as we have seen, rested upon it, should have shown, not only that it was ignorant of the falsity of the message, but that it was justifiably ignorant. It could not establish this without showing that the imposition upon it occurred notwithstanding the use of proper care on its part. The character, necessities, and limitations of its business as well as its regulations and modes of conducting it, were best known to it. In the arrangement and conduct of this business it commands the best skill that can be had, and it is peculiarly in its power to develop and explain all that should be known to court and jury in the determination of the questions like that before us. *Ryan v. Missouri, K & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589.

We have said that no showing was made of the impracticability of making provision against such frauds. We say this because the employees of the defendant who testified seem to express the opinion that such provision could have been made, and such of their testimony as tends the other way is so vague and unsatisfactory that the jury were not bound to accept it. Whether or not swindlers might be able to circumvent the best safeguards that could be erected, is not the question. The better the safeguards, the more improbable that such frauds would be attempted, or, if attempted, would succeed. The defendant makes good its defense when it shows that it has done all that due care and foresight would suggest, and, if loss occur in spite of this, it is not liable; but without such showing, it does not appear to have been innocent in its apparently wrongful act by which plaintiff was deceived.

Affirmed.

PENNSYLVANIA SUPREME COURT.

Mary HAWN

v.

Samuel M. STOLER, Exr., etc., of A. B. Stoler, Deceased, Appt.

(208 Pa. 610.)

Parol instructions by one who has given money to another for safe keeping, which has been deposited by the latter's husband in a bank upon a certificate taken in his own name, to the one to whom the money was delivered, as to the persons to whom it is to be paid after the death of the donor, without any instruction in writing or delivery of the certificate of deposit, are not sufficient to effect a valid gift *causa mortis*.

(April 11, 1904.)

APPEAL by defendant from a judgment of the Superior Court reversing a judgment of the Court of Common Pleas for Franklin County in defendant's favor in an action brought to recover money alleged to belong to plaintiff under a gift *causa mortis*. *Reversed*.

The facts are stated in the opinion.

Messrs. J. S. Omwake, W. U. Brewer, and J. R. Ruthrauff, for appellant:

A gift is more than a purpose to give, however clear and well settled the purpose may be. It is a purpose executed. It may be defined as the voluntary transfer of a chattel completed by the delivery of possession.

It is the fact of delivery that converts the unexecuted and revocable purpose into an executed, and therefore irrevocable, contract.

Walsh's Appeal, 122 Pa. 177, 1 L. R. A. 535, 9 Am. St. Rep. 83, 15 Atl. 470.

A gift is a contract executed. The act of execution is the delivery of possession.

Scott v. Lauman, 104 Pa. 595; *Kulp v. March*, 181 Pa. 630, 59 Am. St. Rep. 687, 37 Atl. 913.

A gift cannot be made by words *in futuro*, or by words *in presenti*, unaccompanied by delivery.

Re Campbell, 7 Pa. 100, 47 Am. Dec. 503; *Trough's Estate*, 75 Pa. 115; *Kidder v. Kidder*, 33 Pa. 268; *Walsh's Appeal*, 122 Pa.

NOTE.—As to sufficiency of constructive delivery to sustain gift *causa mortis*, see, in this series, note to *Page v. Lewis*, 18 L. R. A. 170; also the later cases of *Keepers v. Fidelity Title & D. Co.* 23 L. R. A. 184; *Leyson v. Davis*, 31 L. R. A. 429; and *Royston v. McCulley*, 52 L. R. A. 899.

As to sufficiency of possession of donee of chose in action, see *First Nat. Bank v. Holland*, 55 L. R. A. 155.

65 L. R. A.

187, 1 L. R. A. 535, 9 Am. St. Rep. 83, 15 Atl. 470; *Nicholas v. Adams*, 2 Whart. 17; *Wells v. Tucker*, 3 Binn. 366; *Fearing v. Jones*, 149 Mass. 12, 14 Am. St. Rep. 392, 20 N. E. 199.

The gift of a check delivered to the donee, but not cashed by the bank in the lifetime of the donor, does not pass the title to the money represented by the check to the donee.

Kern's Estate, 171 Pa. 55, 33 Atl. 129; *Taylor's Estate*, 154 Pa. 183, 18 L. R. A. 855, 25 Atl. 1081; *Waynesburg College's Appeal*, 111 Pa. 132, 56 Am. Rep. 252, 3 Atl. 19.

The money remained in the hands of the donor's agent and within the control and dominion of the donor until her death. This is fatal to plaintiff's claim.

Re Campbell, 7 Pa. 100, 47 Am. Dec. 503; *Walsh's Appeal*, 122 Pa. 177, 1 L. R. A. 535, 9 Am. St. Rep. 83, 15 Atl. 470; 3 Pom. Eq. Jur. § 1146; *Thornton, Gifts & Advancements*, p. 110.

If, in point of fact, the relation of bailee to the donor was changed to that of trustee for the donee, the plaintiff was bound to show this as part of her case.

Oller v. Bonebrake, 65 Pa. 344.

If the question as to whose agent Mrs. Slentz was is left in doubt, the doubt must be resolved against the plaintiff.

Thornton, Gifts & Advancements, § 216; *Clapper v. Frederick*, 199 Pa. 609, 49 Atl. 218.

In all gifts *causa mortis* delivery must be made for the express purpose of consummating the gift; and a previous and continuing possession of the donee is not sufficient.

Drew v. Hagerty, 81 Me. 231, 3 L. R. A. 230, 10 Am. St. Rep. 255, 17 Atl. 63; *Hatch v. Atkinson*, 56 Me. 326, 96 Am. Dec. 464; *Lane v. Lane*, 76 Me. 521; *Parcher v. Saco & B. Rav. Inst.* 78 Me. 470, 7 Atl. 266; *Dunbar v. Dunbar*, 80 Me. 152, 6 Am. St. Rep. 166, 13 Atl. 578; *Miller v. Jeffress*, 4 Gratt. 472; *French v. Raymond*, 39 Vt. 623; *Cutting v. Gilman*, 41 N. H. 147; *Delmotte v. Taylor*, 1 Redf. 417; *Egerton v. Egerton*, 17 N. J. Eq. 419; *Kenney v. Public Administrator*, 2 Bradf. 319; 2 Kent, Com. 10th ed. 602, and note; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Walsh's Appeal*, 122 Pa. 177, 1 L. R. A. 535, 9 Am. St. Rep. 83, 15 Atl. 470; *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9; *Thornton, Gifts & Advancements*, §§ 132, 150, 161; 14 Am. & Eng. Enc. Law, 2d ed. pp. 1057-1061; 3 Pom. Eq. Jur. §§ 1146-1149.

This gift cannot be sustained on the ground of a trust, because clearly no trust was intended.

Smith's Estate, 144 Pa. 434, 27 Am. St. Rep. 641, 22 Atl. 916.

Messrs. Sharpe & Elder, for appellee:

It would be impossible to utter more direct and positive words of gift than those spoken by the donor.

Michener v. Dale, 23 Pa. 59; *Wagoner's Estate*, 174 Pa. 558, 32 L. R. A. 766, 52 Am. St. Rep. 828, 34 Atl. 114; *Taylor's Estate*, 154 Pa. 183, 18 L. R. A. 855, 25 Atl. 1061.

In every *donatio causa mortis* there is an express or an implied condition attached to the gift, and it shall take effect only on the donor's death by the existing disorder. Consequently, where the delivery is to a third person for the donee, there is a condition attached to the gift and, of course, to the delivery of it to the third person, that the subject of the gift shall be returned to the donor in case the donor recovers from his illness before a delivery to the donee.

Rhodes v. Childs, 64 Pa. 18.

The delivery need not be contemporaneous with the words of gift. The delivery by the donor to the donee, or to a third person for the donee, may be either prior or subsequent in point of time to the words of gift.

Brown v. Niethammer, 141 Pa. 114, 21 Atl. 521; *Thornton, Gifts & Advancements*, §§ 152, 168; *Devol v. Dye*, 123 Ind. 321, 7 L. R. A. 439, 24 N. E. 246; *Shackleford v. Brown*, 89 Mo. 546, 1 S. W. 390; *Michener v. Dale*, 23 Pa. 59; *Sessions v. Moseley*, 4 Cush. 87; 2 Schouler, Pers. Prop. 3d ed. § 180; *Southerland v. Southerland*, 5 Bush, 591; *Williams v. Fitch*, 18 N. Y. 546; *Crawford's Appeal*, 61 Pa. 52, 100 Am. Dec. 609; *Carradine v. Carradine*, 58 Miss. 286, 38 Am. Rep. 324; *Champney v. Blanchard*, 39 N. Y. 111.

If Mrs. Little intended to constitute Mrs. Slentz trustee for the donees, the transaction would have no semblance of a testamentary disposition. It would be a valid trust.

Dougherty v. Shillingsburg, 175 Pa. 56, 34 Atl. 349; *Mulone's Estate*, 13 Phila. 313; *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9; *Clough v. Clough*, 117 Mass. 83; *Davis v. Ney*, 125 Mass. 590, 28 Am. Rep. 272; *Grymes v. Home*, 49 N. Y. 17, 10 Am. Rep. 313; *Wagoner's Estate*, 174 Pa. 558, 32 L. R. A. 766, 52 Am. St. Rep. 828, 34 Atl. 114; *Taylor's Estate*, 154 Pa. 183, 18 L. R. A. 855, 25 Atl. 1061.

In the case of money deposited in bank, if a check is drawn for the whole amount of the deposit, and the drawer intends, by means of the check, to make a gift to another of the whole fund, the check will operate as an equitable assignment of the fund, and will be good as a gift.

Taylor's Estate, 154 Pa. 183, 18 L. R. A. 855, 25 Atl. 1061.
65 L. R. A.

No particular form of words is necessary to give effect to a gift *causa mortis*; and all questions relating to the fact of delivery, as well as of the capacity in which the person who receives the thing holds it, are usually to be left to a jury.

2 Schouler, Pers. Prop. 3d ed. § 184; *Jacques v. Fourthman*, 137 Pa. 428, 20 Atl. 802.

Potter, J., delivered the opinion of the court:

This was an action of assumpsit by Mary Hawn against A. B. Stoler to recover the sum of \$300 as a *donatio causa mortis* alleged to have been made to plaintiff by Catherine J. Little, and which subsequently came into the hands of defendant. Upon the trial the learned judge of the court of common pleas directed the jury to find a verdict for the plaintiff, subject to the question of law reserved, whether there was any evidence in the case upon which the plaintiff is entitled to recover. Judgment was afterwards entered for the defendant *non obstante veredicto*. Upon appeal to the superior court, this judgment was reversed.

The material facts upon which the controversy arose are not in dispute. Mrs. Little lived in Waynesboro, Pennsylvania. On June 21st she was very sick at her home. She sent for her neighbor Mrs. Slentz, and committed to her keeping a sum of money amounting to \$595. This money was taken by Mrs. Slentz to her home, and given to her husband, and he took it to a bank, and deposited it, taking therefor a certificate in his own name. The certificate was not returned either to Mrs. Slentz or to Mrs. Little. The next morning the two women took the train for Baltimore, where Mrs. Little entered a hospital, and upon the evening of the next day, which was June 23d, she died. Mrs. Slentz says that in the afternoon she saw Mrs. Little was dying, and that she said to her, "I may go home this evening, and I don't know what to do with that money; we don't know what might happen." Mrs. Little said, "Yes, you know it goes very hard for me to talk." I said, "Yes, I know it does, but I have this money in my possession, and I would not know what to do with it if you did not tell me." Mrs. Little then said, "You give \$300 to my sister, Mrs. Hawn," etc. This conversation, upon which the plaintiff relies to establish the gift, took place in the hospital in Baltimore. Mrs. Hawn, the donee, was not present, and the fund from which the gift was to be made was not then in the possession of Mrs. Little or of Mrs. Slentz, but was on deposit in the bank at Waynesboro, in the name of Mr. Slentz, and they did not even have the certificate, which was the evidence

of the deposit, with them; nor does it appear to have been indorsed or assigned by Mr. Slentz. When the money was given to Mrs. Slentz it was for safe-keeping only, and there is nothing to indicate that Mrs. Little had then in mind any thought of making a gift of it to anyone. It passed completely out of her possession, and out of the possession of the party to whom she gave it, and found its way into the bank, where it was deposited in the name of a third party. The money was thus transformed from a chattel in the possession of Mrs. Little, presumably with her consent, into a chose in action. She did not have in her possession any evidence of the ownership of the deposit. If she had held a certificate of deposit, or any equivalent evidence of the ownership of the fund, she would have had something to deliver or transfer, but as it was she had nothing of the kind. So long as she had the gold or paper money in her possession, she had a visible, tangible thing; but when she passed it over to another, and that other, presumably with the consent of the donor, handed it to still another person, who in turn deposited it in bank, the right which remained in Mrs. Little could not in any sense of the word be held to be anything more than a right of action to recover the amount of the money from the party who held it. Therefore, when she was in the hospital in Baltimore, she had nothing to give except a chose in action, and to transfer this the law requires an assignment or some equivalent instrument, and the transfer must be actually executed. 2 Kent, Com. 439. Undoubtedly, a valid gift might have been made of a chose in action had it been properly assigned or transferred. Had it been evidenced by a note, bond, certificate, or any other instrument capable of indorsement or actual delivery, and had that instrument been present, and duly assigned by Mrs. Little when she attempted to make the gift there would have been ground upon which to contend that there was an actual delivery. In *Fross's Appeal*, 105 Pa. 258, it was said: "The delivery must be according to the nature of the subject, and the donor must in some form relinquish, not only the possession, but all dominion over it." The doctrine that an assignment, or some instrument equivalent thereto, is necessary to perfect the delivery of a chose in action is distinctly affirmed by Sharswood, J., in *Bond v. Bunting*, 78 Pa. 210. The law does not look with favor upon gifts *causa mortis*; and under all the authorities nothing can be sustained as such unless it is purely and strictly so. Delivery is in all

cases indispensable, but whether to the donee immediately or to another for him is immaterial. *Michener v. Dale*, 23 Pa. 59; *Wells v. Tucker*, 3 Binn. 366. Without an act of delivery, an oral disposition of property in contemplation of death could be sustained only as a nuncupative will, and in the manner and with the limitations provided for such wills. *Drew v. Hagerty*, 81 Me. 231, 3 L. R. A. 230, 10 Am. St. Rep. 255, 17 Atl. 63. When the words of gift were uttered by Mrs. Little in the hospital, as is well said by counsel for appellee, the subject-matter was incapable of being delivered at that time by her to anyone, because neither the money nor the certificate of deposit was present. But it is urged in the argument that the delivery of the money to Mrs. Slentz two days before was sufficient, even though at that time no intention to make a gift was entertained by Mrs. Little. We cannot assent to this proposition. Nothing short of clear and explicit evidence of delivery in furtherance of an intention to make the gift will answer the purpose. When the money was delivered to Mrs. Slentz it was certainly not for the use of any intended donee. Had she retained the money specifically in her possession and under her control, so that actual delivery of it as a chattel could have been made when the intention to make a gift was manifested, the case would have been very different. But Mrs. Little and her agent had by their actions put it out of her power to make any actual delivery of the money as a chattel in possession at that time. By the deposit of the money in the bank there was substituted for it, on the part of Mrs. Little, a mere right of action, and it is clearly apparent that the requirements necessary for the valid transfer of a chose in action were not complied with by her.

We are not disposed to favor any relaxation of the law in aid of a gift *causa mortis*. Reason and the weight of authority are opposed to it. Tilghman, Ch. J., said in *Wells v. Tucker*, 3 Binn. 366: "These donations do, in effect, amount to a revocation *pro tanto* of written wills, and, not being subject to the forms prescribed for nuncupative wills, they are certainly of a dangerous nature." We are clear that there was not in the present case a delivery of the subject-matter intended to be conveyed, and without it there could be no valid gift. The assignment of error is sustained.

The judgment of the Superior Court is reversed, and the judgment of the Court of Common Pleas is reinstated and affirmed.

RHODE ISLAND SUPREME COURT.

Elizabeth M. WAGENER

v.

Joseph A. LATHAM, Admr. of George E. Wagener, Deceased.

(.....R. I.....)

An action at law may be maintained to enforce payment of sums due under a decree in equity for payment of alimony rendered in another state, although the decree is not for a specific sum, but for a periodic allowance, and the remedy in the state where the decree was rendered would be by contempt proceedings in the equity court.

(March 4, 1904.)

ON DEMURRER to a plea calling in question the jurisdiction to entertain an action at law upon a decree for alimony. *Sustained.*

The facts are stated in the opinion.

Messrs. Van Slyk & Mumford, for plaintiff, in support of demurrer:

Such a decree is one which, under the Constitution of the United States, is entitled to full faith and credit in every other state.

Arrington v. Arrington, 127 N. C. 190, 52 L. R. A. 201, 80 Am. St. Rep. 791, 37 S. E. 212; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735.

An action at law will now lie upon a decree in equity providing for the payment of money only.

Pennington v. Gibson, 16 How. 65, 14 L. ed. 847; *Evans v. Tatem*, 9 Serg. & R. 252, 11 Am. Dec. 717; 2 Black, Judgm. 2d ed. 962; *Bullock v. Bullock*, 57 N. J. L. 508, 31 Atl. 1024; *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761; *Brisbane v. Dobson*, 50 Mo. App. 170; *Arrington v. Arrington*, 127 N. C. 190, 52 L. R. A. 201, 80 Am. St. Rep. 791, 37 S. E. 212; *Knapp v. Knapp*, 59 Fed. 641; *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857, 68 N. W. 391; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227.

Mr. William M. P. Bowen, for defendant, *contra*:

The constitutional provision requiring full faith and credit to be given to judgments of other states has no application to a judgment in a proceeding in which no jurisdiction is acquired.

Bartlet v. Knight, 1 Mass. 401, 2 Am. Dec. 36; *Black's Case*, 4 Abb. Pr. 162; *Black v. Black*, 4 Bradf. 174; *Martin v. Central Vermont R. Co.* 50 Hun, 347, 3 N. Y. Supp. 82.

NOTE.—As to enforcement in other state of judgment for alimony, see also *note to Benton's Succession*, 59 L. R. A. 178. 65 L. R. A.

Fraud on the part of the plaintiff alone in procuring a foreign judgment may be shown by the defendant in a sister state.

Black, Judgm. 2d ed. § 291; *Cooley*, Const. Lim. § 400; *Rathbone v. Terry*, 1 R. I. 73; *Frothingham v. Barnes*, 9 R. I. 474; *Watson v. Steinau Bros.* 19 R. I. 218, 61 Am. St. Rep. 768, 33 Atl. 4.

In Rhode Island the jurisdiction to award alimony in divorce proceedings there is purely statutory.

Sammis v. Medbury, 14 R. I. 214.

In *Allen v. Allen*, 100 Mass. 373, it was held that a decree of the supreme court for alimony on a separation from bed and board cannot be enforced by an action at law thereon in the superior court.

The remedy in equity was sustained in *Barber v. Barber*, 21 How. 582, 595, 16 L. ed. 226, 230.

Statutory decrees for alimony should be confined for enforcement everywhere within the limitations under which they arose.

Bullock v. Bullock, 57 N. J. L. 508, 31 Atl. 1024; *New York Mut. L. Ins. Co. v. Newton*, 50 N. J. L. 571, 14 Atl. 756; *Van Buskirk v. Mulock*, 18 N. J. L. 184; *Barber v. Barber*, 2 Pinney (Wis.) 297; *Elliott v. Ray*, 2 Blackf. 31; 2 Bishop, Marr. Div. & Sep. § 847.

Stiness, Ch. J., delivered the opinion of the court:

The plaintiff sues in debt on judgment on a decree for alimony rendered by the superior court of Massachusetts. The defendant pleads to the jurisdiction in law, claiming that the remedy is in equity. To these pleas the plaintiff demurs.

The first question is, Does an action at law lie upon a decree in equity from another state for the payment of money? In *Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847, the rule is stated that, whenever an action of debt can be maintained on a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for a specific amount. That was a case brought in a Federal court on a decree in equity in a state court. In *Barber v. Barber*, 21 How. 582, 591, 16 L. ed. 226, 229, the court said that a decree for alimony is a judgment of record, and will be received as such by other courts. That suit was in equity, and the alimony sued for was granted in a divorce from bed and board. That the remedy is not limited in equity by the Supreme Court of the United States appears from *Lynde v. Lynde*, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555. In that case

alimony had been awarded in New Jersey, and an action was brought on the judgment in New York, where the courts held (*Lynde v. Lynde*, 41 App. Div. 280, 58 N. Y. Supp. 567, and 162 N. Y. 405, 48 L. R. A. 679, 76 Am. St. Rep. 332, 56 N. E. 979) that such an award could be enforced in the latter state. The case was then taken to the Supreme Court of the United States, where the judgment of the court of appeals of New York was affirmed. The rule is now well established that an action of debt will lie in a court of law on the decree of a domestic court of chancery in all cases where such decree directs the payment of a fixed and absolute debt in money. 2 Black, Judgm. 2d ed. § 962; *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761.

A second question arises,—whether an action will lie where the sum adjudged is not a single, stated amount, but an accruing allowance. Upon this there have been more adverse decisions than on the preceding question, but the tendency of courts and the better reason are in favor of enforcing such decrees where the only question involved is the payment of the money. An obvious advantage in this course is that it tends to unify the remedial agencies of the country by making them enforceable in all its parts. It would be a reproach to our system of legal administration if one could escape from the operation of a judicial decree by going into another state. This is one country, and, so far as possible, it should have one law. Whatever tends to make the operation of law and legal remedies equally effective in all parts of the land is carrying out the true idea of a common country. A party against whom a judgment stands should not be shielded by the fact that he is not in the state where it was rendered. In the state where a decree is given for an allowance at stated periods, it would be enforced, and so it should be enforced elsewhere if it can be. So it is held in *Knapp v. Knapp*, 59 Fed. 641, that an action will lie in a Federal court, upon a decree of divorce rendered by a state court of equity, to recover alimony accrued at the time of filing the complaint. In *Bullock v. Bullock*, 57 N. J. L. 508, 31 Atl. 1024, the court said, quoting from *Bullock v. Bullock*, 52 N. J. Eq. 501, 27 L. R. A. 213, 46 Am. St. Rep. 528, 30 Atl. 676: "If by the direction to pay alimony an indebtedness arises from time to time, as such payments become due, an action at law will lie thereon, and the decree will furnish conclusive evidence of such indebtedness." One of the strongest cases in support of the enforcement of accruing alimony is *Barber v. Barber*, 21 How. 582, 591, 16 L. ed. 226, 229. The court said 65 L. R. A.

of an allowance for support: "It becomes a judicial debt of record against the husband, which may be enforced by execution or attachment against his person, issuing from the court which gave the decree; and when that cannot be done, on account of the husband having left or fled from that jurisdiction, . . . the wife, by her next friend, may sue him wherever he may be found, or where he shall have acquired a new domicile, for the purpose of recovering the alimony due to her, or to carry the decree into a judgment there with the same effect that it has in the state in which the decree was given. Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is." The opinion holds that the remedy is in equity, but, as we have seen, the later case of *Lynde v. Lynde* admits the remedy at law. To the same effect are *Arrington v. Arrington*, 127 N. C. 190, 52 L. R. A. 201, 80 Am. St. Rep. 791, 37 S. E. 212; *Brisbane v. Dobson*, 50 Mo. App. 170; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227.

The objection that an allowance is subject to alteration by the court ordering it, and so it cannot be regarded as a final and conclusive judgment, has little, if any, weight as to an amount already due at the time of suit. An accrued amount would not be changed by the court if the debtor was able to pay it, and a suit on a decree is but a step to enforce payment. But, however this may be, the cases cited sufficiently recognize the right to sue; and in this case, the husband having died before this suit was brought, the possibility of a change had passed.

The defendant argues further that, because the jurisdiction over decrees in divorce is in equity in Massachusetts and in this state, the prosecution of the claim must be in equity, and not at law. Evidently in the original forum the ordinary remedy for failure to comply with an order would be in equity, by way of process for contempt. This process could not appropriately be applied by some other court, whose decree has not been violated, but a suit at law would be appropriate. Hence, as we have seen in the cases cited, the remedy at law is allowed in other states. The remedy in this state is not confined to equity, for by Pub. Laws 1902, chap. 971, § 5, p. 40, an allowance is declared to be so far a judgment for debt that suits may be brought or executions may issue thereon for amounts from time to time due and unpaid.

Demurrer to pleas sustained.

TEXAS SUPREME COURT.

FT. WORTH & RIO GRANDE RAILWAY
COMPANY, *Appt.*,

v.

John GLENN, by Next Friend.

(.....Tex.....)

A child living in the family of his father, upon property in which he has no property right, has a right of action against one who maintains a well on adjoining property in such a condition as to constitute a nuisance which renders the child ill to his injury.

(May 19, 1904.)

QUESTIONS certified by the Court of Civil Appeals for the Second Supreme Judicial District which arose on appeal by defendant from a judgment of the District Court for Hood County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the maintenance of a nuisance on defendant's property. *Answer favorable to plaintiff returned.*

The facts are stated in the opinion.

Messrs. West, Chapman, & West and Theodore Mack, for appellant:

The action was not one growing out of negligence, but was an action for damages resulting from a private nuisance. Negligence is not an element in an action for nuisance.

1 Chitty, Pl. 330; 14 Enc. Pl. & Pr. 1114.

At common law an action for nuisance was strictly an action on the case.

2 Chitty, Pl. p. 775.

Possession or title was an essential allegation.

The modern common-law remedy for nuisance is by action on the case.

14 Enc. Pl. & Pr. p. 1094; 1 Chitty, Pl. 139.

In a case of private nuisance, the action is really one for the disturbance of possession.

Fell v. Bennett, 110 Pa. 181, 5 Atl. 17; *Low v. Mumford*, 14 Johns. 426, 7 Am. Dec. 469; 1 Chitty, Pl. 133.

The possession of the house or land, or a reversionary interest therein, is necessary in all actions for injury to the possession or enjoyment of the premises.

2 Greenl. Ev. p. 470; *Ellis v. Kansas City, St. J. & C. B. R. Co.* 63 Mo. 136, 21 Am. Rep. 436; *Columbus Gaslight & Coke Co. v. Freeland*, 12 Ohio St. 397; 1 Addison, Torts, p. 40; *Kavanagh v. Barber*, 131 N. Y. 211.

NOTE.—As to how far property right is necessary to sustain action for a private nuisance, see also, in this series, *Kavanagh v. Barber*, 15 L. R. A. 689, and *note*.
65 L. R. A.

15 L. R. A. 689, 30 N. E. 235; *Quincy Canal v. Newcomb*, 7 Met. 276, 39 Am. Dec. 778; *Hughes v. Auburn*, 161 N. Y. 96, 46 L. R. A. 636, 55 N. E. 389.

The parent in possession of premises affected by a nuisance affecting his health, as well as that of his family, can maintain an action for damages.

Texas & P. R. Co. v. Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134; *Pierce v. Wagner*, 29 Minn. 355, 13 N. W. 170; *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Ferguson v. Firminich Mfg. Co.* 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448; *Randolf v. Bloomfield*, 77 Iowa, 50, 14 Am. St. Rep. 268, 41 N. W. 562; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 9 L. R. A. 737, 25 Am. St. Rep. 595, 20 Atl. 900; 3 Sutherland, Damages, § 1051.

Mr. H. D. Payne for appellee.

Gaines, Ch. J., delivered the opinion of the court:

This is a certified question from the court of civil appeals of the second district. The statement and question are as follows:

"This suit was brought by John Glenn, an infant two or three years old, by his father as next friend, Felix P. Glenn, to recover from appellant \$1,000 as damages for personal injuries sustained under the circumstances stated below, and resulted in a verdict and judgment in his favor for \$450, from which this appeal is prosecuted by the railway company.

"Various errors have been assigned to the proceedings in the court below, but we have been unable to sustain any of the assignments. It is earnestly insisted, however, that there is a fundamental error, requiring the judgment to be reversed: and as the contention is sustained by a decision of the court of appeals of New York, and as there are other cases pending involving the same question, in which, as in this case, our jurisdiction is final, we have been urged to certify the question to your honors, and have finally concluded that it is our duty to do so.

"The petition alleged, and the evidence tended to prove, that appellant allowed an old well on its right of way, near the residence of said Felix P. Glenn, the father of appellee, to become so filthy as to create a nuisance and to make appellee sick, causing him discomfort and pain; the contents of the well, besides water, consisting, as alleged, and as the evidence tended in some measure to prove, in burnt cotton, cotton bagging and ties, dogs, rabbits, cats, chickens, and snakes. In other words, as we interpret the record, the case made was one of

nuisance, as defined in article 423 of our Penal Code of 1901.

"The question which we deem advisable to certify, then, is whether appellee, who was on the premises injuriously affected by the nuisance merely as a member of his father's family, without having any property right there, could maintain an action for damages on account of the sickness and discomfort resulting to him from the nuisance; in other words, whether such an action is maintainable by any person other than the owner or occupant of the premises injuriously affected; the supreme court of New York, in the case of *Kavanagh v. Barber*, 59 Hun, 60, 12 N. Y. Supp. 603, having decided the question one way, and the court of appeals, in the same case (131 N. Y. 211, 15 L. R. A. 689, 30 N. E. 235), having decided it the other; holding, as we understand the decision, that where the claimant has no property right to be protected from infringement, he cannot maintain an action for damages caused either by a public or private nuisance, which decision, in a more recent case coming before that court, was cited with approval. In this connection, see also, *Sedgw. Damages*, § 946; *Bishop. Non-Contract Law*, §§ 411, 424; and *Lockett v. Ft. Worth & R. G. R. Co.* 78 Tex. 211, 14 S. W. 564. We are not aware that the precise question has ever been passed upon by the supreme court of this state."

We are of the opinion that the question should be answered in the affirmative. We do not regard the decision in the case of *Lockett v. Ft. Worth & R. G. R. Co.* 78 Tex. 211, 14 S. W. 564, as having any bearing upon the question. In that case the plaintiff brought an action against the railroad company, in his own behalf and that of his minor children, for causing water to stand and become stagnant near his residence, so as to become "hurtful to the health of himself and children, and highly offensive both to sight and smell." An exception on account of the misjoinder of his children was sustained, and it was agreed that the action should proceed in his own behalf, without amending the petition. He was tenant of the premises upon which he resided, and it was held that, if the facts alleged by him were true, the company was liable to him "for any injury resulting to himself . . . and . . . the loss of services of his minor children brought about by sickness caused by the nuisance, and . . . for expenses necessarily incurred on account of sickness so caused." The right of the children to recover was therefore not involved in that decision. The case of *Kavanagh v. Barber*, 59 Hun, 60, 12 N. Y. Supp. 603, 131 N. Y. 211, 15 L. R. A. 689, 30 N. E. 235,—is more nearly in point. In that case

the plaintiff resided, with his family, in a house which was the property of his wife, and brought suit against the defendant for a nuisance alleged to have been created by the latter. He claimed damages for the discomfort caused to himself and family, for sickness of his wife and children also alleged to have been caused by the nuisance, and for expenses incurred by reason thereof. In their decision the court of appeals of New York state the question to be decided by them in the following language: "The question presented is whether, under these circumstances, a private action can be maintained by the husband for the discomfort caused by the offensive vapors." It would seem from this that, notwithstanding the broad allegations in the statement of the plaintiff's cause of action, the evidence upon the trial narrowed the case to one of the mere discomfort of the plaintiff resulting from the nuisance. The opinion throughout indicates that the court did not have in mind a case where one not the owner of premises affected by a nuisance had been made sick by noxious gases and the like. Therefore the question there decided and that certified to us are quite distinguishable. In the subsequent case of *Hughes v. Auburn*, 161 N. Y. 96, 46 L. R. A. 636, 55 N. E. 389, *Kavanagh v. Barber* is cited with approval. In that case the plaintiff, as administratrix of the estate of her daughter, brought suit under the New York statute against the city for injuries resulting in the death of the intestate, who was her daughter. The mother was the owner of the premises where she and her daughter resided, and it was claimed that the death of the latter was caused by the negligence of the city in permitting the escape of sewage from its sewer pipes into the cellar of the house in which they made their home. It was held that the plaintiff could not recover, but, as we understand the opinion, the decision, in the main, at least, rested upon the ground that, since the maintenance of the sewer by the city was a governmental function, the city could not be held responsible for an injury to health resulting from negligence on its part with respect thereto. This decision was by a divided court. But the question before us was distinctly decided adversely to our views in the case of *Ellis v. Kansas City, St. J. & C. B. R. Co.* 63 Mo. 131, 21 Am. Rep. 436. There a husband and his wife resided in a house which was the property of the husband. The husband having died, the wife brought suit against the railroad company, claiming that in the operation of its trains the company had killed a horse on its track, and had permitted the carcass to remain upon its right of way, in front of and very near to the house occupied by the plaintiff,

until, by reason of its decomposition, the surrounding atmosphere became so noxious and offensive as to cause her to become seriously sick. It was held that, by reason of the fact that the wife was not the owner of the premises occupied by her and her husband, she had no right of action. The opinion in the case concedes that, if she had a property right in the premises, she might have recovered. With due respect to the learned court that decided that case, the result reached seems to us illogical. If a suit be brought for an injury to real estate caused by a nuisance, it is clear that the plaintiff must show that he has some right which has been injuriously affected. If the damage be to the right of those occupying the property at the time, he must prove title, or at least a right of occupancy. If it be of such permanent character as to cause damage to an estate in reversion or remainder, the reversioner or remainder-man, if he sue, must prove his title as such. But why should the owner of a house be allowed to recover damages for being made sick by a nuisance created in the vicinity thereof, and another lawful occupant be denied a remedy for a like reason? Let us recur to the case of *Ellis v. Kansas City, St. J. & C. B. R. Co.* as an example. There the carcass of the horse was a nuisance temporary in its character, and it could hardly be held that it diminished the value of the property which belonged to the plaintiff's husband to any appreciable extent. If he had been made sick, in what respect would his damages have differed in character from those of his wife in the actual case? In *Hunt v. Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697, two cases for injury to the health of plaintiffs were tried together. The plaintiffs were visitors at a house where they were made sick by gas permitted to escape by the defendant company, and a judgment in their favor was affirmed. So in the case of *Holly v. Boston Gaslight Co.* 8 Gray, 123, 69 Am. Dec. 233, the suit was in behalf of a child who was made sick by the escape of gas in the house of her father. The jury decided against her, either upon the question of negligence on part of the defendant company, or on account of contributory negligence on part of her father, whose negligence the court held should be imputed to her, and the verdict was sustained. But her right to sue, if the company had been negligent and there had been no contributory negligence, was not questioned.

It seems to us that a conflict of opinion upon this question has arisen from confusing the damage which results to property from a nuisance with that special damage, such as sickness, which may result to an individual from a nuisance either public or private.
65 L. R. A.

INTERSTATE NATIONAL BANK, *Plff.*
in Err.,
v.

W. N. CLAXTON.

(...Tex. 569...)

1. Knowledge by a bank of the insolvency of factors possessing authority to deposit money belonging to their customers in their own names is not sufficient to charge it with liability for the misappropriation of such funds which it permits to be checked out in favor of third persons, although by the exercise of care it might have known that a misappropriation was being thereby effected.
2. Insolvency of a factor, even though accompanied by the commission of an act of bankruptcy, does not terminate his authority to deposit funds received from sales of his customer's property in his own name.
3. Knowledge by a bank of facts which would enable it to know that a depositor holding funds in a fiduciary relation was violating his trust does not impose upon it the duty of instituting an inquiry into its customer's financial condition for the purpose of protecting the beneficiary, or charge it with participating in a misuse of the funds in case it honors the checks without such inquiry.
4. A bank cannot apply funds deposited by a factor in his own name upon a claim held by it against him individually, after knowledge that he is insolvent and has committed an act of bankruptcy, where it has the means of knowing that the funds belong to the factor's principal.

(May 16, 1904.)

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District to review a judgment affirming a judgment of the District Court for Potter County in favor of defendant in an action brought to enforce payment of a promissory note, in satisfaction of which defendant claimed to apply moneys alleged to have been misappropriated by his agent with plaintiff's connivance. *Reversed.*

The facts are stated in the opinion.

Messrs. Browning, Madden, & True-love, for plaintiff in error:

To show liability on the part of plaintiff, to defendant, on account of Tamblin & Tamblin depositing with it, to their credit, the proceeds of the sale of defendant's cattle, it should have been alleged, not only that such funds were trust funds in depositor's hands, and that plaintiff knew such facts, but also that plaintiff, before parting with

NOTE.—As to application of trust deposit to individual debt of trustee, see, in this series, *Sayre v. Well*, 15 L. R. A. 544.

As to application to debt of agent of money of his principal deposited by the agent in his own name, see *Kimmel v. Bean*, 64 L. R. A. 785.

such funds, knew that the same belonged to defendant.

Coleman v. First Nat. Bank, 94 Tex. 607, 86 Am. St. Rep. 871, 63 S. W. 867; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 56, 26 L. ed. 695; *Zane, Banks & Banking*, § 136, p. 218.

By receiving checks as for deposit on the general account of Tamblyn & Tamblyn, plaintiff became bound to pay out the amount thereof on checks drawn by them against such account, and it cannot be held to account to defendant for a part thereof on allegations that it so received and paid out such funds, in the absence of allegations and proof showing that such depositors had no right so to handle such funds, and that plaintiff was put on notice thereof prior to paying the checks drawn by such depositors.

Duncan v. Magette, 25 Tex. 248; *Baker v. Kennedy*, 53 Tex. 205; *Coleman v. First Nat. Bank*, 94 Tex. 607, 86 Am. St. Rep. 871, 63 S. W. 869; *Zane, Banks & Banking*, § 128, p. 201, § 130, p. 204.

Defendant, to hold plaintiff liable, must show that Tamblyn & Tamblyn were violating the trust imposed in them by him, and that plaintiff had notice or knowledge thereof.

Coleman v. First Nat. Bank, 94 Tex. 607, 86 Am. St. Rep. 871, 63 S. W. 869; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Zane, Banks & Banking*, § 136, p. 218.

An action to recover money coming into the hands of a party lawfully, or to recover money received by one in the character of one as agent or trustee, cannot be maintained until after demand therefor.

Mitchell v. McLemore, 9 Tex. 154; *Duncan v. Magette*, 25 Tex. 249; *Walrath v. Thompson*, 6 Hill, 540; 6 Wait, Act. & Def. p. 205.

The fact that plaintiff may have taken from one or both of the firm of Tamblyn & Tamblyn mortgages and collaterals to secure the payment of a debt owing to it from the firm, even though the firm was at the time insolvent and known to the bank so to be, and even though both parties intended thereby to create a preference, does not render the bank liable to another creditor of said firm, or to one who has trusted funds to them; but such is only an act of bankruptcy.

National Bankruptcy Law, 30 Stat. at L. 562, chap. 541, § 60, U. S. Comp. Stat. 1901, p. 3445; *Collier, Bankruptcy*, 3d ed. pp. 342, 343.

Even though plaintiff had known of defendant's alleged interest in the deposit, and of Tamblyn & Tamblyn's relation of factor or agent for defendant, to have rendered 65 L. R. A.

plaintiff liable to defendant on account of its paying the same out of checks drawn by Tamblyn & Tamblyn plaintiff must have known that the funds being so paid out were defendant's and that Tamblyn & Tamblyn were violating the trust imposed in them by defendant, so that the paying of such checks would probably cause defendant to lose his money.

Coleman v. First Nat. Bank, 94 Tex. 605, 86 Am. St. Rep. 871, 63 S. W. 869; *Commercial & Agri. Bank v. Jones*, 18 Tex. 820; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 219; *Zane, Banks & Banking*, § 136, p. 218; 3 Am. & Eng. Enc. Law, subject, *Banks and Banking*, p. 833, note.

Messrs. Turner & Boyce, for defendant in error:

Knowing the insolvency of Tamblyn & Tamblyn, and knowing that this fund did not belong to them, plaintiff bank therefore held it as a trust fund. Defendant's ownership of it never passed, but continued after the fund was received by plaintiff.

Union Stock Yards Nat. Bank v. Moore, 25 C. C. A. 150, 49 U. S. App. 153, 79 Fed. 705; *Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; *Rochester & C. Turnp. Co. v. Paviour*, 164 N. Y. 281, 52 L. R. A. 790, 68 N. E. 114; *Davis v. Panhandle Nat. Bank* (Tex. Civ. App.) 29 S. W. 928; *Commercial & Agri. Bank v. Jones*, 18 Tex. 811; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Blum v. Loggins*, 53 Tex. 121; *Cady v. South Omaha Nat. Bank*, 49 Neb. 125, 68 N. W. 358; *Kauffman v. Beasley*, 54 Tex. 563.

It is not necessary to identify the particular money belonging to Claxton.

Peters Shoe Co. v. Murray, 31 Tex. Civ. App. 259, 71 S. W. 977.

One who knowingly participates in a misapplication of trust property is liable to the owner.

27 Am. & Eng. Enc. Law, pp. 264, 268; *Duckett v. National Mechanics' Bank*, 98 Md. 400, 39 L. R. A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; *Leake v. Watson*, 58 Conn. 332, 8 L. R. A. 666, 18 Am. St. Rep. 270, 20 Atl. 343.

When the bank has notice and knowledge that the trustee who deposited the money has recently been guilty of the most flagrant breaches of trust; that the trustee has become insolvent; that his conduct and financial condition are such that the bank refuses further to receive money from him unless it is plainly informed as to whom the money belongs in order that it may protect the owner of the funds,—surely in such a case the bank cannot be said to be without

ample notice and knowledge of the fact that the trustee ought not to be intrusted with funds belonging to others.

Evans-Snyder-Buell Co. v. First Nat. Bank, 15 Tex. Civ. App. 163, 39 S. W. 213; *Manhattan Bank v. Walker*, 130 U. S. 267, 32 L. ed. 959, 9 Sup. Ct. Rep. 519.

If, at the time of the appointment of the trustee in bankruptcy for Tamblyn & Tamblyn, the check, in which was included the price of Claxton's cattle, had remained in the hands of Tamblyn & Tamblyn, or if the deposit in plaintiff bank, of which said check formed a part, had remained in the bank, the defendant Claxton would have been entitled to have the proceeds of his cattle paid to him out of the check, or bank account, in the hands of the trustee in bankruptcy.

Van Alen v. American Nat. Bank, 52 N. Y. 1; *Lincoln v. Morrison*, 64 Neb. 822, 57 L. R. A. 885, 90 N. W. 905; *Re Woods*, 121 Fed. 599; 27 Am. & Eng. Enc. Law, pp. 250-282; 11 Am. & Eng. Enc. Law, p. 160.

Tamblyn & Tamblyn's general authority as factors to receive the proceeds of sale of cattle, and deposit them in their own name, and check them out was terminated by operation of law when they became bankrupt, and this revocation took place upon commission of the act of bankruptcy.

1 Am. & Eng. Enc. Law, p. 1227; 12 Am. & Eng. Enc. Law, p. 705; *Mechem, Agency*, § 267; *Ewell's Evans, Agency*, pp. 92, 401; *Audenried v. Bettley*, 8 Allen, 302; *Hudson v. Granger*, 5 Barn. & Ald. 27, 24 Revised Rep. 268; *Ex parte Snouball*, L. R. 7 Ch. 548, 41 L. J. Bankr. N. S. 49, 26 L. T. N. S. 894, 20 Week. Rep. 786.

An ordinary agent has no authority to deposit funds belonging to his principal to his own credit; and by so doing he is guilty of conversion.

Mechem, Agency, 529; 1 Am. & Eng. Enc. Law, p. 1090; *Commercial & Agri. Bank v. Jones*, 18 Tex. 811.

One who knowingly participates in misapplication of a trust fund is liable to the beneficiary; and, in order to create such liability, it is not necessary that such person should receive any benefit from the misapplication.

17 Am. & Eng. Enc. Law, p. 264; *Duckett v. National Mechanics' Bank*, 86 Md. 400, 39 L. R. A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; *Leake v. Watson*, 58 Conn. 332, 8 L. R. A. 666, 18 Am. St. Rep. 270, 20 Atl. 343.

When plaintiff bank received the deposit on October 28, which contained the proceeds of defendant's cattle, and passed them to the credit of Tamblyn & Tamblyn's private account, knowing that Tamblyn & Tamblyn were insolvent and had committed an act of bankruptcy, and that the funds de-

posited did not belong to them, and thereafter permitted Tamblyn & Tamblyn to check them out in favor of other persons, knowing, or having good reason to believe, that they were not being paid to the equitable owner, it participated in Tamblyn & Tamblyn's wrongful conversion of plaintiff's funds, and is liable therefor.

Union Stock Yards Nat. Bank v. Moore, 25 C. C. A. 150, 49 U. S. App. 153, 79 Fed. 705; *Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; *Davis v. Panhandle Nat. Bank* (Tex. Civ. App.) 29 S. W. 926; *Commercial & Agri. Bank v. Jones*, 18 Tex. 811; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Merchants' & P. Bank v. Clifton Mfg. Co.* 56 S. C. 320, 33 S. E. 755, 34 S. E. 411; *Evans v. Evans*, 82 Iowa, 492, 48 N. W. 931; *Pennsylvania Title & T. Co. v. Meyer*, 201 Pa. 299, 50 Atl. 998.

The bank had sufficient notice to charge it with liability.

Jeffray v. Towar, 63 N. J. Eq. 530, 53 Atl. 182; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, 41 N. E. 731.

The bank, knowing that Tamblyn & Tamblyn were insolvent, and that the funds tendered for deposit were proceeds of sale of live stock consigned to them for sale, was chargeable by law with notice of lack of authority on the part of Tamblyn & Tamblyn to deposit the funds to their own credit and check them out; and, by allowing Tamblyn & Tamblyn to so deposit and check them out, were liable irrespective of participation in the funds or notice of the subsequent misapplication by Tamblyn & Tamblyn.

Commercial & Agri. Bank v. Jones, 18 Tex. 811; *Bates v. First Nat. Bank*, 89 N. Y. 286; *Brown v. Daugherty*, 120 Fed. 526; *Kerr v. People's Bank*, 158 Pa. 305, 27 Atl. 963; *Honig v. Pacific Bank*, 73 Cal. 464, 15 Pac. 58; *Swift v. Williams*, 68 Md. 236, 11 Atl. 835; *Duckett v. National Mechanics' Bank*, 86 Md. 400, 39 L. R. A. 84, 63 Am. St. Rep. 513, 38 Atl. 983.

Williams, J., delivered the opinion of the court:

Plaintiff in error brought this suit to recover of defendant in error upon his note executed to Tamblyn & Tamblyn, and assigned by them to plaintiff. The defendant's liability upon the note is not disputed, but he claims that plaintiff is liable to him for certain moneys of his which were deposited with it by Tamblyn & Tamblyn, and partly applied by plaintiff to their indebtedness to it, and partly drawn out by them and appropriated to their own purposes. This contention is based on the following facts:

Tamblyn & Tamblyn were live-stock commission merchants in Kansas City, and plaintiff was engaged in the banking business in the same place. The business of Tamblyn & Tamblyn consisted chiefly in selling live stock consigned to them as factors, the amount done by them on their own account being inconsiderable. They kept an account with plaintiff, their deposits consisting almost wholly of the proceeds of property thus sold for others, including their charges, which were deposited and checked out in their own name. As factors, they were so employed by defendant, who resides in Texas, in selling his stock shipped to them from time to time, the proceeds of which, as of sales for others, were deposited and drawn out as stated; and this course of business had been followed for a long time before the transaction out of which the present controversy arose. Plaintiff also allowed Tamblyn & Tamblyn to overdraw their account, taking security for their indebtedness, and large balances stood against them from time to time. On the 28th of October, 1901, plaintiff learned that Tamblyn & Tamblyn had sold and not accounted to it for a large number of cattle covered by one of its mortgages, so impairing its security that it demanded and received a note for \$30,000 with a mortgage on other property to secure it. The evidence warrants the conclusion that at that time Tamblyn & Tamblyn were, to plaintiff's knowledge, insolvent, all of their property being encumbered to secure amounts due to plaintiff, and the giving of this mortgage was an act of bankruptcy on account of which, at the suit of the creditors, Tamblyn & Tamblyn were on the 20th of November, 1901, adjudged bankrupts. On, said 28th of October, 1901, they had for sale some cattle belonging to defendant and other people, which they sold for \$4,525.65, of which \$1,604.40 were the gross proceeds of defendant's property. Payment was made by the check of the purchaser for the whole amount, payable to Tamblyn & Tamblyn, which check had on its face the notice, "Good only in payment for live stock and when drawn in favor of a Kansas City live-stock commission office." This check and others were deposited with plaintiff by Tamblyn & Tamblyn, and were credited to them upon their account, late in the day, after the transaction of the mortgage before stated had taken place. Defendant was present when his cattle were sold, received \$50 from his factors, and instructed them, out of the net proceeds, to pay off the note here sued on, of the assignment of which to the bank he was ignorant, and to remit the balance to him. Instead of doing this, Tamblyn & Tamblyn, on the 28th, 29th, and 30th of October, drew checks as they

had been accustomed to do in favor of third parties against this deposit, by which the larger part of it was exhausted. The bank, on the 30th, applied \$160.94 to the payment of an indebtedness of Tamblyn & Tamblyn to it, and subsequently paid over the remainder of the fund to the referee in bankruptcy. On the 30th day of October, 1901, the plaintiff refused to receive and credit further deposits to Tamblyn & Tamblyn individually, but formed what is termed a "trust fund," to which moneys tendered by them were credited, and thereafter a number of deposits were made by them into that fund for defendant, which were paid to him and are not in question. By the judgments of the district court and the court of civil appeals the bank was held liable to defendant, not only for the amount applied to the indebtedness of Tamblyn & Tamblyn to it, but also on account of the payment of their checks in favor of persons other than defendant. For reasons appearing in the course of this opinion, we think the judgment is correct as to the first item, but not as to the second. The reasons urged for the last-named liability may be stated thus: Tamblyn & Tamblyn were insolvent at the time of the deposit, and this was, or ought to have been, known to the bank. They had committed an act of bankruptcy, of which the bank had knowledge, and upon which their bankruptcy was afterwards adjudicated. This revoked any authority they previously had as factors to deposit in their own names money of their customers. The bank had the means of knowing, when it received the deposit, that the moneys so deposited belonged to others than the depositors, and, when it paid their checks, that they were misapplying the funds, and could have learned by proper care who were the owners of such funds. From these facts the conclusion was deduced that the bank became liable (1) by permitting Tamblyn & Tamblyn to deposit in their own names, without authority of its owner, the money of another, and (2) in paying their checks in favor of others than such owner when it had the means of knowing that by such checks they were applying the funds to their own use. If it were true that the deposit was made by the factors in their own names without authority, and that the bank knew that the money belonged to others, and that such a deposit was wrongful, a different question would arise from that upon which we think the decision depends.

The opinion of Judge Wheeler in the case of *Commercial & Agri. Bank v. Jones*, 18 Tex. 811, is relied on to support the position that such a transaction would amount to a conversion participated in by the bank. But in that case the money, with the knowledge

of the bank, was placed in the hands of an agent for the sole purpose of being deposited to the credit of the principal. Upon this point the opinion says: "It cannot be doubted that Dye had authority to deposit this money in bank on account of the plaintiffs,—if not conferred in express terms, at least impliedly from the nature of the transaction. It was intended that it should be so deposited. That was the purpose for which it was consigned to Dye. He was but the instrument of the plaintiffs, used by them for the purpose of employing in their behalf the agency of the bank. There was a privity between the bank and the plaintiffs, and the bank became directly and immediately responsible to the plaintiffs, and not merely to the agent employed by the plaintiffs in making the deposit. Being so responsible, there can be no clearer proposition than that they had no right to pass the deposit to the private account of Dye. Whenever they did so they were guilty of a fraudulent conversion," etc. In that case the bank applied the money to its claim against Dye, and it was upon that ground that the liability was at last rested, for, on page 824, the opinion further says: "If not before, there clearly was such conversion when the defendants permitted him to appropriate it to the payment of his indebtedness, and the balancing of his account with the bank." We make these quotations, not for the purpose of questioning the soundness of anything that was said in the case referred to, but only to show that the views there expressed do not conflict with other authorities upon which we shall base our decision.

The present case is not one in which the deposit was made to the credit of the agents without authority. Their general authority as factors, as well as their long course of dealing with defendant and with the bank, plainly support the conclusion that such deposits were rightfully made. Upon this the bank had the right to rely in receiving the money. That such authority had existed is not questioned, but it is claimed that it was revoked by operation of law upon the facts which had arisen before the deposit in question was made. Authorities are cited to the effect that insolvency of a principal or agent operates as a dissolution of the relation, and, in case of the agent, revokes his authority. *Mechem, Agency*, §§ 263-267; *Ewell's Evans, Agency*, pp. 92, 401; *Audenreid v. Betteley*, 8 Allen, 302; *Hudson v. Granger*, 5 Barn. & Ald. 27, 24 Revised Rep. 268; *Ex parte Snowball*, L. R. 7 Ch. 548, 41 L. J. Bankr. N. S. 49, 26 L. T. N. S. 894, 20 Week. Rep. 786; 1 Am. & Eng. Enc. Law, p. 1227; *Story, Agency*, §§ 482, 486. Of this *Mechem* says, § 264: 65 L. R. A.

"Mere insolvency or inability of the principal to pay his debts when due would not have this effect. It only results from the operation of the law, when, either voluntarily or involuntarily, the principal surrenders and the law assumes the control of his affairs." The cases cited in these various authorities as enforcing the doctrine relied on have been examined, and in all of them the bankruptcy or insolvency referred to was of the character stated by this author. In none of them did any question like that before us arise, all of them involving questions as to rights or titles arising between assignees in bankruptcy or insolvency and others. The proposition that the agency of *Tamblyn & Tamblyn* had ceased, or that its character had changed when this deposit was made, does violence to the facts then existing. The business of their customers was still in their charge; cattle were being sold, and money handled uninterrupted, as always before. The defendant himself still employed and trusted them, and they were engaged in the active transaction of his business committed to their charge. There is no law that we know of which would forbid their employers from so employing them because they were financially embarrassed, or even insolvent, in the sense that they had not assets with which to discharge their liabilities. To say that the bank could not treat with them as still possessing the authority upon which they had always dealt is to ignore the fact that the principal himself so recognized and dealt with them. The bank could neither terminate the agency nor limit its scope. The law might do so, to a large extent, by seizing the estate of the agent, but it had not moved at the time the rights of these parties, *inter sese*, became fixed. The act of bankruptcy presented itself to the parties as a fact which might or might not be taken advantage of. Bankruptcy declared upon it might affect rights of the bank as between it and those representing the bankrupt estate, but not those of these parties fixed as between themselves before any adjudication. If it be true, as urged, that if this money had remained in the bank and been paid to the assignee in bankruptcy the defendant would have had the right to reclaim it, that does not affect this case. It might be conceded that if there had been no bankruptcy, and the money still remained in the bank, defendant could recover it; but that would not establish his right to recover it after it has been paid away on checks regularly drawn. We therefore hold that the deposit made by *Tamblyn & Tamblyn* was within their authority, and that they thereby became depositors; and the further questions must depend upon the

rules of the law regulating the relation existing between banks and such customers.

The principles governing are clearly stated in the opinion of the chief justice in the case of *Coleman v. First Nat. Bank*, 94 Tex. 807, 608, 86 Am. St. Rep. 871, 63 S. W. 887, with copious citations from leading authorities. From these authorities it is clear that a depositor, although holding the money in a fiduciary capacity, may draw it out of the bank *ad libitum*. The bank is bound to honor his checks, and incurs no liability in so doing, as long as it does not participate in any misapplication of funds or breach of trust. The mere payment of the money to, or upon the checks of, the depositor, does not constitute a participation in an actual or intended misappropriation by the fiduciary, although his conduct or course of dealing may bring to the notice of the bank circumstances which would enable it to know that he is violating his trust. Such circumstances do not impose upon the bank the duty, or give it the right, to institute an inquiry into the conduct of its customer, in order to protect those for whom the customer may hold the fund, but between whom and the bank there is no privity. This is clearly brought out in the leading case of *Gray v. Johnston*, L. R. 3 H. L. 1, 16 Week. Rep. 842, in which an executrix, by a check signed by her as such, in favor of a mercantile firm of which she was a member, drew out of a bank a fund belonging to the estate. In the opinion of Lord Chancellor Cairns the law is thus stated: "On the one hand, it would be a most serious matter if bankers were to be allowed, on light and trifling grounds,—on grounds of mere suspicion or curiosity,—to refuse to honor a check drawn by their customer, even although that customer might happen to be an administrator or an executor. On the other hand, it would be equally of serious moment if bankers were to be allowed to shelter themselves under that title, and to say that they were at liberty to become parties or privies to a breach of trust committed with regard to trust property, and, looking to their position as bankers, merely, to insist that they were entitled to pay away money which constituted a part of trust property at a time when they knew it was going to be misapplied, and for the purpose of its being so misapplied. I think, fortunately, your lordships will find that the law on that point is clearly laid down, and may be derived without any hesitation from the authorities which have been cited in the argument at your lordship's bar, and I apprehend that you will agree with me when I say that the result of those authorities is clearly this: In order to hold a banker justified in refusing to pay a demand of his customer, the

customer being an executor, and drawing a check as an executor, there must, in the first place, be some misapplication—some breach of trust—intended by the executor, and there must, in the second place, as was said by Sir John Leach in the well-known case of *Keane v. Roberts* [4 Madd. 357, 20 Revised Rep. 306], be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed." In the only other opinion, by Lord Westbury, this statement of the principle occurs: "The relation between banker and customer is somewhat peculiar, and it is most important that the rules which regulate it should be well known and carefully observed. A banker is bound to honor an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a *jus tertii* against the order of the customer, or to refuse to honor his draft, on any other ground than some sufficient one resulting from an act of the customer himself. Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a check for that purpose; the banker, not being interested in the transaction, has no right to refuse the payment of the check, for, if he did so, he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed *jus tertii* as a reason why he should not perform his own distinct obligation to his customer. But then it has been very well settled that if an executor or a trustee who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once, not only abundant proof of the breach of trust, but participates in it for his own personal benefit." The law is stated to the same effect in *Morse on Banks & Banking*, and he cites many cases the opinions in which sustain him. § 317 and cases cited.

This case is to be distinguished from those in which a bank undertakes to acquire title to, an interest in, or benefit from, a fund held in trust by a depositor. In attempting to acquire such a right or benefit the bank becomes a party to the action of the trustee, and stands as any other person dealing

with one holding property in a fiduciary capacity. The question of notice of the title of the person holding the property and his power over it arises, and a bank cannot, any more than any other person, acquire that which belongs in equity to another, if it have notice of his rights; and, if it thus aid a trustee in diverting trust property from the beneficiary, it becomes liable as a wrongdoer.

Other cases to be distinguished are those in which a principal is the depositor, and occupies a contractual relation to the bank, but an agent is given authority to draw checks against the deposit for the benefit of the principal or of his business. In such cases the bank is not authorized to pay checks drawn by the agent for his own benefit if it know, or, it is sometimes said, if it have good reason to know, the fact. It is mainly from expressions in opinions discussing these two classes of cases that the courts below reached the conclusion that it was the duty of the bank to avail itself of the means it had of knowing of the misappropriation of defendant's money by his agents. *Wolfe v. State*, 79 Ala. 201, 206, 58 Am. Rep. 590; *Gerard v. McCormick*, 130 N. Y. 206, 14 L. R. A. 234, 29 N. E. 115; *Duncan v. Jaudon*, 15 Wall. 165, 21 L. ed. 142; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; *Duckett v. National Mechanics'*

Bank, 86 Md. 400, 39 L. R. A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; *Union Stock Yards Nat. Bank v. Moore*, 25 C. C. A. 150, 49 U. S. App. 153, 79 Fed. 705; *Merchants' & P. Bank v. Clifton Mfg. Co.* 56 S. C. 320, 33 S. E. 755, 34 S. E. 411.

In other cases cited, money was deposited to the credit of one person, and drawn out by another without authority, and in still others the original deposits were held to have been wrongfully entered in the name of one who was not the owner of and not authorized to so deposit the fund. This case is distinguishable from all of those by the fact that the deposit was rightfully entered in the name of *Tamblyn & Tamblyn*, from which arose the power in them, which the bank was bound to recognize, of drawing it out by their personal checks. The principles laid down clearly make the bank liable for the sum applied to the debt of *Tamblyn & Tamblyn*. As to the sums paid out on checks, the most that is claimed is that the facts brought to the attention of the bank furnished it with the means of knowing that the money in question belonged to defendant, and that, in checking it out, his agents were misappropriating it. That, as we have seen, is not enough to make the bank liable further than stated.

The judgment will therefore be reversed, and judgment will be here rendered for plaintiff for the amount of the note, less a credit of \$160.94, applied as of date October 30, 1901, and for all costs of suit.

WASHINGTON SUPREME COURT.

T. O. ABBOTT, *Appt.*,

v.

Chester THORNE *et al.*, *Respts.*

(.....Wash.....)

1. That a defendant succeeded in obtaining a peremptory instruction in his favor in the trial court upon the facts will not prevent him from raising the question in the appellate court that the complaint does not set up a cause of action.

NOTE.—For cases in this series holding that to entitle one to damages for malicious prosecution of a civil action it is not necessary that his person shall have been molested or his property seized, see *Antcliff v. June*, 10 L. R. A. 621; *Smith v. Burrus*, 13 L. R. A. 59; *McCormick Harvesting Mach. Co. v. Willan*, 56 L. R. A. 338; *contra*, *Luby v. Bennett*, 56 L. R. A. 261.

As to malicious prosecution of civil suits generally, see, in this series, *Pope v. Pollock*, 4 L. R. A. 255, and *note*; *Sneed v. Harriss*, 14 L. R. A. 389; *Le Clear v. Perkins*, 26 L. R. A. 627; *Doctor v. Riedel*, 37 L. R. A. 580; and *Vinson v. Flynn*, 39 L. R. A. 415.

65 L. R. A.

2. No action lies for malicious prosecution of a civil action in which there is no arrest or attachment of property, and no special injury inflicted which would not necessarily result from the prosecution of any similar suit.

(April 14, 1904.)

APPEAL by plaintiff from a judgment of the Superior Court for Pierce county in favor of defendants in an action brought to recover damages for alleged conspiracy maliciously to prosecute an action against plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. Stiles & Doolittle and T. O. ABBOTT, for appellant:

A judgment in favor of one joint tortfeasor will not bar a separate action against the other.

Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129.

If the decree or judgment was based upon the facts, or on conflicting evidence, then

as to such facts it was conclusive of probable cause. But if it was based upon an error of the court in its judgment of the law, it was not evidence of probable cause.

Nehr v. Dobbs, 47 Neb. 863, 66 N. W. 804; *Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194; *Spring v. Besore*, 12 B. Mon. 551; *Goodrich v. Warner*, 21 Conn. 432; *Burt v. Place*, 4 Wend. 591; *Brown v. McIntyre*, 43 Barb. 344.

The complaint must contain a fair and honest statement of the facts relied upon for a judgment.

Short v. Spragins, 104 Ga. 628, 30 S. E. 811; *Barber v. Scott*, 92 Iowa, 59, 60 N. W. 499; *Arnold v. Moses*, 48 Iowa, 694; *Olsen v. Neal*, 63 Iowa, 216, 18 N. W. 863; *Bowman v. Brown*, 52 Iowa, 437, 3 N. W. 609.

Judgments conclude the parties only upon the facts or matters actually determined.

Marble Sav. Bank v. Williams, 23 Wash. 766, 63 Pac. 511.

The rule that this action will not lie because there was "no seizure of property, or arrest of the person, or injunction, or other special damage," has been very generally abandoned by the courts of this country, and is not now adhered to, even by those states where the rule contended for formerly obtained.

McCormick Harvesting Mach. Co. v. Wilan, 63 Neb. 391, 56 L. R. A. 338, 93 Am. St. Rep. 449, 88 N. W. 497; *Wade v. National Bank of Commerce*, 114 Fed. 377; *Kolka v. Jones*, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558.

Messrs. Bogle & Richardson and Bates & Murray, for respondents:

An action will not lie for damages to the reputation for the malicious prosecution of a civil suit, where there has been no seizure of property, or arrest of the person, or injunction, or other special damage, except such as would result from any suit for a similar cause of action.

Seattle Crockery Co. v. Haley, 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650; *Wetmore v. Mellinger*, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870; *McNamee v. Minke*, 49 Md. 133; *Supreme Lodge A. P. L. v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Mayer v. Walter*, 64 Pa. 283; *Potts v. Imlay*, 4 N. J. L. 330, 7 Am. Dec. 603; *State, Bitz, Prosecutor v. Meyer*, 40 N. J. L. 252, 29 Am. Rep. 233; *Mitchell v. Southwestern R. Co.* 75 Ga. 398; *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245; *Smith v. Michigan Buggy Co.* 175 Ill. 619, 67 Am. St. Rep. 242, 51 N. E. 569; *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489, 76 Am. St. Rep. 433, 56 N. E. 198; *Rice v. Day*, 34 Neb. 100, 51 N. W. 464; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Terry v. Davis*, 114 N. C. 31, 18 N. E. 943; *Luby v. Bennett*, 111 Wis. 65 L. R. A.

613, 56 L. R. A. 261, 87 Am. St. Rep. 897, 87 N. W. 804; *Tunstall v. Clifton* (Tex. Civ. App.) 49 S. W. 244; *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S. W. 606; *Willard v. Holmes; B. & H.* 142 N. Y. 492, 37 N. E. 480.

This action is not the appropriate remedy for damages resulting from false allegations, statements, charges, and publications which scandalize and defame; for such injuries the action of libel is the appropriate and only remedy.

Abbott v. National Bank of Commerce, 20 Wash. 552, 56 Pac. 376; *Cooper v. Armour*, 8 L. R. A. 47, 42 Fed. 215; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650.

Where no actual damage is proved no exemplary damages can be recovered.

Hilfrich v. Meyer, 11 Wash. 186, 39 Pac. 455; *Levy v. Fleischner*, 12 Wash. 15, 40 Pac. 384.

The judgment of the trial court in favor of the plaintiff in the *Deming Case* is conclusive proof of probable cause for bringing the action, although the judgment was subsequently reversed for error by this court.

Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Merrill v. Chapman*, 34 Cal. 251; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116.

Dunbar, J., delivered the opinion of the court:

This is an action by appellant against the respondents for a conspiracy to maliciously prosecute. The action is based upon allegations set forth in the case entitled *T. B. Deming, Plaintiff, v. Pacific Investment Co., J. H. Easterday, T. O. Abbott, L. R. Wheeler, Commercial Investment Co., National Bank of Commerce of Tacoma, and M. J. Adams, Defendants*. This case came to this court under the title of *Opie v. Pacific Invest. Co.* 26 Wash. 505, 56 L. R. A. 778, 67 Pac. 231, a judgment of reversal having been obtained in this court by the appellant in the case at bar, and the allegations which the appellant claims were malicious having been found by this court not to be true. The cause proceeded to trial, and upon the conclusion thereof the respondents requested the court for a peremptory instruction to the jury for a verdict in their behalf, which was granted. The ground upon which the motion was granted, it is not necessary to discuss, under our view of subsequent questions which are determinative of the case.

A great many questions are presented by the record and in the briefs of counsel, but preliminary to all others is the question whether or not this case can be maintained.

It is insisted by the appellant that this question cannot be raised by the respondents, inasmuch as they prevailed in the court below, but it is too evident for discussion that it would be a foolish proceeding on the part of this court to reverse a case, and send it back for a new trial, when it would finally have to be determined that the action would not lie; and the view we take of this question renders a discussion of the other proceedings involved unnecessary. On the main question—whether an action for malicious prosecution will lie where there is no arrest of the person or attachment of the property—there is some conflict of authority, and it has been held by Judge Hanford, in *Wade v. National Bank of Commerce*, 114 Fed. 377, that such an action would lie. Also in *McCormick Harvesting Mach. Co. v. Willan*, 63 Neb. 391, 56 L. R. A. 338, 93 Am. St. Rep. 449, 88 N. W. 497,—a Nebraska case,—the contrary rule, announced in *Rice v. Day*, 34 Neb. 100, 51 N. W. 464, was practically overruled. The leading case sustaining this doctrine is *Kolka v. Jones*, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558, where the doctrine was announced that, for the malicious prosecution of a civil action without probable cause, plaintiff was answerable to the defendant, though the latter was not arrested, nor his rights interfered with in any manner. This is a North Dakota case, and presents that view of the law very forcibly and clearly; and the conflicting cases are discussed with great precision and power. But, notwithstanding the able opinion in this case, we are forced to the conclusion, from an investigation of authorities and a consideration of the principles involved, that the contrary doctrine is well established, and that an action will not lie for the prosecution of a civil action with malice and without probable cause, when there has been no arrest of the person or attachment of the property of the defendant, and no special injury sustained, or injury which is not the necessary result in such suits. And this doctrine, we think, is sustained, not only by the overwhelming weight of numerical authority, but by the overwhelming weight of reason. The right of free allegations in a pleading has always been considered privileged. Courts are instituted to grant relief to litigants, and are open to all who seek remedies for injuries sustained: and unnecessary restraint and fear of disastrous results in some succeeding litigation ought not to hamper the litigant, or intimidate him from fully and fearlessly presenting his case. If the charges prove to be unfounded, costs have been prescribed by the legislature as the measure of damages. Prior to the time when costs were allowed to the prevailing party, there was

more reason for sustaining actions on the case; and, as a rule, the costs and expenses incident to an unsuccessful lawsuit will be sufficient to restrain actions which are founded purely on malice. While it is, no doubt, true that in some instances the peril of costs is not a sufficient restraint, and the recovery of costs is not an adequate compensation for the expenses and annoyances incident to the defense of a suit, yet all who indulge in litigation are necessarily subject to burdens, the exact weight of which cannot be calculated in advance, and a rule must be established which, as a whole, is the most wholesome in its effects, and accords in the greatest degree with public policy. If the rule were established that an action could be maintained simply upon the failure of a plaintiff to substantiate the allegations of his complaint in the original action, litigation would become interminable, and the failure of one suit, instead of ending litigation, which is the policy of the law, would be a precursor of another; and, if that suit perchance should fail, it would establish the basis for still another. For the failure to establish the fact alleged, that an allegation in the original complaint was malicious, might well warrant the conclusion that the allegation in the second case, charging malice in the allegations of the first action, was malicious, and so on *ad infinitum*.

In *Wetmore v. Mellinger*, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870, it was held that no action would lie for the recovery of the damages sustained by the institution and prosecution of a civil action of malice, and without probable cause, when there had been no arrest of the person or seizure of the property of the defendant, and no special injury sustained which would not necessarily result in all prosecutions for like causes of action. In that case, in the argument, it was said: "If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation, rather than to promote it." It seems to us that there is much common sense in this observation, for the affirmative allegations of an answer are as liable to contain malicious statements as the affirmative allegations of a complaint; and the result would be, if the doctrine contended for were upheld to its logical conclusion, that the plaintiff in an action would be entitled to damages for the unsupported allegations of an answer, for there is as much publicity given to an answer in an action as there is to a complaint, and damages in one case would be just as liable to be incurred as in the other. The

same rule is announced in *Smith v. Hintrager*, 67 Iowa, 109, 24 N. W. 744, and in *McNamee v. Minks*, 49 Md. 122, where the court, in summing up an argument which holds that the action will not lie, says: "Otherwise parties would be constantly involved in litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution." In *Mayer v. Walter*, 64 Pa. 283, it is said: "But for this rule, the termination of one suit would be, in a multitude of instances, the signal for the institution of another, in which the parties would be reversed; and the process might be renewed indefinitely, in contravention of the maxim, *Interest reipublicæ ut sit finis litium*." It was decided in *State, Bitz, Prosecutor, v. Meyer*, 40 N. J. L. 252, 29 Am. Rep. 233, that a civil action, in all its parts, is a claim of right, and is pursued only at the peril of costs, if not sustained, subject to the qualification that the defendant has been arrested without cause and deprived of his liberty, or made to suffer other special grievances. The same doctrine is specifically announced in *Supreme Lodge A. P. L. v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Potts v. Imlay*, 4 N. J. L. 337, 7 Am. Dec. 603; *Terry v. Davis*, 114 N. C. 31, 18 S. E. 943; *Mitchell v. Southwestern R. Co.* 75 Ga. 398; *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245; *Smith v. Michigan Buggy Co.* 175 Ill. 619, 67 Am. St. Rep. 242, 51 N. E. 569; *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489, 70 Am. St. Rep. 433, 56 N. E. 198; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Luby v. Bennett*, 111 Wis. 613, 56 L. R. A. 261, 87 Am. St. Rep. 897, 87 N. W. 804; *Tunstall v. Clifton* (Tex. Civ. App.) 49 S. W. 244; *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S. W. 606; and many other cases, a tabulated statement of which would not be of assistance.

But, in addition to outside authority, this court has spoken with no uncertain sound on this subject, and in a case brought by the parties to this action in *Abbott v. National Bank of Commerce*, 20 Wash. 552, 56 Pac. 376, it was held that allegations contained in pleadings filed in a court of competent jurisdiction are absolutely privileged where they are relevant and pertinent to the cause, regardless of their falsity or maliciousness. In the discussion of this case it was said by the writer of the opinion (Judge Gordon): "We think it requires no argument to demonstrate that the words complained of were pertinent and material to the cause, and the question to be determined is, Were they absolutely privileged, regardless of whether they were true or false, used maliciously or in good faith? The doctrine of privileged communications rests upon public policy,

'which looks to the free and unfettered administration of justice, though, as an incidental result, it may in some instances afford an immunity to the evil-disposed and malignant slanderer.' *Bartlett v. Christliff*, 69 Md. 219, 14 Atl. 518. It cannot be doubted that it is a privilege liable to be abused, and its abuse may lead to great hardships; but to give legal sanction to such suits as the present would, we think, give rise to far greater hardships." It is true that this was an action for libel, but the principle involved is exactly the same as is involved in this case, although the form of the action was slightly different. Also in *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650, it was said by Judge Stiles, who wrote the opinion: "While the issuance of an attachment may do injury to this mercantile character and credit of a debtor, it is, in that respect, not different from other judicial proceedings. If the allegations of the affidavit are in one case libelous, and tend to break down the confidence theretofore reposed in the defendant, they are no more so than would be a complaint in a suit for money obtained by alleged false pretenses. And so this kind of injury may be brought about as effectually where no property at all has been taken under the writ. The commencement of an ordinary suit upon a promissory note has fully as great a tendency to impair credit as any other proceeding, for the presumption is that a business man will take care of his notes, at least, if he has any regard for his standing in the commercial world; and if he cannot take care of them, so that he has to be sued, the inference most naturally is that he is weak in resources, and therefore not a safe person to credit. But the note may be forged or not due or paid, or there may be counter-claims or good defenses, so that the suit is totally unjustifiable. But does anyone sue for damages to credit growing out of such proceedings? Not at all, because they are privileged, being proceedings in courts of justice. And so we think this attachment proceeding, and all allegations of frauds made therein, although they may injure the character, reputation, or credit of the defendant, are in the same way privileged, and not to be recovered for." It is said by the appellant that this case is not in point because it was simply decisive of a measure of damages. But the decision on the measure of damages was based upon the theory that the allegations in the complaint were privileged, and that no action would lie for that reason; and it would certainly be inconsistent for this court to hold that damages to reputation and character could be recovered in an action where no attachment had is-

sued, and that they could not be recovered where the defendant's property had been attached, as in the case of *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650. We think the principles announced by this court in the cases just cited would preclude a recovery in this cause, and we are not disposed to retreat from the positions there taken. In this liti-

gious age, when speculative lawsuits are rapidly multiplying, we think that considerations of sound public policy will not justify courts in announcing a doctrine which tends to encourage this character of litigation.

The judgment is affirmed.

Fullerton, Ch. J., and Hadley, Mount, and Anders, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

LA REPUBLIQUE FRANCAISE *et al.*,
Appts.,
v.

SARATOGA VICHY SPRINGS COMPANY.

(46 C. C. A. 418, 107 Fed. 459.)

The use, upon bottles containing water from the Saratoga spring, of a label in which the word "Saratoga" is made inconspicuous and the word "Vichy" prominent, so that, when the bottles are standing on a table or shelf, the word "Vichy" is the prominent object of sight, is unfair competition with bottled waters from the commune of Vichy in France, which have long been upon the market under that name.

(Wallace, J., dissents.)

(April 9, 1901.)

A PPEAL by complainants from a decree of the Circuit Court of the United States for the Northern District of New York in favor of defendant in a suit to enjoin defendant from advertising its goods as the product of complainants. *Reversed.*

The facts are stated in the opinion.

Argued before *Wallace, Lacombe, and Shipman*, Circuit Judges.

Mr. Charles B. Hubbell for appellants.

Mr. Edgar T. Brackett for appellee.

Shipman, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree of the circuit court for the northern district of New York, which dismissed the complainants' bill in equity to restrain the use of the word "Vichy" upon the defendant's bottles containing the water of the spring known as the "Saratoga Vichy spring," and for other relief, upon the ground that the defendant's labels and advertisements improperly and unfairly misled purchasers to believe that they were buying the complainants' article, and unfairly interfered with their exclusive

right to the use of the word "Vichy." 99 Fed. 733. The facts in regard to the title of the complainants to the spring at Vichy, and to the labels upon the bottles in which it is exported to this country, and the extent of its business in the United States were stated in the opinion of this court in the case of the same complainants against *Schultz*, 42 C. C. A. 233, 102 Fed. 154, and are as follows:

"The existence in the commune of Vichy, in France, of numerous mineral springs, which have long produced water of high medicinal value, is well known. The water began to be sold as early as 1716, and became popularly known as 'Vichy' or 'Vichy Water.' The Republic of France is the owner of nearly all these springs, and by the terms of acts passed in 1853 and 1864 La Compagnie Fermiere de l'Etablissement Thermal de Vichy (hereinafter called the 'company'), obtained the concession of the springs owned by the state for terms of years which have not yet expired. This company bottles at Vichy and sells in France and in other countries the waters of which it is the lessee, under labels which are its property, and of which the characteristic marks consist in the name 'Vichy' and the name of the particular spring, and a wood-cut vignette showing the 'thermal establishment.' In 1853 it began to export its water to this country, and in 1893 its shipments to this country were about 300,000 bottles. In 1896 its entire shipments amounted to nearly 10,000,000 bottles. The natural waters are exported in their original condition, and are not artificially charged with gas."

The township of Saratoga Springs has long been known as abundant in mineral springs, the waters of which are distinguished by different names, and in March, 1872, the geyser or spouting spring of the defendant was discovered in that town. The water is alkaline, is regarded by medical

NOTE.—For other cases in this series as to protection of trade name, even when there is no valid trademark, see also *Weener v. Brayton*, 8 L. R. A. 641; *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 17 L. R. A. 129; *Scott v. 65 L. R. A.*

Standard Oil Co. 31 L. R. A. 374; *American Waltham Watch Co. v. United States Watch Co.* 43 L. R. A. 826; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162; and *Fuller v. Huff*, 51 L. R. A. 332.

men as a valuable mineral water, and has been recommended extensively by the defendant as having a wonderful similarity to the Vichy waters of France. The water was bottled and sold in 1873, and thereafter until 1876, by the owners of the spring, when the defendant, under the name of the Saratoga Vichy Spring Company, became the owner, and has since sold the water extensively under the name of Saratoga Vichy Water, or Natural Saratoga Vichy Water. The bottles, circulars, and advertisements have invariably used the words "Saratoga Vichy." The water is highly charged with natural carbonic acid gas, and is bottled under a high pressure of that gas. The water of the complainants is a still water. It was stipulated that the testimony in the *Schultz Case* could be used in this case by either party, and from that testimony it appears that the manufacture of artificial sparkling water, compounded after the analysis of Vichy water, has been extensively carried on in this country since 1802 under representations of its artificial character; that it was understood by intelligent purchasers to be artificial; and, as one was a sparkling and the other a still water, there was no confusion in the public mind as to the identity of the two articles, and the manufactured Vichy became an article distinct from the still water of the natural spring. The bottles and labels of the complainants and the defendant have been very unlike each other in general appearance and character, and one could not be mistaken for the other by any person who had an acquaintance with either. Until 1896 the words "Saratoga" and "Vichy" upon the labels were substantially in the same style and size of type, and the name "Saratoga" was as prominently displayed as the name "Vichy." In 1896 a neck label of white paper, printed in black and red letters, was added by the defendant to its other labels. The word "Vichy" is very prominently displayed, and the "Saratoga" over it is in far less conspicuous type; so that, if the bottle stands upon a table or a shelf, the word "Vichy" is the one which is the marked and prominent object of sight. Like the manufactured water, the Saratoga water is understood by consumers to be sparkling, and to have in that respect a character distinct from the still natural Vichy. It does not appear that the complainants expressed dissatisfaction with the acts of the defendant until the time of the commencement of this suit. So long as the defendant confined itself rigidly to the universally conspicuous declaration upon its labels and bottles and in its advertisements that the contents of the bottles were Saratoga Vichy Water, it did not violate the rights of the complain-

ants, because Saratoga Vichy and the Vichy of France are well understood to be different articles, in that one is a sparkling and the other is a still water. They are used differently, and, when used, no person could mistake one for the other. In this respect both the natural water of Saratoga and the manufactured water of Schultz resemble each other, and accordingly our decision in the *Schultz Case* intimated very strongly that, after the alteration by Schultz of his labels, subsequent to the commencement of the suit, so as to assert that his article was artificial Vichy manufactured by himself, he was not open to the charge of unfair competition. Until 1896 the defendant's bottles uniformly and without disguise declared that the contents were Saratoga Vichy Water, and thus proclaimed the difference between two well-known articles; but in the label of 1896 the defendant unfairly disregarded the previously acquired right of the complainants to the use of the word when applied to the product of their wells. The effect of the label is to represent to the purchaser not accustomed to the article that it is Vichy water, and "Vichy" properly signifies water from the French wells. It is, in fact, an untruthful label, employed for an objectionable purpose. It is true that a mere geographical name, without attending facts which have caused the name to become significant of a particular manufacture and to identify the manufacture as the product of a particular person, is not the subject of a trademark. The distinction, however, between mere names of a locality and the secondary signification of names which identify an article with its manufacturer or producer, and which tell the public that an article so produced is of singular excellence, with the result that the use of the name by a nonresident producer is unfair to the competitor and fraudulent to the public, has been long recognized. *Elgin Nat. Watch Co. v. Illinois Watch-Case Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270. The decision in *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. ed. 581, referred only to a denial of the exclusive right of a resident of a district of country to the application of its name to a well-known article of commerce,—in that instance coal,—so "as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation." The decisions are abundant that where the name of a district of country has been used to an inhabitant of that district to identify his product, and has become significant the success and a declaration of the superiority of the product, a nonresident manufacturer cannot properly use the name as

deceive the public and fraudulently obtain the good will which belongs to his competitor. Thus, a watchmaker of some other town than Waltham cannot properly call the articles which he produces "Waltham watches." The opinion in *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608, which exhaustively collates the authorities upon the subject, among which *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35, 58 L. J. Ch. N. S. 374, 60 L. T. N. S. 766, 37 Week. Rep. 637, and *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 42 L. J. Ch. N. S. 130, 27 L. T. N. S. 393, are important, states as the result of the decisions the distinction which has been referred to as follows: "The distinction, both in the English and American cases, is between those where a geographical name has been adopted and claimed as a trademark proper and those where, as in the case at bar, it has been adopted first as merely indicating the place of manufacture, and afterwards, in course of time, has become a well-known sign and synonym for superior excellence. In the latter class of cases persons residing at other places will not be permitted to use the geographical name so adopted as a brand or label for similar goods for the mere purpose by fraud and false representation of appropriating the good will and business which long-continued industry and skill and a generous use of capital has rightfully built up."

The label of 1896 comes within the spirit of this prohibition, for it untruthfully tends to mislead the unwary purchaser, and to gain the reputation which the Vichy natural springs have acquired.

The defendant should be enjoined against the use of this neck label, or of any other label in which the place of the origin of its water is not as plainly and prominently made known as the fact that it is named Vichy.

Let the decree of the Circuit Court be reversed, with costs of this court, and the case be remanded to the Circuit Court, with instructions to enter a decree in accordance with the principles herein expressed, and for an accounting of damages from the use of neck label of 1896, with costs of the Circuit Court.

Wallace, Circuit Judge, dissenting: I dissent from the opinion of the court, because, as I view the facts, the case does not disclose any attempt on the part of the defendant to represent its mineral water to purchasers as the French Vichy. In its advertisements the defendant has studiously presented its water to the public as a product of its spring at Saratoga; and the labels and dress upon its bottles not only have never borne any similitude to those upon the bottles of the complainants, but have always distinguished it as Saratoga Vichy Water so plainly that misapprehension by purchasers was impossible. The word "Saratoga" is the valuable part of the descriptive name, because the reputed therapeutic virtues of Saratoga waters have rendered them the most popular mineral waters known in the markets where the defendant's water is offered for sale, and no sane man having the right to sell his mineral water as a Saratoga water would be tempted to suppress that part of the name, or sell it by any name which would denote a different origin. All the Saratoga waters are bottled and sold by distinctive names, such as "Saratoga Congress Water," "Saratoga Hathorn Water," etc., and the defendant, in naming its water "Saratoga Vichy," did so merely to distinguish it from the other Saratoga waters, and selected "Vichy" as its distinctive name because its alkalinity assimilated it more nearly to the French Vichy. The label which has met with animadversion in the opinion of the court is one used on the neck of the bottles. It is a fancy label, having a white background, and printed upon it in red and black letters are the words "Saratoga Vichy." The word "Saratoga" is above the word "Vichy," but included between its extended V and Y. It is true that it is in smaller letters, but the letters are an eighth of an inch in height and breadth. Although not so conspicuous as the word "Vichy," it is so prominent that it is almost inconceivable that it would not be observed across a counter. If this were the only label on the bottle, there would be color for the theory that it might mislead casual purchasers; but just below it is another label, covering nearly half the surface of the bottle, upon which are printed in letters three fourths of an inch in length and breadth the words "Saratoga Vichy Water."

The decree which is authorized by the opinion will not be of the slightest practical benefit to the complainants, and will have no effect except to subject the defendant to expense, for I cannot believe that any person ever has been misled, or ever can be misled, by the use of the neck label, as the defendant has always used it, in conjunction with the body label.

I agree with the conclusion of the court below that the bill should be dismissed.

Affirmed by Supreme Court of United States December 7, 1903.

OHIO SUPREME COURT.

Arthur JACOBS, by Next Friend, *Plff. in Err.*,
v.

FULLER & HUTSINPILLER COMPANY.

(67 Ohio St. 70.)

*1. Where the defendant employed a third party to manufacture furniture for it, furnishing all the materials, tools, and machinery for that purpose, in which was a machine which was safe to operate under proper instructions, and dangerous to operate without instruction as to the manner of operating it, and when it is claimed that the plaintiff was injured by reason of neglect to notify him of the dangerous character of the machine and neglect to give him instructions as to operating it, the defense that the plaintiff was an employee of an independent contractor will not avail the de-

fendant, because it is a case in which, under the circumstances of the employment, a resulting injury might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care should be omitted, in the course of its employment.

2. In such case it is error to charge the jury that the plaintiff, being under sixteen years of age, and having been employed in violation of §§ 6986-1 and 6986-2, Rev. Stat., which provide that the employment of a child under sixteen years of age by any person, firm, or corporation in this state at any employment whereby its life or limb may be endangered, etc., shall be deemed guilty of a misdemeanor, and shall be fined or imprisoned, that fact may be considered by the jury as a circumstance, in connection with other evidence in the case, as bearing upon the question of the negligence of the employer in causing the injury.

*Headnotes by the COURT.

(October 28, 1902.)

NOTE.—*Liability of employer for injuries caused by the performance of work by independent contractor which is dangerous unless certain precautions are observed.*

- I. Scope of note, 833.
- II. Doctrine stated generally, 833.
- III. Limits of the doctrine, 838.
- IV. Effect of stipulation by contractor to take appropriate precautions, 841.
- V. Necessity of showing that the contractor was acting under the authority of the employer, 842.
- VI. Liability of employer where work is dangerous to persons using highways,
 - a. In general, 842.
 - b. Erection of buildings, 843.
 - c. Delivery of goods through openings in footpaths, 844.
 - d. Construction or repair of highways, 845.
 - e. Other construction work on highways,
 1. Street railways, 845.
 2. Area under footpath, 846.
 3. Sewer, 846.
 4. Pipe line, 847.
 5. Telephone line, 847.
 - f. Removal of wrecks from navigable rivers, 848.

- VII. Liability where work is dangerous to adjoining landowners,
 - a. In general, 849.
 - b. Injury to lateral support, 849.
 - c. Injury to adjoining building through negligent execution of work connected with party wall, 851.
 - d. Injury to business and goods of occupant of adjoining premises, 852.
 - e. Injury from explosion caused by negligent escape of gas, 852.
 - f. Injury resulting from flooding of lands through negligent drainage operations, 853.
 - g. Injury resulting from allowing materials dredged from water to escape onto adjoining land, 853.
 - h. Injury resulting from negligent demolition of fire ruins, 853.

VII.—continued.

- I. Injury resulting from allowing fire to escape, 853.
- J. Injury resulting from blasting operations, 854.

VIII. Liability where work is dangerous to persons invited onto defendant's premises, 855.

IX. Liability where work is dangerous to tenants, 855.

X. Liability where work is dangerous to owners of vessels navigating rivers, 855.

I. Scope of note.

This note is one of a series dealing with the liability of employers for acts of independent contractors.

The authorities bearing on the general rule relieving employers from liability for acts of independent contractors were presented in the note to *Sallotte v. King Bridge Co.* ante, 620, together with the decisions applying the rule to particular torts or acts. It is here proposed to present the authorities in which one of the exceptions to such rule has been applied. The other exceptions to the rule are presented in the following notes: Note to *Thomas v. Harrington*, ante, 742, on liability of employer for acts of independent contractor where the injury is a direct result of the work contracted for; note to *Anderson v. Fleming*, 66 L. R. A. —, on liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer; note to *Louisville & N. R. Co. v. Low*, 66 L. R. A. —, on liability of employer for injuries occurring in performance of work by independent contractor where owner's own act is a proximate cause of the injury.

The authorities as to who are independent contractors are presented in note to *Richmond v. Stitderding*, ante, 445, on persons deemed to be independent contractors within meaning of rule relieving employer from liability.

II. Doctrine stated generally.

In another large group of cases the inability of the employer to avail himself of the defense

ERROR to the Circuit Court for Gallia County to review a judgment reversing a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Affirmed.*

Statement by **Davis, J.:**

It was alleged in the petition of the plaintiff that on or about the 11th day of March, 1897, the defendant, by and through one of its foremen and agents, employed the plaintiff, and put him to work upon and about a certain dangerous machine, then in use in the factory of the defendant; that this machine was known as a "jointer" or "hand planer," and was operated by steam

power; that the defendant was in duty bound to know, and did know, the dangerous and hazardous character of the machine, and the risk and danger incident to the removal of pieces of wood in the operation of the machine; and that it knew this both before and at the time of the employment of the plaintiff. Plaintiff alleged that he was a minor under the age of fifteen years at the time of his employment; that he had never worked upon machines or machinery of any kind, and that he was wholly unacquainted with the operation of the particular machine mentioned here; that the defendant, at the time of his employment, knew of his youth and inexperience; and that on said date—that being the first day he had worked for the defendant—the defendant negligent-

that the occurrence or conditions which caused the injury in suit resulted from the act of an independent contractor is referable to a doctrine which in one aspect may be regarded as a special application of the principle discussed in the note to *Thomas v. Harrington*, ante, 742, on *Liability of employers for act of independent contractor where injury is direct result of the work contracted for*, but which, in view of its operation and the ground upon which, in the last analysis, it depends, would seem to be more properly associated with the still wider principle which is dealt with in the note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer*. An examination of the cases shows that the doctrine may be enunciated in two slightly different forms. One of these is exemplified in the phraseology of the following sentence, which is extracted from the opinion delivered by *Romer, L. J.*, in a recent English case:

"When a person, through a contractor, does work which, from its nature, is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor, if the latter does not take these precautions." The learned judge added that "accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand, and do not come within this rule." *Penny v. Wimbledon Urban District* [1899] 2 Q. B. 72, 68 L. J. Q. B. N. S. 704, 80 L. T. N. S. 615, 47 Week. Rep. 565, 63 J. P. 406.

To the same effect are these remarks of *Lord Watson*: "In cases where the work is necessarily attended with risk he [the employer] cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, as well as the contractor, to repair any damage which may be done." *Dalton v. Angus* (1881) L. R. 6 App. Cas. 740, 832, 50 L. J. Q. B. N. S. 689, 44 L. T. N. S. 844, 30 Week. Rep. 196.

Compare also the following extracts from the judgments of American courts.

"If, according to previous knowledge and experience, the work to be done is in its nature 65 L. R. A.

dangerous to others, however carefully performed, the employer will be liable, and not the contractor, because, it is said, it is incumbent on him to foresee such danger, and take precautions against it." *Atlanta & F. R. Co. v. Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 18 S. E. 277.

"Where the work contemplated by the contract is of such a nature that the public safety requires something more to be done than the mere construction of the improvement, we think the owner of the property owes a duty to the public to see that proper safeguards are taken; and that, where such precautions are not taken, he should not escape liability for resulting injuries." *McCarrier v. Hollister* (1902) 15 S. D. 866, 91 Am. St. Rep. 695, 89 N. W. 862.

"Where the act must necessarily result in a nuisance, unless it be prevented by proper precautionary measures, the owner [of the premises on which the work is to be done] is bound to the exercise of such measures." *Robinson v. Webb* (1875) 11 Bush, 464.

"If I employ a contractor to do a job of work for me, which in the progress of its execution obviously exposes others to unusual peril, I ought, I think, to be responsible . . . for I cause acts to be done which naturally expose others to injury." *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32, Quoting from the opinion of *Seymour, J.*, in *Lawrence v. Shipman* (1873) 39 Conn. 586.

"The rule, then, seems to be this: Where work is contracted to be done which is not of itself dangerous, but becomes so by the negligence of the contractor, the employer is not liable for injuries resulting therefrom; but, if the work is dangerous of itself unless guarded, and the employer makes no provision in his contract for its being guarded, and does not make a proper effort to guard it himself, then he is negligent, and cannot escape liability on the ground that the work was done by a contractor." *Wood v. Independent School District* (1876) 44 Iowa, 30.

The rule as to the nonliability of the employer for the acts of a contractor "does not apply, where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed." 2 Dill. Mun. Corp. § 1029. This statement has been quoted with approval in *White v. New York* (1897) 15 App. Div. 440, 44 N. Y. Supp. 454.

Under Ga. Code 1895, § 3819, one of the

ly, carelessly, and unlawfully put the plaintiff to work upon and about said dangerous and hazardous machine without notifying the plaintiff in any way or manner as to the dangerous and hazardous character of said machine, or of the danger and peril incident to the performance of the duty assigned him, as aforesaid, and without giving him any instructions whatever as to how he should do and perform said duty assigned to him. The plaintiff also alleges that on the afternoon of said day, while at his duty about the said machine, and which he had been ordered and directed to do by the defendant, by reason of the careless, negligent, and unlawful acts and omissions of the defendant, as aforesaid, and without any fault on his part, his right hand was caught in

and upon the revolving knives or bits of said machine, and cut and mangled so that the amputation of his right arm became necessary. The answer was a general denial. On the trial of the action the jury returned a verdict for the plaintiff in the sum of \$1,875, and also returned special findings. Motion for new trial was made and overruled, and judgment rendered upon the verdict. Bill of exceptions was taken, petition in error filed in the circuit court, and on hearing in that court the judgment of the court of common pleas was reversed for error in charging the jury as follows, to wit: "To constitute the said Orion L. Kiger an independent contractor, it must appear, in the first place, that he had a contract for a job; that is, that he had a con-

cases in which the employer is liable is when, "according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed."

A second mode of stating the doctrine is indicated by the language of Cockburn, Ch. J., in an oft-cited case: "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise." *Bower v. Peate* (1876) L. R. 1 Q. B. Div. 821, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321.

In *Hardaker v. Idle District* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196, Lindley, L. J., after referring to several cases, said that the employer was held responsible, because it was his duty "to take whatever care was necessary to prevent injury . . . from what he was doing."

Similar language is used in the American cases.

"If, however, the work is one that will result in injury to others unless preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do what it was his duty to do to prevent 65 L. R. A.

such injurious consequences. In the latter case the duty to so conduct one's own business as not to injure another continuously remains with the employer." *Bailey v. Troy & B. R. Co.* (1883) 57 Vt. 252, 52 Am. Rep. 129.

"The law devolves upon everyone about to cause something to be done, which will probably be injurious to third persons, the duty of providing that reasonable care shall be taken to obviate those probable consequences." *Southern Ohio R. Co. v. Morey* (1890) 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269. The reporter's headnote to the case, which was approved as a correct statement of the law in *Covington & C. Bridge Co. v. Steinbrock* (1899) 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618, runs as follows: "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such cases the person causing the work to be done will be liable, though the negligence is that of an independent contractor." The court remarked that the application of the rule as to the nonliability of an employer for the negligence of an independent contractor is "confined to the cases where, from the nature of the work or the circumstances under which it is to be performed, no particular duty is imposed on the party procuring the work to be done, to see that it is carefully done."

"It is as sound a rule of law as of morals, that when, in the natural course of things, injurious consequences will arise to another from an act which I cause to be done, unless means are adopted by which such consequences may be prevented, I am bound, so far as it lies within my power, to see to the doing of that which is necessary to prevent the mischief. Failure to do so would be culpable negligence on my part." *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 82.

"Even if the relation of principal and agent, or master and servant, do not, strictly speak-

tract for the manufacture of some definite number of pieces of furniture of the kind he was engaged in making. He must also have hired, controlled time, and paid his own hands. He must also have had entire control over the mode and manner of the manufacture of said furniture. He must also have had a contract with the defendant for the use of its machinery for a definite time, or for such time as was necessary to complete the job he had contracted to do. If any of these elements are wanting, the claim that he was an independent contractor must fail."

Messrs. C. W. White, R. M. Switzer, A. D. Alcorn, and E. D. Davis, for plaintiff in error:

Kiger was the foreman of the manufacturing department, and nothing else.

The mere fact that Kiger and some of the

ing, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him, as a probable consequence of the work let out to the contractor." *City & Suburban R. Co. v. Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643.

"The fact that the exhibition was provided and conducted by an independent contractor would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator, unless due precautions were taken to guard against harm." *Thompson v. Lowell, L. & H. Street R. Co.* (1898) 170 Mass. 577, 40 L. R. A. 345, 64 Am. St. Rep. 323, 49 N. E. 913.

The fact that the case was not one in which "the work, even if properly done, created a peril unless guarded against" is in some cases noted as a negative element which makes in favor of the employer. *Koch v. Fox* (1902) 71 App. Div. 288, 75 N. Y. Supp. 913; *Boomer v. Wilbur* (1900) 176 Mass. 482, 53 L. R. A. 172, 57 N. E. 1004.

It is possible that the kinds of work to which each of the above forms of statement is more especially appropriate are, in a strictly logical point of view, susceptible of differentiation. But the distinction, if there be any, is too refined to supply a practical basis for the classification of the decisions. Inasmuch as the "danger" which, in one form of statement, the employer is declared to be absolutely bound to guard against by reasonable care, possesses a juridical significance only in so far as it may produce the "injury" which is adverted to in the other form of statement, it is clear that the ultimate consequence upon which the employer's responsibility is predicated is the same, whichever may be the standpoint from which the evidence is considered. As a matter of fact, no court has ever, so far as the writer is aware, undertaken to discriminate between the decisions by assigning them to different categories according as the employer's duty might be conceived to arise out of his obligation to avert danger, or his obligation to avert injury.

The quality of the work which is contemplated by the doctrine above enunciated has also been defined by the term "intrinsically dan-

other witnesses speak of having a contract with the company does not make him an independent contractor.

Cincinnati v. Stone, 5 Ohio St. 38; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Toledo Stove Co. v. Reep*, 18 Ohio C. C. 58, 9 Ohio C. D. 467; *Andrews Bros. Co. v. Burns*, 22 Ohio C. C. 437.

If the work was a dangerous one in itself, the master cannot hide behind the fiction of "independent contract."

Hughes v. Cincinnati & S. R. Co. 39 Ohio St. 461; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269; *Hauser v. Whalen*, 49 Ohio St. 69, 14 L. R. A. 828, 29 N. E. 1049; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618.

When the company employed this boy,

gerous." *Birmingham v. McCary* (1887) 84 Ala. 469, 4 So. 630; *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Joliet v. Harwood* (1877) 86 Ill. 110, 29 Am. Rep. 17; *Chicago Economic Fuel Gas Co. v. Myers* (1897) 168 Ill. 139, 48 N. E. 66; *Buddin v. Fortunato* (1890; C. P.) 16 Daly, 195, 31 N. Y. S. R. 278, 10 N. Y. Supp. 115; *Madigan v. Wellington & M. R. Co.* (1883) New Zealand L. R. 2 S. C. 209; *Martin v. Sunlight Gold Min. Co.* (1896) 17 New South Wales L. R. 364 (description held not to be applicable to the work of trucking and hauling in a gold mine).

It has also been defined by the term "inherently dangerous." *Wiggin v. St. Louis* (1896) 135 Mo. 558, 37 S. W. 528; *Richmond v. Sitterding* (1903) 101 Va. 354, 65 L. R. A. 445, 99 Am. St. Rep. 879, 43 S. E. 562 (description held not to be applicable to the construction of the brickwork of a house abutting on a street).

And by the term "dangerous in itself." "Where work is dangerous in itself, or of such a character as to be likely to become dangerous, the person who orders the work to be done is not absolved from responsibility by the employment of a contractor." *William, J. in Bossene v. Kilmore* (1883) 9 Vict. L. Rep. (L.) 35, 4 Australian Law Times, 151.

These descriptive words have been held to be inapplicable to the work of raising a party wall (*Negus v. Becker* [1894] 143 N. Y. 303, 25 L. R. A. 667, 42 Am. St. Rep. 724, 38 N. E. 290); to the work of floating logs down stream (*Pierrepoint v. Loveless* [1878] 72 N. Y. 211); to the work of excavating for a foundation near a house (*Crenshaw v. Ullman* [1893] 113 Mo. 633, 20 S. W. 1077).

Upon the facts, however, this last-cited decision is contrary to the weight of authority, as indicated by the cases collected in subd. VI. *infra*.

Again, it has been defined as "in its nature dangerous" (*Angus v. Dalton* [1878] L. R. 4 Q. B. Div. 162, 187); and as "necessarily dangerous" (*Ferguson v. Hubbell* [1884] 97 N. Y. 507, 49 Am. Rep. 544, denying that the work of clearing off wood and brush from a piece of land could properly be so described; *Neumann v. Greenleaf Real Estate Co.* [1898] 73 Mo. App. 326, where a one-story building, the foun-

who was at that time under the age of fifteen years, and placed him at work in a place where his life and limbs were endangered, it acted in violation of the statute law of this state; and this unlawful employment was certainly a circumstance for the jury to consider in determining whether the company had acted negligently towards the boy,—especially when we consider that the negligence charged was the failure to instruct a boy of tender years.

Hoppe v. Parmalee, 20 Ohio C. C. 303, 11 Ohio C. D. 24; *Meek v. Pennsylvania Co.* 38 Ohio St. 632; *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L. R. A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; *Watson*, Damages for Personal Injuries, §§ 250-278.

Messrs. Grosvenor, Jones, & Worstell, Hollis C. Johnston, and Roscoe J. Mauck, for defendant in error:

Kiger had a contract to do certain work

dation of which was 7 feet from the wall of an adjacent house, was being erected by a contractor; it was held that this description was not applicable to the work; and as "ordinarily attended with danger" (*Boomer v. Wilbur* [1900] 176 Mass. 482, 53 L. R. A. 172, 57 N. E. 1004).

As in the cases dealt with in the note to *Thomas v. Harrington*, ante, 742, on the liability of the employer where the injury is the direct result of the work contracted for, "the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract." 2 Dill. Mun. Corp. § 1029, quoted with approval in *White v. New York* (1897) 15 App. Div. 440, 44 N. Y. Supp. 454; *Birmingham v. McCary* (1887) 84 Ala. 469, 4 So. 630; and *Joliet v. Harwood* (1877) 86 Ill. 110, 29 Am. Rep. 17.

For other cases in which a similar point of view is indicated, see *Chicago Economic Fuel Gas Co. v. Myers* (1897) 168 Ill. 139, 48 N. E. 66; *Matheny v. Wolffs* (1865) 2 Duv. 137; *Dillon v. Hunt* (1881) 11 Mo. App. 246.

In one case it was argued that, as the security of third persons will not be any the more effectually secured if an employer retains the control of a dangerous piece of work which he desires to have done, but which, owing to his lack of knowledge or skill, he cannot himself perform, it is unreasonable to charge him with responsibility for the negligence of those to whom he intrusts the work. But this contention did not prevail. *Covington & C. Bridge Co. v. Steinbrock* (1899) 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 818.

In discussing the contention thus pressed upon it, the court said: "There is a seeming force in this, but only so. It is not agreeable to the principles of distributive justice. For it is equally a hardship that one should suffer loss by the negligent performance of work which another procured to be done for his own benefit, and which he in no way promoted, and over which he had no control. Hence, where work is to be done that may endanger others, there is no real hardship in holding the party for whom it is done responsible for neglect in doing it. Though he may not be able to do it himself, or intelligently supervise it, he will, nevertheless, 65 L. R. A.

in a certain way, and to say that he must have had "entire control over the mode and manner of the manufacture" impressed upon the jury the opinion that he must have had an independent right to make furniture of any form that he saw fit, wholly independent of any views or wishes of the company itself.

Hughes v. Cincinnati & S. R. Co. 39 Ohio St. 461.

To constitute Kiger an independent contractor it need not appear that he had a contract for a job,—that is, that he had a contract for the manufacture of some definite number of pieces of furniture of the kind he was engaged in making.

Samuelson v. Cleveland Iron Min. Co. 49 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499; *Fink v. Missouri Furnace Co.* 82 Mo. 276, 52 Am. Rep. 376; 16 Am. & Eng. Enc. Law, 2d ed. p. 188.

ertheless, be the more careful in selecting an agent to act for him. This is a duty which arises in all cases where an agent is employed; and no harm can come from stimulating its exercise in the employment of an independent contractor, where the rights of others are concerned."

If the case is one in which the law casts upon the employer the duty of seeing that reasonable precautions are taken by the contractor to protect third persons, the mere circumstance that the particular act which was the immediate cause of the injury was unnecessary, and was not only unauthorized, but positively forbidden, will not enable the employer to escape liability. This doctrine was laid down by the House of Lords in rejecting the contention to the opposite effect, which was put forward by the defendant's counsel in *Hughes v. Percival* (1883) L. R. 8 App. Cas. 443, 450, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772, the facts of which are given in VII., c. *infra*. Discussing the argument urged with reference to the cutting of the wall, Lord Watson said: "Unnecessary it certainly was, because the staircase might have been securely fixed without interfering with the wall. Unauthorized and forbidden it also was, in this sense, that, by the terms of the contract and relative specification, the contractor was bound to leave the wall untouched. But the terms of the contract and specification are, in my opinion, of no relevancy as in a question with the respondent. If there were any reason to suppose that an ordinary workman intrusted with the job might cut into the wall, the appellant took a very proper precaution when he bound his contractor not to cut it; but he failed in his duty to the respondent when he permitted the contractor and his workmen to neglect that precaution. I am of opinion that the appellant could not establish a good defense to the respondent's claim by simply proving that it was not in the least necessary to cut the wall, and that the contractor was under an obligation not to do it. It appears to me that he could not escape from liability unless he further proved that it could not have been reasonably anticipated that any workman of ordinary skill in such operations, who was neither insane nor dishonest, would have dreamt

There was no propriety in calling the attention of the jury to the child-labor statute.

Davis, J., delivered the opinion of the court:

Whether the instruction given by the court to the jury in relation to an independent contractor was right or wrong is, in our opinion, immaterial in law, because the defense that the plaintiff was an employee of an independent contractor is not available to the defendant under the facts of this case. Conceding that Kiger was an independent contractor, yet it is an undisputed fact that, under his agreement with the defendant, he was to perform his services with material and machinery which

were furnished by the defendant, and that with these was the dangerous machine which injured the plaintiff. That it was dangerous when operated by one who had not been properly instructed, is specially found by the jury; and, indeed, that fact stands out distinctly all through the evidence contained in the record. So that this case, so far as the defense of an independent contract is concerned, comes directly within the doctrine of this court as announced in *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269, and *Covington & C. Bridge Co. v. Steinbrook*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618. It is a case in which, under the circumstances shown, "a resulting injury . . . might have been anticipated as a direct or probable

of cutting the wall. I can find no allegation to that effect; nor do the statements made by the appellant's counsel appear to me to sustain the inference that the cutting of the wall was an act of that improbable description. It is not said that the contractor's workmen were deficient in ordinary skill, or that their act, however ill-adjudged, was dictated by any other motive than a desire to perform their work efficiently. In these circumstances, the only inference in fact which I can draw is that these men ought to have been specially directed not to interfere with the wall, and that care should have been taken that they obeyed the direction." To the same effect see the remarks of Lord Blackburn.

It is clear that the acceptance of a doctrine which rests upon the hypothesis that the employer should have seen that the stipulated work was likely to cause danger to others involves the consequence that a plaintiff cannot be debarred from recovery merely for the reason that his injury was not a necessary result of that work.

In *Thompson v. Lowell, L. & H. Street R. Co.* (1898) 170 Mass. 577, 40 L. R. A. 345, 64 Am. St. Rep. 323, 49 N. E. 913, the facts of which are stated in subd. VIII., *infra*, the defendant asked for an instruction that it "was not responsible unless the exhibition was in its nature such that it would necessarily bring wrongful consequences to pass, unless guarded against, and the defendant failed to exercise due care to prevent harm." The judge, instead thereof, instructed the jury that "the defendant is not responsible unless the exhibition was in its nature such that it would necessarily or probably cause injury to some person present under the defendant's invitation, unless guarded against, and the defendant failed to exercise due care to prevent harm." The substituted instruction was held to be correct.

The questions, whether the stipulated work itself was essentially dangerous, and whether it was the understanding of the employer that the contractor was to adopt an essentially dangerous method of executing the work, should be submitted to the jury, where the evidence is such that these issues may, without impropriety, be decided in the plaintiff's favor.

It was so held in a case where contractors let to another a contract for the dragging of plies through the streets of a city in violation of an ordinance, and a child was killed while the 65 L. R. A.

work was being executed. *Doran v. Flood* (1891) 47 Fed. 543. The court said: "If these defendants had contracted for dragging these logs along the streets as they were dragged, and so dragging them caused the injury, they would, without doubt, be liable. Letting the hauling for that distance at that price, to a person not a common carrier, who had no trucks or connection with facilities for doing it otherwise than by dragging, would have some tendency towards showing that the understanding with the defendants was that it was to be done by dragging, as it was done. The jury might have found that moving such logs in such streets was dangerous in itself; and the circumstances or the injury tended to show that dragging the logs, instead of trucking them, caused it."

The theory which predicates the existence of a nondelegable duty upon the fact that the contractor was employed to execute an essentially dangerous piece of work is not recognized in Georgia, as the construction put upon the section of the Code which dealt with the subject (3819) is that the only instances in which an employer of an independent contractor is liable for the negligence of such contractor are those therein enumerated and defined. *Ridge-way v. Downing Co.* (1900) 109 Ga. 591, 34 S. E. 1028, holding that where the owner of a vacant city lot, who for many years has suffered the public to use a thoroughfare over the same, employs an independent contractor to construct a building thereon according to certain specifications, including excavations for piling for the foundation; and the contractor digs a trench for such purpose across the thoroughfare,—the owner is not liable for a personal injury sustained by one who falls into the trench by reason of its unguarded condition. The main contention of the plaintiff was that the law imposed upon the defendant the duty of guarding the dangerous excavation dug by him, or his contractor or servants, across the way which had been used by the public for years; and that this duty could not be delegated to an independent contractor.

III. Limits of the doctrine.

One of the subsidiary propositions which are deducible from the general principle under which an employer is relieved from responsibility for the torts of an independent contractor may be thus enunciated: "If the act to be done may be safely done in the exercise of due

consequence of the performance of the work contracted for if reasonable care is omitted in the course of its performance." But while we cannot affirm the judgment of the circuit court upon the reason assigned by that court, we nevertheless are of the opinion that the judgment ought to be affirmed upon an altogether different ground, which appears upon the record. As already intimated, the only question which was properly raised by the pleadings and the evidence in this case was whether the defendant, having knowledge of the youth and inexperience of the plaintiff, "negligently, carelessly, and unlawfully put the plaintiff to work upon and about said dangerous and hazardous machine, . . . without notifying the plaintiff in any manner as to the

dangerous and hazardous character of said machine. . . . and without giving him any instructions whatever as to how he should do and perform said duty assigned him," whereby the plaintiff was injured. The trial judge, in instructing the jury in regard to this issue, turned aside to say that, "in fact, the employment of children under the age of sixteen years at any employment whereby life or limb is endangered is prohibited by statute in this state, and any person, firm, or corporation that willfully permits such children to be so employed is deemed guilty of a misdemeanor. But while this statute makes it unlawful to employ children under the age of sixteen years at any employment whereby life or limb is endangered, the mere fact of such

care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care." *Engel v. Eureka Club* (1893) 137 N. Y. 100, 33 Am. St. Rep. 692, 50 N. Y. S. R. 188, 32 N. E. 1052, *Reversing* (1892) 45 N. Y. S. R. 940, 18 N. Y. Supp. 945, in which the supreme court had adhered to its former judgment, as reported in (1891) 59 Hun, 593, 37 N. Y. S. R. 527, 14 N. Y. Supp. 184.

In the practical application of such a doctrine there is an obvious difficulty in fixing the boundary line between the cases which are properly governed by it, and those which fall within the domain of the doctrine now under discussion. The difficulty is twofold.

In the first place, it seems to be scarcely possible, in stating the latter doctrine, to avoid the use of phraseology which shall not be suggestive of a field of operation so wide as to bring it into conflict with the former doctrine. This source of embarrassment is adverted to in judicial criticisms of some of the formularies which have been proposed. In *Hughes v. Percival* (1883) L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772, Lord Blackburn thus criticized the language of Cockburn, Ch. J., in *Rower v. Peate* (1876) L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321 (see II., *supra*): "I doubt whether this is not too broadly stated. If taken in the full sense of the words, it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant, but that of the innkeeper, uses that skill and care which are necessary, when driving the coach, to prevent mischief to the passengers." It is not easy to admit, however, that the doctrine, as enounced, does really involve the extreme consequences thus ascribed it. As was pointed out by Smith, L. J., in *Hardaker v. Idle District* [1896] 1 Q. B. 335, 347, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196, "it is not, in the natural course of things, to be expected, when a man hires post-horses and a coachman from an innkeeper, that, unless means are adopted to prevent them, injurious consequences will arise to his neighbor." In the last cited case *Lindley, L. J.*, also refers to the difficulty of expressing the general principle in terms which will apply to all cases. 65 L. R. A.

In *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163, the Virginia court of appeals, after quoting the statement in *Mechem, Agency*, § 747, to the effect that "It is the duty of every person who does in person, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken; and he cannot escape this duty by turning the performance over to a contractor,"—proceeded thus: "In stating the first branch of this proposition, the author was not as guarded in the language employed as he might, and perhaps should, have been, in the light of the decided cases upon which he seems to have based his statement of the principle. The language, at first blush, seems to be open to the interpretation that every person, natural or artificial, who does in person, or causes to be done by another, work which from its nature is liable, unless precautions are taken, to do injury to others, must see to it in person that the necessary precautions are taken, and cannot escape liability for the nonperformance of such duty by turning the whole performance over to a contractor, although the employer has exercised proper care in the selection of a skillful and competent person, exercising an independent employment, and has contracted with such person for the execution of the entire work by the means and methods of his own selection. Work is constantly being performed by independent contractors, as well as others, which in the nature of things may, in the course of its execution, result in injury to others; but it by no means follows that an employer in any such case must personally supervise the work and see that the necessary precautions are taken, and that, for his failure to do so, he must be held liable in damages for injuries to other persons. For if, in the nature of things, the mere liability of the work to result in injury to someone be made the test, then it is obvious that the line of distinction becomes shadowy and indistinct between acts which are unlawful, or are *per se* nuisances, or that cannot be done without doing damage, and those the performance of which not only may, but in the nature of things must, often be committed to others; as is the case with a railway company in the construction and repair of its roadway, bridges, and other structures. . . . There is manifestly a broad distinction between the statement of the author (*Mechem*) and that of

employment in violation of the statute does not of itself warrant a recovery against the employers, but it is only a circumstance to be considered by the jury in connection with the other evidence in the case as bearing upon the question of the negligence of the employer in causing the injury. As applied to this case, the statute made it the duty of the defendant, if it did not know plaintiff's age, to use due care and caution to ascertain his age; and, if it failed to do so, and employed plaintiff, while within the prohibited age, in a service that was hazardous to his life and limb, knowing him to be under the age of sixteen years, or when, by the exercise of due care and caution, it could have ascertained that he was under that age, it is a fact or circumstance to be considered by you in determining the question of the alleged negligence and other wrongful conduct of defendant in causing

the injury to plaintiff." This was clearly erroneous and prejudicial, because it submitted to the jury, as evidence of negligence, a matter which was not competent as evidence in a case such as this. Buswell, *Personal Injuries*, § 112. It was not charged in the petition, and could not be claimed, that the plaintiff's injury resulted in any direct or immediate way from an illegal employment of the plaintiff; but it was claimed that, being employed, the employer neglected his legal duty to give proper instructions as to the use of a dangerous machine. Therefore, whether the statute had been violated or not, the suggestion of that matter by the trial judge was altogether irrelevant, and could not be otherwise than prejudicial. It was stated and restated that "the fact of such employment in violation of the statute . . . is a circumstance to be considered by the jury in connection with other

the judge whose language is quoted as illustrating the distinction stated by the former. In the former the author makes the fact that the act to be performed is, in its nature, liable to result in injury to others the test; while the judge whose language is quoted applies as the test the fact that the work is one that will result in injury to others unless preventive measures be adopted." The judicial statement here referred to is that which was quoted in subd. II., *infra*, from the opinion in *Bailey v. Troy & B. R. Co.* (1883) 57 Vt. 252, 52 Am. Rep. 129. It should be observed, however, that the phraseology used by Mr. Mechem, even if not entirely warranted by the case which is cited, is quite in harmony with the language used in the cases referred to in the preceding subdivision.

In the second place, although it cannot be disputed that, as a matter of abstract logic, a well-marked distinction exists between work which may be safely done if due care is taken, and work which is dangerous unless due care is taken in respect to the observance of certain precautions, it is often far from easy, in dealing with the infinitely diversified groups of concrete facts which present themselves in litigation, to give effect to this distinction by determining the category to which the work in question should be assigned. The extent of the region covered by a doctrine the applicability of which in each particular instance depends upon the meaning of a phrase so extremely vague as "work which is likely to cause danger or injury to others," is a matter which can only be determined by judicial legislation; and the arbitrary and empirical nature of the tests which are available for this process is shown in a very striking manner by the antagonistic decisions which have been rendered in regard to similar or identical circumstances. The cases in which, as shown in the ensuing subdivision, the employer has been held liable for the failure of a contractor to take proper precautions to protect the certain classes of persons from dangers created by unguarded excavations, by the removal of lateral support, and by the use of explosives for blasting purposes, are in singular conflict with those in which the employer has been absolved from liability for injuries traceable to the same causes, on the ground that the dam-

age was due to the manner in which the work was done. See subd's. VII. b, and VII. c, of note to *Sallotte v. King Bridge Co.* *ante*, 620, on *General rule as to absence of liability of employer for torts of independent contractor*. In some instances, however, this conflict is possibly to be accounted for by the fact that the doctrine discussed in the present subtitle was not brought to the attention of the court.

Cases which lie near the border line, and which are not concluded by precedents so close as to be binding, will always continue to be a source of embarrassment. The difficulties which such cases involve may be usefully illustrated by adverting to one recent decision in which the question of the applicability of the doctrine dealt with in this subtitle was directly raised by the language in which the instructions to the jury were couched. *Boomer v. Wilbur* (1900) 176 Mass. 482, 53 L. R. A. 172, 57 N. E. 1004. There the injury was caused by a brick, which a mason employed to repair a chimney, let fall into the street, and the trial judge charged that, if "such work on the chimneys would ordinarily be attended with danger to the public, unless proper precautions to avoid it were taken, the defendants were bound to take proper precautions, or to see that proper precautions were taken, for the safety of the public." This instruction was held to be erroneous for reasons thus explained: "This is not a case where the work, even if properly done, creates a peril, unless guarded against, as in the cases relied upon by the plaintiff. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do. . . . If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but, as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public. The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held."

evidence in the case as bearing upon the question of the negligence of the employer in causing the injury." This case is not at all like the cases of *Meek v. Pennsylvania Co.* 38 Ohio St. 632, and *Davis v. Guarnieri*, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350. In each of those cases the negligent act complained of was the very act which was made unlawful by ordinance or by statute, and for that reason, while repudiating the doctrine that a violation of a statute or ordinance is *per se* negligence, this court has held that in such cases the fact that the act which was charged to be negligent was also a breach of statute may be considered with other evidence as a circumstance tending to prove negligence. The reason for this rule is that the injured party has a right to assume that the other party will obey the law, and has the right to govern himself accordingly; and hence, when the

law is violated, and injury occurs, that is some evidence of negligence. Whether this reasoning is altogether sound or not is not within the scope of our present inquiry. We are, however, not now inclined to extend the rule further. The employment of the plaintiff when he was under sixteen years of age was not the proximate cause of the injury, and it could not in any degree tend to show that the defendant was negligent in not giving, or causing to be given, to the plaintiff, proper instructions as to operating the machine. We find no other error in the record.

The judgment of the Circuit Court reversing the judgment of the Court of Common Pleas and remanding the cause for a new trial is therefore affirmed.

Burket, Ch. J., and Shauck, Price, and Crew, JJ., concur.

IV. *Effect of stipulation by contractor to take appropriate precautions.*

See also subd. IV. a, of note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer.*

In any case where the doctrine stated in subd. II., *supra*, is applicable, the employer "may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed; but he cannot thereby relieve himself from liability to those injured by the failure to perform it." *Dalton v. Angus* (1881) L. R. 6 App. Cas. 740, 829, 50 L. J. Q. B. N. S. 689, 44 L. T. N. S. 844, 30 Week. Rep. 196, per Lord Blackburn.

A similar statement of principles by the same distinguished jurist was made in another case decided soon afterwards: A person upon whom the law casts a duty is at liberty to employ another to fulfil that duty, and, if they so agree together, to exact a stipulation that he is to be indemnified if injury results from the nonfulfilment of the duty; but the employer still remains subject to that duty, and liable for the consequences if it is not fulfilled. *Hughes v. Percival* (1883) L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772.

For other cases embodying a similar doctrine, see *Bower v. Peate* (1876) L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321; *The Snark* [1899] Prob. 74, 68 L. J. Q. B. N. S. 22, 80 L. T. N. S. 25, 47 Week. Rep. 398, 8 Asp. Mar. L. Cas. 483; *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Cabot v. Kingman* (1896) 166 Mass. 403, 33 L. R. A. 45, 44 N. E. 344.

In *Osborn v. Union Ferry Co.* (1869) 53 Barb. 629, the court expressed the opinion that, where the contractor has stipulated to use the necessary precautionary measures to protect the public against accidents, the owner or employer is relieved from responsibility.

The court considered this to be the effect of *Buffalo v. Holloway* (1852) 7 N. Y. 493, 57 Am. Dec. 550, and *Storrs v. Utica* (1858) 17 N. Y. 104, 72 Am. Dec. 437. But the construction 65 L. R. A.

thus put upon these cases is clearly erroneous. The first mentioned is not in point, as it simply deals with the right of a defendant who has been compelled to pay damages in satisfaction of an absolute liability to secure indemnification from a contractor whose negligence was the immediate cause of the injury. The second case is, as an authority, directly antagonistic to the proposition in support of which it is cited, as *Comstock, J.*, explicitly declared that, even though the employer might insert in the agreement a clause that the contractor should adopt certain specified precautions for the protection of the public, such a stipulation had no effect upon the liability of the employer.

In *Donovan v. Oakland & B. Rapid Transit Co.* (1894) 102 Cal. 245, 36 Pac. 516, where a street railway company for which a contractor had dug a post-hole of the size and at the place designated by its superintendent was held liable for injuries received by a traveler who fell into it two or three days after it was finished, the court laid stress upon the fact that the contract did not require the contractors to guard the hole for the protection of travelers on the street, nor for any other purpose, in any manner, at any time,—certainly not after it was finished,—and arrived at the conclusion that, since the negligence which caused the injury was that of failing to guard the hole after it was finished by the contractors, it must be imputed to the defendant.

The reference thus made to the absence of any stipulation as to guarding the hole seems to imply that, if such a stipulation had been inserted, the defendant would have been absolved from liability, yet in a case decided during the same year (*Colgrove v. Smith* [1894] 102 Cal. 220, 27 L. R. A. 590, 36 Pac. 411), the defendants were held liable for the breach of an ordinance by their contractor in improperly filling a trench opened in a street, although the contract provided that the earth was to be properly tamped so as to prevent vehicles from sinking into it.

It may be that this court recognizes a distinction between precautions prescribed by statute, and precautions which are obligatory on account of the inherently dangerous nature of the work. But the weight of authority, as shown by the cases cited above, is opposed to such a theory.

It scarcely needed a specific decision to establish the doctrine that a stipulation binding the contractor to use all precautionary measures to protect the public will not protect the employer where the gravamen of the action is his failure to remedy a positive nuisance. But it has been so ruled in *New York. Osborn v. Union Ferry Co.* (1869) 53 Barb. 629.

V. Necessity of showing that the contractor was acting under the authority of the employer.

A contractor who proceeds to perform dangerous work on his employer's premises before the date specified in the contract is a mere trespasser, whose negligence in failing to take proper precautions is not imputable to the employer. Whether he was, as a matter of fact, authorized to commence the work at the time when he did so must be determined from the provisions of the contract.

In *Black v. Christchurch Finance Co.* [1894; P. C.] A. C. 48, 63 L. J. P. C. N. S. 32, 6 Reports, 394, 70 L. T. N. S. 77, 58 J. P. 32, "the contract, taken as a whole, was one for the clearance of the ground of all growing bush and timber, to be effected by the consecutive operations of felling and burning. It is stipulated that the first of these operations shall be begun at once, and concluded by the end of November following," and the contractor agreed to "burn in a favorable time, about February next." It was contended by counsel that the specification of time to burn "about February next" had the practical effect of separating the operations of felling and burning so completely as really to create two contracts, though for a lump payment, and that the contractor, if he went on the land sooner than "about February" to light the bush, was to be regarded in the same way as an intruder or a stranger for whose act the defendant company would have no responsibility. This argument prevailed in the New Zealand court of appeal (*Christchurch Finance Co. v. Black* [1891] 10 New Zealand L. R. 238). *Dalton v. Angus* (1881) 50 L. J. Q. B. N. S. 689, L. R. 6 App. Cas. 740, 44 L. T. N. S. 844, 30 Week. Rep. 196, and *Hughes v. Percival* (1883) 52 L. J. Q. B. N. S. 719, L. R. 8 App. Cas. 443, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772 (see VII., *infra*), were distinguished on the ground that, in those cases the principal, being aware of what was going on, was bound to see that the contract was properly performed, while in the case under review the company did not know that the work of burning was in progress, or was likely to go on till the date fixed by the contract. The privy council did not agree with this view of the contractor's position. In delivering the judgment, Lord Shand said: "The contract bound the contractor 'to burn in a favorable time.' It cannot be suggested that, if he had violated this condition only of his contract, the defendants would have escaped responsibility. Having authorized and intrusted the operation of burning to another, they must answer for his proceedings, however much he may have violated their instructions or the detailed conditions of his contract with them. . . . But, assuming that there was a violation of the terms of the contract on the contractor's part in burning so early as the end of December, this cannot, in their lordships' opinion, affect the defendants' liability to third parties injured by the act of their contractor. It is clear that the

contractor had the right, under his contract, to be on the ground from time to time as he thought fit, until the whole operations were completed for felling, for clearing away the timber he was entitled to remove, for making a road to enable him to do so, and for the burning of the bush. Their lordships cannot adopt the view that the contracts for felling and for burning the bush are to be regarded as in any proper sense separate or independent, and that the separate contract to burn the bush did not come into operation until about February. There was but one contract, to fell and to burn,—that is to clear the land; and, though the contractor disregarded the stipulation which the defendants made with him as to the time of burning, this cannot relieve them from responsibility. The defendants might have stipulated that an interval of two months should elapse after the time of felling and before the burning should take place. If the contractor, having leave under his contract to be on the land, had allowed a shorter interval only, it could not be said he was a trespasser when he lighted the fire, so that the defendants would not be liable for his act. So, also, if the contractor disregarded or violated stipulations as to the manner of lighting, or the place at which the fire should be lit. Their lordships are unable to draw any distinction in legal principle between such cases and the present, in which the condition related to the time at which the fire was to be lighted."

VI. Liability of employer where work is dangerous to persons using highways.

a. In general.

See also subd's. IV. a, and IV. b, of the note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from the nonperformance of absolute duties of employer.*

As applied to one large group of cases, the general principle stated in subd. II., *supra*, involves the corollary that one who employs a contractor to execute on or near a public way any kind of work which, in its normal and customary course, will expose persons using the way to certain definite perils, is liable for injuries caused by the failure of the contractor to take such precautions as may be appropriate for the purpose of preventing those perils from becoming active for mischief. The rule with regard to work of this description has been thus stated by an American author of high reputation: "Where the work contracted for necessarily constitutes an obstruction or defect in the street, of such a nature as to render it unsafe or dangerous for the purposes of public travel unless properly guarded or protected, the employer (equally with the contractor), where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party." 2 Dill. Mun. Corp. § 1030, quoted with approval in *Birmingham v. McCary* (1887) 84 Ala. 469, 4 So. 630.

This doctrine is not accepted in Pennsylvania. See *Chartiers Valley Gas Co. v. Lynch* (1888) 118 Pa. 362, 12 Atl. 435, where the writer of the opinion took occasion to express individually his regret that corporations, such as plaintiff in error, invested with the right of appropriating private property and entering upon public highways for the purpose of laying pipes in which to transport and distribute one of the most dangerous natural agencies in existence, should be

permitted to relieve themselves of the duties and responsibilities incident to the business, by letting part of the work, requiring the highest degree of care, to an independent contractor.

The following subsections will show the various circumstances under which defendants have been held responsible on this ground.

b. Erection of buildings.

Where a building is erected in a city by a contractor, and the plan of construction involves the making of an excavation or the formation of some other kind of dangerous opening under or adjacent to the street on which the premises abut, the owner is liable for any injury which a passer-by may receive by reason of the negligence of the contractor in leaving it open and omitting to guard it by lights and barriers.

In *Chicago v. Robbins* (1862) 2 Black, 418, 17 L. ed. 298, a landowner, who contracted for the erection of a building on a plan which provided for converting into an area the space left between the front of the building and an embankment made for the purpose of raising the level of the street, was held liable for injuries received by a person who fell into the pit thus formed. The court said: "This area, when it was begun, was a lawful work, and, if properly cared for, it would always have been lawful; but it was suffered to remain uncovered, and thereby became a nuisance, and the owner of the lot, for whose benefit it is made, is responsible. He cannot escape liability by letting work out like this to a contractor, and shift responsibility on to him if an accident occurs. He cannot even refrain from directing his contractor in the execution of the work so as to avoid making the nuisance. A hole cannot be dug in the sidewalk of a large city, and left without guards and lights at night, without great danger to life and limb; and he who orders it dug, and makes no provision for its safety, is chargeable if injury is suffered. It is said that Robbins did not reserve control over the mode and manner of doing the work, and is not, therefore, liable; but the digging this area necessarily resulted in a nuisance,—was the result of the work itself,—unless due care was taken to make the area safe. This is a clear case of 'doing unlawfully what might be done lawfully; digging earth in a street without taking proper steps for protecting from injury.' *Newton v. Ellis* (1885) 5 El. & Bl. 115, 24 L. J. Q. B. N. S. 387, 1 Jur. N. S. 850, 3 Week. Rep. 476."

The decision of the circuit court being reversed, there was a new trial, and on the second appeal ([1866] 4 Wall. 637, 18 L. ed. 427), the Supreme Court thus reiterated the views which it previously expressed: "Import of the decision of this court in reversing the former judgment of the circuit court, and remanding the cause for a new trial, was, that the party contracting for the work was liable, in a case like the present, where the work to be done necessarily constituted an obstruction or defect in the street or highway which rendered it dangerous as a way for travel and transportation, unless properly guarded or shut out from public use; that in such cases the principal for whom the work was done could not defeat the just claim of the corporation, or of the injured party, by proving that the work which constituted the obstruction or defect was done by an independent contractor. Strictly speaking, that question was not open in this case, but the argument was allowed to proceed; and, lest there should be a doubt 65 L. R. A.

upon the subject, it is proper to say that we again affirm the proposition. Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party."

In the following cases, also, the employer was held liable for injuries caused by excavations which had been made either under or in close proximity to public ways, and not properly guarded: *Ann v. Herter* (1903) 79 App. Div. 6, 79 N. Y. Supp. 825; *Murphy v. Perlestein* (1902) 73 App. Div. 256, 76 N. Y. Supp. 657 (held that evidence of the contract was properly excluded in a case where the excavation was adjacent to street); *Spence v. Schultz* (1894) 103 Cal. 208, 37 Pac. 220; *Matheny v. Wolffs* (1865) 2 Duv. 137; *Wiggin v. St. Louis* (1896) 135 Mo. 558, 37 S. W. 528.

In *Palmer v. Lincoln* (1876) 5 Neb. 136, 25 Am. Rep. 470, the court, in sustaining a demurrer to a plea stating that the excavation had been left unguarded by a contractor who was then in control of the premises, said: "So far as appears from the answer, the injuries complained of were the direct result of making the necessary excavation for the erection of the building, such excavation having been made in pursuance of the contract."

In *McCarrier v. Hollister* (1902) 15 S. D. 366, 91 Am. St. Rep. 695, 89 N. W. 862, where the injury was caused by an open trench dug for a drain which was to connect a house with a sewer, the court said: "The work contracted for could not be done without creating a condition in the public thoroughfare from which mischievous consequences might reasonably be expected to arise unless preventive measures were adopted. An excavation for the purpose of constructing a sewer may not be unlawful, but it is certainly intrinsically dangerous, and, unless properly guarded, liable to cause personal injuries. The nature of the work demands more than its proper performance. Digging the ditch and laying the pipe are not enough. Lights, barriers, or other safeguards are required during the progress of the work to protect persons from such accidents as the one resulting in plaintiff's injury."

More especially is it proper that the defendant should be held responsible where the hazardous conditions were created by himself before the place where they existed was transferred to the control of the contractor.

A jury is properly instructed that, if the defendants, who were engaged in constructing a building, had themselves made an excavation in the sidewalk for the purpose of building the coal vaults and area walls, and thus made a hole in a public street into which travelers in passing would probably fall if it was not properly guarded, they could not, by a contract giving a temporary occupancy and control of the excavation to the contractor, for the building of the vaults and walls, relieve themselves of further care in guarding the hole. *Hawver v. Whalen* (1892) 49 Ohio St. 69, 81, 14 L. R. A. 828, 29 N. E. 1049.

In the construction of buildings in cities it often becomes necessary to remove a sidewalk

temporarily in order to excavate cellars and carry in the material used in the construction of the buildings. Such temporary removal does not constitute a nuisance, but the person doing it is bound to guard the dangerous place properly, and to furnish reasonably safe passage for the public. *Ster v. Tuety* (1887) 45 Hun, 49. In this case, where the plaintiff, after passing over a part of a footpath from which the planks had been removed, stumbled at the place where they began again, evidence to the effect that the dangerous conditions were created by a contractor who had been let into possession of the premises for the purpose of building a house for the defendant was held to have been properly admitted, since, if the defendant could have shown that the premises had been let by him to another, who had entered into the exclusive and entire possession thereof, with the right to control the same, and, after acquiring such possession, had removed the sidewalk without the knowledge or consent of the defendant; and that he had no notice, actual or constructive, of such removal,—these facts would have constituted a good defense. But, as the defendant failed to establish his defense in this regard, it was held that the court had properly instructed the jury that, by making the contract, he did not relieve himself from the responsibility of keeping the sidewalk in a reasonably safe condition for persons traveling thereon.

An employer is also liable for injuries caused by the negligence of a contractor in regard to any instrumentality which is ordinarily used, when a building is being erected, and which, if it is carelessly placed or handled, will be dangerous to the public.

In *Evans v. Martin* (1880) 6 Vict. L. Rep. (L) 176, 2 Australian Law Times, 7, a builder who had been licensed to erect a boarding which encroached on a street constructed it with a movable panel, which, when materials were to be delivered, was removed and placed so as to lean against the boarding. On one of these occasions, as the workman whose duty it was to take out the panel was absent, a carter in the employ of a person who had made a subcontract for the delivery of flagging took it down himself, and left it so insecurely placed that it was blown down by a gust of wind, and injured a passer-by. The builder was held liable, on the ground that the defendant, having received a license to encroach upon a public street in order to facilitate the erection of his building, was under a special obligation to the public to take care that the exercise of that privilege should not interfere with the safety of persons passing along the street. Nothing, it was remarked, had been shown which took the case out of the operation of the principle that the privilege allowed to the defendant carried with it a correlative special duty to keep the gate safe. It was essentially a matter for the jury to determine whether the gate was attended to in such a manner as to guard against injury to or by the person dealing with it, and also whether the defendant ought not to have had a man constantly in attendance to manage, or direct the management of, the gate.

Compare also the cases as to blasting, which are cited in subd. VII., *infra*, and *James v. McMinimy* (1892) 93 Ky. 471, 40 Am. St. Rep. 200, 20 S. W. 435, cited in subd. VII. of the note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer*. 65 L. R. A.

It has been held to be error to charge a jury that, if the owner of a building contracts with another to raise a roof to his house, and in that work a derrick is employed, extending over a sidewalk which is a great thoroughfare, where many persons are continually or frequently passing, and that derrick is necessarily so extended, or it is known to the owner that it is so extended, or will be extended, then it is the duty of the owner to cause a barricade to be placed to prevent persons passing by, or to place a person there to give warning to the persons passing, for the omission of such duty the owner is liable as for his own neglect. *Vanderpool v. Husson* (1858) 28 Barb. 196. The ordinary rule as to the nonliability of an employer for the acts of a contractor was held to be controlling where an injury is caused by the careless management of such an appliance. It will be observed, however, that this ruling was made before the introduction and general adoption of the doctrine discussed in this subtitle. Considered with reference to the more recent authorities, it would seem to be of rather dubious correctness.

c. *Delivery of goods through openings in footpaths.*

A person who maintains for his own convenience, on the surface of a public footpath adjacent to the premises occupied by him, an aperture which is ordinarily covered by a grating scuttle, a trapdoor, and who makes a contract which requires that the aperture shall be opened while the stipulated work is being performed, is answerable for injuries received by a passer-by in consequence of the failure of the contractor's servants to close the aperture or to fasten the covering securely.

Refreshment rooms and a coal cellar at a railway station were let by the company to one S., the opening for putting coals into the cellar being on the arrival platform. A passenger, while leaving the station in the usual way, fell into the cellar opening which a coal merchant's servant had negligently left insufficiently guarded. The court held that S. was responsible for this negligence. *Williams, J.*, was of the opinion that the railway company also would be liable, but not the coal merchant. *Pickard v. Smith* (1891) 10 C. B. N. S. 470, 4 L. T. N. S. 470. "In the present case," said *Williams, J.*, "the defendant employed the coal merchant to open the trap in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having entrusted it to a person who also neglected it furnishes no excuse, either in good sense or law."

In the recent case of *Penny v. Wimbledon Urban District* [1898] 2 Q. B. 212, 67 L. J. Q. B. N. S. 754, 78 L. T. N. S. 748, the effect of this decision was said by *Bruce, J.*, to be this: "That, when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken; and that, if the necessary precautions are not taken, he cannot es-

cape liability by seeking to throw the blame on the contractor." It was also considered to be an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do.

In a case where the cover of a scuttle hole which the defendant company was licensed to maintain for his personal use was so negligently replaced by the servants of one who had contracted to deliver a certain amount of coal every week that it turned under the foot of a passer-by, the defendant was held liable on the ground that it owed to the public, who had the right to use the footpath, an absolute duty to exercise reasonable care to keep that footpath in a safe condition, and that this duty revived immediately after the contractor's servants had taken their departure after leaving any particular load of coal. *Benjamin v. Metropolitan Street R. Co.* (1896) 133 Mo. 274, 34 S. W. 590. It was held to be a question for the jury whether notice of the dangerous condition of the scuttle was imputable to the defendant fifteen minutes after the delivery of a load of coal.

d. Construction or repair of highways.

The nature and extent of the obligation of the principal employer to safeguard the public against dangers incidental to the construction or repair of roadways is indicated by the decisions cited below.

A district council is answerable to one injured by the negligence of a contractor employed by it to repair the highway, in leaving a pile of dirt unlighted and unprotected. *Penny v. Wimbledon Urban District* [1899; C. A.] 2 Q. B. 72, 68 L. J. Q. B. N. S. 704, 80 L. T. N. S. 615, 47 Week. Rep. 565, 63 J. P. 406, *Affirming* [1898] 2 Q. B. 212, 67 L. J. Q. B. N. S. 754, 78 L. T. N. S. 748. In the lower court the decision was put by Bruce, J., on the ground that "the district council employed the contractor to do work upon the surface of a road which they knew was being used by the public, and they must have known that the works which were to be executed would cause some obstruction to the traffic, and some danger, unless means were taken to give due warning to the public." This statement of the law was approved by two of the lords justices of appeal (*Smith and Vaughan Williams*); *Romer, L. J.*, expressed his views in similar language: "The work done in this case was the making up of a road frequented by the public. From the nature of this work danger was likely to arise to the public accustomed to use the highway by the alteration of level, and by the heaps of soil and the holes almost inevitable in work of the kind. The usual precaution to take in such a case is to put up lights or other warnings to prevent persons falling into the holes or over the heaps of soil. In my opinion, it is unreasonable not to take those precautions, and the passages from the contract that I have referred to in the course of the argument show that this view is correct."

On the ground that the work was intrinsically dangerous if special care was not taken, a railway company has been held liable, where a contractor employed to grade its road continued for a considerable period to excavate the side of a hill in such a manner as to frighten the horses of travelers, and cast the materials on a

public highway. *Madigan v. Wellington & M. R. Co.* (1883) *New Zealand L. R.* 2 S. C. 209.

Where a municipal council undertakes the repair of a bridge, and also has a temporary road made to accommodate the public while the repairs are in progress. It is responsible for injuries received by a traveler, as a result of the temporary road being left unfenced and unlighted, although it employed an independent contractor to do the work, and he had agreed to fence and light the road. *Bossence v. Kilmore* (1883) 9 Vict. L. Rep. (L.) 35. (This case seems to have been decided partly on the general grounds discussed in this note, and partly on the ground of the failure to fulfil a statutory duty. See subd. III. of the note to *Anderson v. Fleming*, 66 L. R. A. —, on *Liability of employer for acts of independent contractor where injuries result from nonperformance of absolute duties of employer.*)

In *Weber v. Buffalo R. Co.* (1897) 20 App. Div. 292, 47 N. Y. Supp. 7, where the defendant was held liable for the negligence of a contractor in failing to guard an opening in a bridge which was being constructed to carry a street railway over a canal, the court said: "As the very nature of the work which the company here undertook to do involved danger to persons lawfully on the highway, who might approach the bridge in the nighttime and attempt to cross it, it was bound to see that proper safeguards or warnings were provided while the work was going on, so as to afford reasonable protection to the public. . . . A duty was imposed by law upon the defendant towards the plaintiff, as one of the public, not to interfere with the right which the plaintiff possessed of using a public highway in such a manner as to impede or injure him when passing along it. The defendant is liable for the breach of the duty thus imposed upon him, although the act or default which caused the injury may have been the act or default of the defendant's contractor, and not of defendant itself. The negligent act or omission, if established, constituted an unlawful invasion of the plaintiff's right of transit over the public highway."

e. Other construction work on highways.

1. Street railways.

In *Woodman v. Metropolitan R. Co.* (1889) 149 Mass. 335, 4 L. R. A. 213, 14 Am. St. Rep. 427, 21 N. E. 482, the plaintiff was held entitled to recover for an injury caused by tripping over some rails which were allowed to project beyond a barrier placed to guard an excavation. *Holmes, J.*, after remarking that "It would not stretch the words of the Public Statutes and of the defendant's charter very much to say that such a personal duty was imposed upon it," to see that the public was properly protected against such risks, proceeded thus: "But further, apart from statute, if the performance of a lawful contract necessarily will bring wrongful consequences to pass unless guarded against, and if, as in the present case, the contract cannot be performed except under the right of the employer, who retains the right of access to the premises, the law may require the employer, at his peril, to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs. . . . Laying the track for the defendant necessitated the digging up of the highway, and the obstruction of it with earth and materials. This ob-

struction would be a nuisance unless properly guarded against. The work was done under a permit issued to the defendant. Considering the general principle of the law, and also the special relations of horse railroads to the highway, and the policy of the statutes, so far as the legislature has expressed itself upon the subject, we are of opinion that the defendant, having caused the highway to be obstructed, was bound, at its peril, to see that a nuisance was not created."

This decision was cited with approval in *Johnston v. Phoenix Bridge Co.* (1899) 44 App. Div. 581, 60 N. Y. Supp. 947, where it was held that where a corporation which has contracted to construct a section of an elevated railroad, and has undertaken to become responsible for all damages to persons or property "occasioned by the omission, neglect, or carelessness of itself, its agents, or employees, during the performance of the work," sublets a portion of the contract to subcontractors, who agree "to remove all the surplus excavation and other materials used in the foundation work from the ground, and to take your place under your contract with the . . . [principal employer] for furnishing these foundations,"—the corporation is liable to a pedestrian who, while walking at night along the side walk of the street in which the work is being performed, sustains injuries by falling over an unguarded pile of earth excavated by the subcontractors, and deposited by them upon the sidewalk. Woodward, J., said: "While it is possible, of course, that the subcontractor in the case at bar might have made the excavation, taking all of the dirt removed upon private ground, this was not contemplated by the contract, nor is it in accord with the usual method of doing this particular kind of work. The language of the contract is not that Green & Co. will remove all the excavation and other materials from the ground adjacent to the excavation in the progress of the work, but is intended to say that on finishing the work they will remove all the surplus excavation and other material used in the foundation work from the ground." This is no more than a promise to complete the work by clearing away all of the encumbrances after the work of placing the foundations had been completed; and it in no manner relieved the defendant from the obligation which it owed to the public of guarding the excavation as well as the materials which had been thrown out upon the street as an incident to the work. The obstruction which resulted in the accident was not 'purely collateral to the work,' as in the case of blasting rocks in the process of excavating, but was a direct and necessary incident of the undertaking; and, in the absence of plain and unmistakable language, the subcontractor cannot be held to have contemplated removing the earth to private grounds, a portion of it to be returned in filling up the excavation after the foundations were laid."

As the work of making in the street an excavation to receive one of the columns which are to support an elevated railway is intrinsically dangerous, the company owning the line cannot, by intrusting the work to an independent contractor, escape its obligation to see that the pitfall thus created is so guarded as to prevent its being a cause of injury to passers-by. Since this obligation is imperative so long as the excavation exists, notice that it is not sufficiently protected is not a condition of legal responsibility for injuries resulting from it. *Flynn v. 65 L. R. A.*

New York Elev. R. Co. (1883) 17 Jones & S. 60 (wheel of truck slipped into the hole).

An electric railroad company which lets to independent contractors the digging of a certain number of post holes in a public street, by a contract fixing the size of the holes and nothing more, is liable for an injury caused by falling into one of the holes which was completed two or three days before the accident. *Donovan v. Oakland & B. Rapid Transit Co.* (1894) 102 Cal. 245, 36 Pac. 516.

Where a railway company, acting under the provisions of a statute, constructed a track along a public highway on the premises of a board of dock commissioners, and was made responsible by the statute for the condition of the track, it was held that a person who was injured by the defective condition of the highway, resulting from the operation incident to the alteration of the track, could not maintain an action against the dock commissioners. The cases imposing liability on the employers of independent contractors, on the ground of the infraction of nondelegable duties, were cited by plaintiff's counsel. But it was considered by Huddleston, B., that the case was analogous, rather, to those in which a landlord who has not undertaken to repair demised premises is not liable for injuries caused by the defective state of those premises while the tenant is in possession thereof. The circumstances upon which he relied as sustaining his conclusion were these. That the positions of the railway company and the dock commissioners were altogether different and independent; that the railway company was in the sole possession of the place where the accident happened; that the railway company must be considered as doing the work, not under the orders, or as licensees, of the dock commissioners, but under the powers of the act of Parliament upon property which was made theirs. *Barham v. Ipswich Dock* (1885) 54 L. T. N. S. 23.

2. Area under footpath.

In *Silvers v. Nerdlinger* (1868) 30 Ind. 53, it was held that the owners of the building alongside which the excavation was made, having caused the work to be done by virtue of a license granted by the municipal authorities, were bound "to use every reasonable care that the privilege thus granted should be so exercised as not to become a nuisance, or produce injury to others." "The digging of the area was lawful. It was not a nuisance *per se*, but was rendered such by the neglect to keep it properly protected and guarded so as to avoid injury."

In *Ryan v. Curran* (1878) 64 Ind. 345, 31 Am. Rep. 123, recovery was denied for an injury received by a person who fell into an unguarded and unlighted excavation which had been dug under a footpath; and the court stated that the doctrine of the earlier case just cited was not binding on it, for the reason that the question of the employer's liability for the negligence of the contractor was not really involved, the action having been brought by the employer to recover from the contractor the damages which the former had been compelled to pay to the injured person. This view of the decision is clearly erroneous, as the only ground in which the action could be maintained is that the employer was himself primarily liable for the negligence of the contractor.

3. Sewer.

In *Detroit v. Corey* (1861) 9 Mich. 165, 80

Am. Dec. 78 (pedestrian fell into trench which was left unguarded), the court, after observing that the power under which the city of Detroit acted was not a power given to it for governmental purposes, but a special legislative grant with respect to a thing which was its private property, proceeding thus: "The donee of such a power, whether the donee be an individual or a corporation, takes it with the understanding—for such are the requirements of the law in the execution of the power—that it shall be so executed as not necessarily to interfere with the rights of the public, and that all needful and proper measures will be taken, in the execution of it, to guard against accidents to persons lawfully using the highway at the time. He is individually bound for the performance of these obligations; he cannot accept the power divested of them, or rid himself of their performance by executing it through a third person as his agent."

In Illinois it was held that, if a city employs a person to do work which is intrinsically dangerous, such as the blasting of rock in a street for a sewer, and damage results to another from a stone thrown by the blasting, the city will be liable to respond in damages for the injury. *Joliet v. Harwood* (1877) 86 Ill. 110, 29 Am. Rep. 17.

Ditch.

The plaintiffs were held entitled to recover in *Southern Ohio R. Co. v. Morey* (1890) 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269, and *Baxter v. Warner* (1876) 6 Hun, 585, on the ground that the ditches which caused their injuries had been left open and unguarded by the contractors.

In *Storrs v. Utica* (1858) 17 N. Y. 104, 72 Am. Dec. 437, Comstock, J., while expressing his full agreement with the general principle relied upon in *Blake v. Ferris* (1851) 5 N. Y. 48, 55 Am. Dec. 304, offered the following reasons for his opinion that the principle had not been correctly applied under the circumstances in evidence: "There was no complaint of negligence in the actual performance of the work. The ditch was carefully and skillfully dug. There was no careless projection of rocks against horses or travelers. The plaintiff's carriage and horses were driven into the ditch because it was not guarded at night. The cause of the accident, therefore, was not in the manner in which the work was carried on by the laborers; if it had been, their immediate employer, and he only, was liable for the injury. But in a sense strictly logical, as it seems to me, the accident was the result of the work itself, however skillfully performed. A ditch cannot be dug in a public street, and left open and unguarded at night, without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers, or lets it out by contract? If by contract, then I admit that the contractor must respond to third parties if his servants or laborers are negligent in the immediate execution of the work. But the ultimate superior or proprietor first determines that the excavation shall be made, and then he selects his own contractor. Can he escape responsibility for putting a public street in a condition dangerous for travel at night by interposing the contract which he himself has made for the very thing which creates the danger? I should answer this question in the negative."

65 L. R. A.

4. Pipe line.

In *Colgrove v. Smith* (1894) 102 Cal. 220, 27 L. R. A. 590, 36 Pac. 411 (plaintiff fell into open trench), it was remarked that the fact that the defendants obtained from the city a franchise or permission to dig up the street and lay their pipes merely relieved them of the consequences of doing unlawful work.

In *O'Brien v. Board of Land & Works* (1880) 6 Vict. L. Rep. (L.) 204, 2 Australian Law Times, 22, the plaintiff was held entitled to recover for injuries caused by falling over a pipe laid down by the servants of a carter in such a manner as to project over a crossing in a street. Under the contract, the pipes were to be deposited in such continuous lines as might be pointed out, in such a manner as not to interfere with the traffic, and to the satisfaction of the officer who might be present; any of the contractor's workmen who refused to obey the instructions of the officer with regard to the handling of the pipes was not to be allowed to convey them; the contractor was in every respect to carry out the instruction and directions of the superintending officer. The evidence showed that no officer was present when the pipes were deposited. *Stowell, Ch. J.*, considered the action to be maintainable on two distinct grounds: First, the negligent act of the carter was not entirely collateral to the work which he was employed to do. The injury resulted from the careless manner of performing the work, and the defendants were not absolved from liability by employing a contractor to do the work for them. Secondly, "by accepting the authority given them to do acts which, without such authority, would constitute a public nuisance, the defendants undertook an obligation to use all the care necessary to protect the public from injury," and they could not, by employing a contractor, relieve themselves of the obligation. The learned judge also intimated that the defendants might be held liable on the ground that "reasonable vigilance" had not been exercised in that no officer was present to direct the manner in which the pipes should be deposited. *Stephen, J.*, considered the case not to be distinguishable from *Ellis v. Sheffield Gas Consumers' Co.* (1853) 2 El. & Bl. 767, 2 C. L. Rep. 249, 23 L. J. Q. B. N. S. 42, 18 Jur. 146, 2 Week. Rep. 19, and took the position that, although the defendants had power to break up the streets and deposit pipes, they were bound to exercise this power in such a way as not to create a dangerous nuisance.

A person who has authorized work to be done which requires the propulsion of explosive gas through pipes not yet thoroughly cemented and joined together cannot, upon the plea that the men engaged in the work were servants of a contractor, escape liability for injuries caused by an explosion resulting from their negligence. *Chicago Economic Fuel Gas Co. v. Myers* (1897) 168 Ill. 139, 48 N. E. 66, Affirming (1896) 64 Ill. App. 270.

5. Telephone line.

In *Holliday v. National Teleph. Co.* [1899] 2 Q. B. 392, 81 L. T. N. S. 252, 68 L. J. Q. B. N. S. 10, 16, 47 Week. Rep. 658, Reversing [1898] 1 Q. B. 221, 68 L. J. Q. B. N. S. 302, the defendants, a telephone company, were lawfully engaged in laying telephone wires along a street. They passed the wires through tubes which they laid in a trench under the level of the pavement.

The defendants contracted with a plumber to connect these tubes at the joints with lead and solder to the satisfaction of the defendants' foreman at the sum of 12s. per joint. There was evidence that the work was done by the plumber under the supervision of the defendants' foreman, and that one of their men was assisting him in it. In order to make the connections between the tubes, it was necessary to obtain a flare from a benzoline lamp, which could not be done without the application of heat to the lamp. The lamp used for the purpose was provided with a safety valve. The plumber, for the purpose of obtaining the necessary flare, dipped the lamp into a caldron of melted solder, which was placed over a fire on the footway for the purpose of the work, and which was unprotected by any screen or tent. Dipping the lamp into the solder would have been a proper and usual mode of obtaining the flare provided the lamp had been in good order. The safety valve of the lamp not being in working order, as the plumber ought to have known, the lamp exploded, with the result that the plaintiff, who was passing on the highway, was splashed by the molten solder, and thereby injured. In an action by him against the defendants in the city of London court, for damages in respect of the injuries so occasioned to him, the deputy judge held that the plumber was not doing the work as an independent contractor, but under the defendants' supervision and control, and that the defendants were responsible for his negligence as above mentioned. It was held by the court of appeal, that the judgment of the deputy judge was right on the grounds, first, that there was evidence that the defendants and the plumber were jointly engaged in the performance of the work under such circumstances as to render the defendants liable for the negligence of which the plumber had been guilty (see subd. IV. of the note to *Louisville & N. R. Co. v. Low*, 66 L. R. A. —, on *Liability of employer for injuries occurring in performance of work by independent contractor where employer's own act is a proximate cause of the injury*); and, secondly, that, if the plumber were an independent contractor, the defendants, having authorized the performance upon a highway, of work which, from its nature, was likely to involve danger to persons using the highway, were bound to take care that those who executed the work for them did not negligently cause injury to such persons. Lord Halsbury said: "There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorized by the proper authority. The telephone company so authorized to interfere with a public highway, are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works. In this case the work to be done was the soldering together of pipes, and for that operation it appears to have been necessary to have molten metal at hand for the purpose of being instantly applied, and it was, as the deputy judge finds, a common and proper practice, with which it may be assumed that the defendants were familiar as they themselves did part of the work, to dip a benzoline lamp into the caldron of molten metal for the purpose of getting a flare. If the lamp were in good order, the operation would be harmless; but, if the safety valve of the lamp were out of order, an

explosion must ensue. Therefore, works were being executed in proximity to a highway, in which, in the ordinary course of things, an explosion might take place. It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that persons passing along the highway were not injured by the negligent performance of the work." Smith, L. J., said: "The defendants were a telephone company who were engaged in the execution on a highway of works which were clearly dangerous. It obviously involves a certain amount of danger to have a caldron of molten lead on a highway. The defendants, therefore, on the hypothesis that Highmore was an independent contractor, were delegating to him the execution of dangerous work upon a highway. . . . In my opinion, since the decision of the House of Lords in *Hughes v. Percival* (1883) 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772, and that of the privy council in *Black v. Christchurch Finance Co.* [1894] A. C. 48, 63 L. J. P. C. N. S. 32, 6 Reports, 394, 70 L. T. N. S. 77, 58 J. P. 332, it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Highmore was engaged to perform."

Where a child five years old was injured by voluntarily seizing with its hands a rope which was being drawn through a pulley, while the servants of one who had contracted to erect telephone poles and wires on a street were stretching the wires on the poles, it was held that the negligence was not in obstructing the street, but in failing to keep the child away from the rope, and that the duty owing by the telephone company was not one from which, as between it and the public, the telephone company could not relieve itself by contracting with another to do the work. *Vosbeck v. Kellogg* (1899) 78 Minn. 176, 80 N. W. 957.

f. Removal of wrecks from navigable rivers.

A navigable river being a public highway at common law (1 Beven, Neg. p. 570; Shearm. & Redf. Neg. § 333), a person who employs a contractor to perform on such a river work which is in its nature dangerous to vessels passing up and down the channel is bound, at his peril, to see that such precautions are taken as may be necessary to secure the safety of those vessels. Although the person employed to raise a sunken vessel for the owner may be placed in actual physical custody of the wreck, "the owner does not . . . discharge himself from the duty towards the public, which rested upon him, of using reasonable care to warn other vessels of the position of the wreck which remains his property." *The Snark* [1899] Prob. 74, 68 L. J. Prob. N. S. 22, 80 L. T. N. S. 25, 47 Week. Rep. 398, 8 Asp. Mar. L. Cas. 483, *Affirmed* by the court of appeal in [1900] Prob. 105, 69 L. J. Prob. N. S. 41, 82 L. T. N. S. 42, 48 Week.

Rep. 279, 9 Asp. Mar. L. Cas. 50 (wreck not lighted during salvage operations).

See further, as to this case, subd. X., *infra*.

VII. *Liability where work is dangerous to adjoining landowners.*

a. *In general.*

In other cases the interposition of an independent contractor has been held to be no protection to the defendant, for the reason that the stipulated work was to be executed on land owned or occupied by him, and that its performance would be accompanied by certain incidents which would be likely to produce injury to the adjoining premises, unless the appropriate precautions were adopted. Upon this ground, the plaintiff has been allowed to recover under the circumstances shown in the following subdivisions.

b. *Injury to lateral support.*

The plaintiff has been allowed to recover where the work of making an excavation for a building was so negligently executed that a building on the adjoining premises was damaged by the withdrawal or weakening of its lateral support.

The leading case on this subject is *Bower v. Peate* (1876) 35 L. T. N. S. 321, L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446. There the defendant, having determined to pull down his old house and build another on the same site, proposed to carry the foundations and walls of his new house to a lower depth than those of the plaintiff; for which purpose it would be necessary to excavate and remove the soil which before the alteration was adjacent to the plaintiff's house and land, and by which it had been supported. In order to do this without injury to the plaintiff's house, it would, as the defendant knew, be necessary to resort to underpinning or some other mode of supporting or shoring the plaintiff's soil and walls during the operations. In the specifications referred to in the contract was the following clause: "The adjoining buildings must be well and sufficiently propped and upheld during the progress of the works by the contractor, who shall be required to take the responsibility, and to make good any damage occurring thereto." There was also a provision of a similar purport in the contract itself. Owing to defective underpinning or want of other support to the plaintiff's soil and walls, while the excavation was being made, the plaintiff's house suffered the injuries for which the action was brought. Cockburn, Ch. J., in delivering the judgment of the court, said: "No question was made on the argument as to the right of the plaintiff to the support of the adjacent soil of the defendant for his house; nor was it doubted that the injuries to the house of which the plaintiff complained had been occasioned by the removal of such soil in the execution of the defendant's works. But it was contended that the defendant, having committed the execution of the work to a contractor, both as regarded the taking down and rebuilding his house, and the measures necessary for the protection of the adjoining house, the contractor, and not the defendant, became liable for any injury arising from want of due care in shoring or otherwise supporting the plaintiff's house. The argument, as put on behalf of the defendant, may be shortly stated thus: According to the doctrine in *Backhouse v. Bonomi* (1861) 65 L. R. A.

9 H. L. Cas. 503, 34 L. J. Q. B. N. S. 181, 7 Jur. N. S. 809, 4 L. T. N. S. 754, 9 Week. Rep. 759, the taking away the soil, to the support of which an adjoining owner is entitled, is not *in se* wrongful. It only becomes so when followed by injurious consequences to the neighbor. And if, therefore, such injurious consequences can be averted by efficient means, as by the substitution of artificial for the natural support previously afforded by the soil, the removal of the soil is in no respect wrongful. Here, the defendant, in one and the same contract, employed the contractor to execute the work he desired to have done, and to take the necessary measures for protecting the plaintiff's premises. He authorized him to do the former only on condition of his preventing it from causing injury to the plaintiff, and only so far as it could be done consistently with the safety of the premises of the latter. If, therefore, the work which the contractor was employed to do had been carried out in conformity with the instruction of the defendant, the work would have been perfectly lawful, and would have been attended with no injurious consequences. The injuries complained of have arisen from the negligence of the contractor alone. The defendant is, therefore, entitled to the benefit of the general rule, that when a person employs a contractor to do a work, lawful in itself, and involving no injurious consequences to others, and damage arises to another party from the negligence of the contractor or his servants, the contractor, and not the employer, is liable. It appears to us that, upon a correct view of the facts, this reasoning cannot prevail. In the first place, because the assumption on which it is founded altogether fails. The contractor was not employed to give support to the plaintiff's house as part of the work he was to do for the defendant. It was not included in the specifications and formed no part of the work he contracted to do, except so far as was necessary to satisfy his obligation to provide the necessary support of the plaintiff's house; in addition to which the defendant stipulates that the contractor shall 'take upon himself the risk and responsibility of shoring and supporting the adjoining buildings affected by the alterations,' and shall 'make good any damage which may be sustained by the said buildings in consequence of the works,' and shall 'satisfy any claims for compensation arising therefrom.' The effect of this is, not that the defendant orders, or stipulates for, any specific work necessary for the support of the adjoining buildings, but that he leaves the recourse to such work entirely at the discretion of the contractor, stipulating only that the latter shall bear him harmless in the event of any damage taking place. In other words, he directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim arising from damage to the adjoining property. He is, therefore, not in the position of a man who has simply authorized and contracted for the execution of a work from which, if executed with due care, no injury can arise, and who is, therefore, not to be held responsible if, while the work is going on, injury arises from the negligence of the contractor or his servants." It was also considered that the action was maintainable on the broader ground

already stated in the passage quoted in II., *supra*.

In *Dalton v. Angus* (1881) L. R. 6 App. Cas. 740, 50 L. J. Q. B. N. S. 689, 44 L. T. N. S. 844, 30 Week. Rep. 196, the owner of a house, who was held to have acquired by prescription an easement of lateral support from the soil of the adjoining premises, was allowed to recover damages for injury caused to the house by excavations made in the course of the performance of a contract for the erection of a new building on the servient premises. Lord Blackburn expressed the opinion that, if the state of the evidence in *Bower v. Peate* (1876) L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321, and in *Butler v. Hunter* (1862) 7 Hurlst. & N. 826, 31 L. J. Exch. N. S. 214, 10 Week. Rep. 214, with which it was in conflict, was really such that the facts were not distinguishable, the reasoning in the former case was the more satisfactory. This criticism he repeated in the judgment delivered two years afterwards in *Hughes v. Percival* (1883) L. R. 8 App. Cas. 443, 447, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772, where he remarked, with regard to *Butler v. Hunter*: "I do not know whether the court of exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the court of exchequer I am obliged to differ from them." In the court of appeal (*Angus v. Dalton* [1878] L. R. 4 Q. B. Div. 162) a different conclusion had been arrived at with respect to the question whether the plaintiff had, under the circumstances, acquired an easement of lateral support for his building. But Cotton, L. J., accepted as correct the general doctrine enunciated in Chief Justice Cockburn's judgment in *Bower v. Peate* (1876) L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321, the effect of which he summarized as follows: "Where a defendant has employed a contractor to do work which in its nature is dangerous to a neighboring property, and damage is the result of the work done, the employer is liable though he has employed a competent contractor and given him directions to take precautions in executing the work." Brett, L. J., did not express any specific opinion on the point, as it was not material in the view which he took of the case.

In *Shea v. River Bridge & K. Drainage Board* (1880) Ir. L. R. 6 C. L. 179, O'Brien, J., had anticipated the above-mentioned criticism of Lord Blackburn upon *Butler v. Hunter* (1862) 7 Hurlst. & N. 826, 31 L. J. Exch. N. S. 214, 10 Week. Rep. 214.

A few years before the decision in *Dalton v. Angus* (1881) L. R. 6 App. Cas. 740, 50 L. J. Q. B. N. S. 689, 44 L. T. N. S. 844, 30 Week. Rep. 196, had been rendered, the Virginia court of appeals had arrived at precisely the same conclusion with reference to a case which involved essentially similar circumstances. No cases were cited. *Stevenson v. Wallace* (1876) 27 Gratt. 77.

The decision in *Dalton v. Angus* was followed very soon afterwards in a case where a contractor, to whom had been intrusted the work of rebuilding a tenement in which a prescriptive easement of lateral support had been acquired by the owner of the adjoining tenement, executed the work so negligently as to cause the subsidence of an arch in the vault of the latter tenement and a bulging of the walls of the 65 L. R. A.

vault. *Lemaitre v. Davis* (1881) L. R. 19 Ch. Div. 281, 51 L. J. Ch. N. S. 173, 46 L. T. N. S. 407, 30 Week. Rep. 360, 46 J. P. 324. The court said: "The defendant, Davis, doing the works with the assistance of a contractor was doing his own works, and it was his duty to see that the works were properly done, and that certain precautions were taken, either by himself or his agent, by shoring, to prevent any injury to his neighbor's vault. Such precautions were not taken. The defendant, Davis, cannot shift the responsibility from himself by saying that he employed a contractor, and that it was his wrongful act."

In *Brown v. Werner* (1873) 40 Md. 15, it was assumed by the court in its argument that a house owner is liable to his neighbors for the damage caused by the sinking of a party wall, in consequence of the negligence of a contractor in not underpinning it properly.

In *Bonaparte v. Wiseman* (1899) 89 Md. 12, 44 L. R. A. 482, 42 Atl. 918, the defendant had asked that the jury should be instructed to the effect that he was not liable for the injury to the plaintiff's house by the excavation on his lots, because the work was done by an independent contractor. This request was held to have been properly denied, the rule applicable to the circumstances being thus announced by the court: "One who causes an excavation to be made on his own lot of ground, although by an independent contractor, is liable for injury thereby caused to the house of an adjoining lot owner when such injury might reasonably have been anticipated as a probable consequence of the excavation, and when no notice has been given to the adjoining lot owner to protect his property. The question whether such injury was a probable consequence of the excavation is a question of fact for the jury."

In *Chicago v. Norton Milling Co.* (1900) 97 Ill. App. 631, Affirmed in (1902) 196 Ill. 580, 63 N. E. 1043, the employer was held liable for so excavating for the abutment of a bridge that the plaintiff's building settled.

The above-cited decisions outweighed the authority of one in which it was laid down that a landed proprietor is not liable for injuries to a house on an adjacent lot, caused by excavations for building purposes on his own lot, when done by a skilled contractor, to whom the job had been let (*Myer v. Hobbs* [1876] 57 Ala. 175, 29 Am. Rep. 719), and of another in which it was held that the work of excavating a foundation for a house was not "in its nature dangerous" to adjacent property in such a sense as to render the employer liable for the negligence of a contractor engaged to do such work (*Crenshaw v. Ullman* [1893] 113 Mo. 633, 20 S. W. 1077).

In a case where the plaintiff claimed damages from his landlord for injuries caused to his goods by the collapse of the leased building, the accident being due to the negligent manner in which a contractor had made an excavation for a new party wall, *Seymour, J.*, reasoned as follows: "If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual peril, I ought, I think, to be responsible upon the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. The case now before me could not, however, I think, come under this head. The peril, whatever it was, was mainly to the defendants' own tenement, and cannot be treated, notwithstanding the unfortunate event, as

one at all imminent to the plaintiffs." *Lawrence v. Shipman* (1873) 39 Conn. 586.

It is submitted, however, that the circumstance thus emphasized is not adequate to serve as a differentiating element. If the work involved imminent danger to the plaintiff's property, it is hard to see why the fact that the defendant's own property was also endangered should exclude him from the benefits of the rule now under discussion.

The fact that a house owner employs an independent contractor to make an excavation for his cellar does not exempt such owner from the duty of preserving from injury "any party or other wall in adjoining land," as is prescribed by chap. 6, N. Y. Laws 1855. The contractee is the person "causing the excavation to be made," within the meaning of that statute. *Dorrity v. Rapp* (1878) 72 N. Y. 307, *Affirming* (1877) 11 Hun, 374.

The liability imputed is in no degree qualified by the fact that the owner of the injured tenement has licensed the contractor's employer to carry out the operations by means of which it is proposed to protect that tenement while the work which creates the danger is in progress. Such a license is presumed to have been granted upon an implied condition that the licensee will see that the operations authorized are executed in a skilful and careful manner. *Waller v. Lasher* (1890) 37 Ill. App. 609 (underpinning of party wall was so negligently done that it settled).

c. Injury to adjoining building through negligent execution of work connected with party wall.

Where one of two adjacent houses was rebuilt upon a plan which involved such a use of the party wall by which they were separated that the safety of the other house depended upon its being kept intact, and a certain portion of the work was executed so negligently as to drag down the wall and with it the other house, the plaintiff was allowed to recover. *Hughes v. Percival* (1883) L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772, *Affirming* (1882; C. A.) L. R. 9 Q. B. Div. 441. There the defendant, whose house was, on one side, adjacent to that of the plaintiff, and, on the other, to that of a man named Barron, entered into a contract for the demolition of his house, and its reconstruction on a plan which required the tying together of the new building and the party wall, the obvious consequence of such an arrangement being that, if the defendant's house fell, the plaintiff's would inevitably be damaged. A servant of the contractor, while fixing a staircase, negligently cut into the party wall between the defendant's house and Barron's, the result being the injury in suit. All the members of the court of appeal were agreed that the defendant would have been liable if the contractor's servants had been guilty of negligence while the operation of tying together the houses of the plaintiff and defendant was in progress. *Holker, L. J.*, was of opinion that, when this operation was finished, that part of the work which was essentially hazardous was concluded; and that the absolute duties which the law casts upon an employer who engages a contractor to execute work answering to that description were not predicable as to the work which was the immediate occasion of the injury. With this view *Baggallay* and *Brett*, 65 L. R. A.

L. J., did not agree, and their opinion was upheld by the House of Lords. The following passage from Lord Watson's judgment contains the clearest statement of the rationale of the decision: "The appellant does not deny that many of the operations which he contemplated, and which he had employed a contractor to execute, were such as would necessarily or possibly imperil the stability of the party wall if no precautions were used; nor does he dispute that it was incumbent upon him to see that these operations were safely carried out by the contractor. What he did (by his counsel) allege, and offer to prove before the jury, was that all these hazardous operations had been brought to a safe termination months before the occurrence which resulted in damage to the respondent's house. Now, looking to the terms of the contract and specification, I think it does appear that extensive structural operations fraught with obvious risk to the party wall in question had been carefully and successfully executed; and, if I had been able to come to the conclusion in fact that after these were completed there remained nothing to be done by the contractor which could reasonably be supposed to involve danger to the party wall, I should have been disposed to agree with Lord Justice *Holker*. I do not think that the combination in one contract of operations hazardous and operations in no reasonable sense hazardous can affect the character of these operations, or impose upon the employer legal duties and liabilities to which he would not have been subject had he employed a different contractor for each operation. But I am not satisfied that the fitting-up of a wooden staircase from the basement floor of the appellant's tenement to the cellar below was an operation which could occasion no risk to the party wall." Referring to the plan of reconstruction, Lord Blackburn said: "The defendant had a right so to utilize the party wall, for it was his property as well as the plaintiff's; a stranger would not have had such a right. But I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it; but I think that the duty went as far as to require him to see that reasonable skill and care were exercised in those operations, which involved a use of the party wall exposing it to this risk. If such a duty was cast upon the defendant, he could not get rid of responsibility by delegating the performance of it to a third person." Lord Fitzgerald's views were stated as follows: "The event shows that the danger was not over, and I should have thought that it could not be as long as anything was being done that could affect the stability of either party wall. Lord Justice *Hooker* seems to have been of opinion that, though the operation as a whole was perilous, yet that the peril had ceased though the work was not completed. He says as to the particular portion of the work: 'It seems to me perfectly clear that it was not hazardous work, and the workmen exceeded their duty; they made a mistake.' But is it open to us to divide the work thus into sections and say, 'As to a particular part, taken by itself, it carried with it no special peril, and you, the defendant, are not responsible?' It seems to me that this cannot be done. We would not be justified in thus breaking it into parts, or considering the case as if the putting

in the stairs or the stone steps was the sole work which the defendant was getting done. The conclusion I have reached is, that the defendant had undertaken a work which, as a whole, necessarily carried with it considerable peril to his neighbors. . . . What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbors, or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbors from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another."

The plaintiff is also entitled to recover where a party wall separating two houses is so negligently pulled down that the other house suffers damage.

In *Earl v. Beadleston* (1877) 10 Jones & S. 294, it was conceded that, if the weakening of a party wall between two adjoining houses was a highly probable consequence of pulling down one of them,—that is, if it would follow unless precautions were taken,—the defendant might have been bound to take these precautions, or at least to have given notice to the plaintiff that he might take them. But it was denied that this point was involved in the case, inasmuch as there was no proof as to the probable consequences of taking defendant's building down, and it could not be inferred from the mere fact of a building having its beams in a party wall, that it could not be done without weakening the wall or taking out the ends of the beams in the wall.

In *Fowler v. Saks* (1890) 7 Mackey, 570, 7 L. R. A. 649, it was held that a house owner was liable for injuries inflicted on an adjoining building by the manner in which a contractor for the reconstruction of the party wall did his work. In one part of the opinion the court seems to base its conclusion on the doctrine discussed in this subtitle, as it was laid down that a person who is "under an antecedent obligation to do a thing, or to do it in a particular way," cannot get rid of his responsibility by deputing it to somebody else. But in another place the language used implies that the rationale of the decision is that the stipulated work was "necessarily and *per se* a nuisance." There seems to be a logical confusion here between two distinct conceptions, unless it is meant that the work was a nuisance unless certain precautions were used.

d. Injury to business and goods of occupant of adjoining premises.

Where building operations are so negligently carried on as unnecessarily to damage the business and goods of the occupant of the adjoining premises the plaintiff is entitled to recover. *Cameron v. Fraser* (1881) 9 Sc. Sess. Cas. 4th series, 28, where the damage was caused by the excessive dust, and by breaking into a chimney and throwing soot and rubbish down it. This decision, however, seems to be of somewhat dubious correctness. Circumstances such as those complained of can hardly be regarded as ordinary incidents of building operations in such a sense that an employer is

bound to foresee and take precautions against them.

e. Injury from explosion caused by negligent escape of gas.

The plaintiff is also entitled to recover where gas pipes are so negligently dealt with during the progress of the work of constructing a sewer in a street that the gas escapes into the house of an abutting owner, and causes an explosion. *Hardaker v. Idle District* [1896; C. A.] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196. *Lindley, L. J.*, said: "The council are not bound, in point of law, to do the work themselves, & c., by servants of their own. There is nothing to prevent them from employing a contractor to do their work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly. . . . Their duty in sewerage the street was not performed by constructing a proper sewer. Their duty was, not only to do that, but also to take care not to break any gas pipes which they cut under; this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the district council's duty for them, but did so carelessly, the case is one in which the duty of the district council, so far as the gas pipes were concerned, was not performed at all. . . . It was contended for the district council that, although they might be liable to the owner of the gas pipes, they were not liable to the plaintiff, as they were under no duty to him. But this is not consistent with *Gray v. Pullen* (1864) 5 Beat & S. 970, 34 L. J. Q. B. N. S. 265, 11 L. T. N. S. 569, 13 Week. Rep. 257, nor with *Tarry v. Ashton* (1876) L. R. 1 Q. B. Div. 314, 45 L. J. Q. B. N. S. 260, 34 L. T. N. S. 97, 24 Week. Rep. 581, in neither of which was the defendant under any duty to the plaintiff, except as one of the public." *Smith, L. J.*, said: "Digging under gas pipes in use must necessarily be attended with risk, unless all reasonable precautions are taken to guard against it. If a gas pipe be left unsupported, it is obvious that it may become fractured; and then an escape of gas, with its attendant consequences, will necessarily result. And, indeed, it is obvious, from clauses 14, 45, and 46 of the contract in this case, that risk was apprehended, for those specific provisions were inserted in order to obviate the danger. It was not attempted on behalf of the district council to prove that they had taken any precautions whatever. The sole point taken at the trial on their behalf was, that they had delegated the performance of the works to a contractor, and therefore were not liable; and upon that they asked the learned judge to enter judgment for them, and he did so."

Likewise, he may recover where a similar accident occurs while the operation of laying a line of gas pipes is in progress.

A servant of a construction company having been injured through the negligence of his foreman in giving an order which led to the escape and explosion of gas, the defendant was held liable on the ground that it "authorized a work to be done, which required the propelling of explosive gas through pipes not yet thoroughly cemented and joined together," and that "It cannot escape liability for the consequences of such dangerous work, upon the plea that those engaged in it are the servants of a construction company." *Chicago Economic Fuel Gas Co. v. Myers* (1897) 168 Ill. 139, 48 N. E. 66.

f. Injury resulting from flooding of lands through negligent drainage operations.

The principal employer is also liable where lands are flooded as a result of the negligent manner in which the operations undertaken for the drainage of a district are carried on.

In *Shea v. River Bride & K. Drainage Board* (1880) Ir. L. R. 6 C. L. 179, a drainage board constituted under the drainage act of 1863 employed a contractor to carry out drainage works, consisting of the deepening of a river and the construction of a new bridge. In the execution of these works the contractor erected a temporary dam across the river, and excavated certain loop drains, for the purpose of carrying off the water penned back by the dam. These drains being of insufficient dimensions to contain the water which came down the river during the ensuing wet season, the plaintiff's land was overflowed. From the evidence set out in the special case submitted by counsel it appeared that, although the erection of the dam was not mentioned or referred to in the articles, specifications, or plans, and was not a part of the work contracted for, such erection was absolutely necessary for the proper execution of the works which the contractor was expressly employed to execute, and that, at the time of the signing of the contract, the engineer who acted for the board was aware that it would be necessary to erect the dam, and, consequently, that it would also be necessary to make loop drains or put a proper sluice gate in the dam. Under these circumstances, the board was held liable for the damage caused by the overflow from the drains. O'Brien, J., based his conclusion upon the ground that the erection of the dam was an illegal act, as it interfered with the water rights of the riparian owners and other parties, and that, although it was not one of the works which the contractor had agreed to execute, it was a work which was necessary to be done, in order to enable the contractor to do what he had specifically agreed to do. (See note to *Thomas v. Harrington*, ante, 742, on *Liability of employer for acts of independent contractor where injury is direct result of the work contracted for*, for other cases involving this principle.) *Allen v. Hayward* (1845) 7 Q. B. 960, 4 Eng. Ry. & C. Cas. 104, 15 L. J. Q. B. N. S. 99, 10 Jur. 92, was relied upon by defendant's counsel, but distinguished on the grounds, that the work during which the negligence complained of had occurred was not illegal, and that the decision was based on the fact that the bank which failed was part of the works which was specified in the contract, and which the 65 L. R. A.

contractor had expressly covenanted to execute in a substantial and workmanlike manner to the satisfaction of the commissioners' surveyor, whereas in the case before the court there was no reference to the drains in the contract, and the contractor's covenant for the due execution of the works was confined to the works expressly specified. *Fitzgerald, J.*, agreed in this conclusion and in the reasons assigned for it, and also added a special reason for his concurrence, viz., that the powers conferred by the drainage act were such as required great care in their application, and that, in view of the nature of the works to be executed, the failure of the board to use more than ordinary care and precaution would obviously cause great injuries to owners and occupiers, either within or without the drainage district. He was of opinion that a drainage board could not get rid of responsibility to those within the district by simply transferring their powers and the execution of the works to a contractor. They might employ a contractor; but, if they did, they were bound to see that every reasonable precaution should be taken to prevent injury arising to the local proprietors by reason of the execution of the drainage works, to be done, which, though of a critical character, could have been carried out safely by adopting a simple and reasonable precaution. The board intrusted the actual execution of the work to a contractor; but imposed no obligation on him to take any precaution to guard against the injurious results likely to ensue.

g. Injury resulting from allowing materials dredged from water to escape onto adjoining land.

An owner of shore land, who contracts with another to dredge in front of it, and deposit the dredging on the rear, without providing means of preventing it from sliding onto the land of an adjacent owner, is as much a trespasser as the contractor, where the deposit spreads onto the adjacent land. *Bralsted v. Brooklyn & R. B. R. Co.* (1899) 46 App. Div. 204, 61 N. Y. Supp. 674 (bulkhead was so constructed that it allowed the mud deposited against it to slip through).

h. Injury resulting from negligent demolition of fire ruins.

In *Covington & C. Bridge Co. v. Steinbrock* (1899) 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618, where the contractor pulled down one of the walls so negligently that it fell outward on the property of the plaintiff the employer was held liable. The decision was based upon the ground that the injury resulted from the negligent manner in which work which "necessarily involved great danger to others unless great care was used" had been executed, and that the accident should have been anticipated as a probable consequence, in case due care was not observed. See, however, in subd. VII. c, 5, of note to *Sallotte v. King Bridge Co.*, ante, 620, on *General rule as to absence of liability of employer for torts of independent contractor*, a case which conflicts with this decision.

i. Injury resulting from allowing fire to escape.

In *Black v. Christchurch Finance Co.* [1894] A. C. 48, 63 L. J. P. C. N. S. 32, 6 Reports, 394,

70 L. T. N. S. 77, 50 J. P. 332, *Reversing* (1891) 10 New Zealand L. R. 238, the defendants were held liable, where the ground of the plaintiff's claim was that the defendants lighted or caused or procured the fire to be lighted on their own land in a negligent and improper manner, and wrongfully and negligently permitted the fire to spread to the lands of the plaintiff, with the result that the injury complained of was done to the plaintiff's growing crops of grass seed, and fences and firewood. In delivering the judgment of the privy council, Lord Shand said: "It has not been disputed that, if Nyman, in what he did, was acting under the defendants' contract by which the burning of the bush had been let or contracted for, the defendants must be responsible for the consequences. The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbor's property. (*Sic utere tuo ut alienum non lædas.*) And if he authorizes another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed; otherwise he will be responsible for the consequences. See *Hughes v. Percival* (1883) L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772, and authorities there cited [*supra*, VII. c]. Cases may indeed occur in which no precautions could be adopted which could reasonably be expected to avert the danger, of which the present appears to be a pretty clear instance, for it is scarcely conceivable that when once the fire was lit, not at a suitable or favorable time, but with the wind blowing as it was any means which could be suggested would have saved the consequences which occurred. In any view, no preventive means of any kind were adopted; and there can be no doubt as to the liability of the defendants if they are responsible for Nyman's act."

In *Cameron v. Oberlin* (1897) 19 Ind. App. 142, 48 N. E. 356, a landowner, who employed a contractor to burn up certain brush and rubbish, was held liable for injuries caused by the spread of the fire to a neighbor's premises; the ground of the decision being that, as the materials to be burned were in direct contact with similar materials on his neighbor's premises, and he had arranged to have the work done after a long drought, while the materials were in a highly inflammable condition, the injury was a natural and probable consequence of the performance of the work in the time and manner agreed upon.

A municipal council which contracted with a person for the destruction of dead animals by burning in a paddock belonging to the council, the work being highly dangerous at the time when the contract was made, but susceptible of being safely performed if certain precautions were observed, was held responsible for injuries caused to the plaintiff's property as a result of the contractor's failure to observe those precautions. *Hannan v. Shepparton* (1892; Vict.) 14 Australian Law Times, 83.

j. Injury resulting from blasting operations.

In Connecticut the doctrine laid down is, that the use of dynamite in the "operation of blast-

ing out an excavation for a sewer is intrinsically dangerous" as a matter of law, but that the question whether under all facts in the case, the work contracted to be done for the construction of the particular sewer under discussion demanded, in its natural, ordinary, and reasonable execution, the use of such intrinsically dangerous agency and means as would have obviously exposed the plaintiff's property to probable injury therefrom, is for the jury to determine. It was said that, for an injury inflicted upon property by the manner in which such an operation is conducted, the sufferer is entitled to recover, not on the ground that it is necessarily injurious to his property, but on the ground that, although it may be performed without causing any injury, it exposes the property to probable injury or unusual risk which the employer is, at his peril, bound to avert, so far as he does so by the exercise of reasonable care. Accordingly, an instruction excusing the defendant from liability, provided the work could be done by ordinary means of performing such work without necessarily injuring the plaintiff's property, was held to be inappropriate to the facts of the case. *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 526, 28 Atl. 32.

In Massachusetts a plaintiff has been held entitled to recover damages for an injury to his property caused by the blasting of rocks on the adjoining premises of the defendant. *Wetherbee v. Partridge* (1900) 175 Mass. 185, 78 Am. St. Rep. 486, 55 N. E. 894.

For the purposes of the decision, it was assumed that the contract contemplated that blasting would be done, and that the place where it was done was within 3 or 4 feet of the line between the plaintiffs and the defendant, and about 8 or 9 feet from the plaintiffs' house. "Under such circumstances," said Holmes, Ch. J., "it was plain that the performance of the contract would bring to pass the wrongful consequences of which the plaintiffs complain, unless it was guarded against; and, if the principle recognized in *Woodman v. Metropolitan R. Co.* (1889) 149 Mass. 335, 4 L. R. A. 213, 14 Am. St. Rep. 427, 21 N. E. 482, applies, the defendant was bound to see that due care was used to prevent harm. We are of opinion that the principle does apply. In some cases of blasting under an independent contract we might go no further than to hold that there was a question for the jury whether the danger was so great as to make the defendant liable. But in the case at bar the danger was so obvious that only one conclusion was possible, and the defendant did not ask to go to the jury upon this point. What he wanted was to have a verdict directed in his favor. Cases sustaining the conclusion to which we have come are *Joliet v. Harwood* (1877) 86 Ill. 110, 29 Am. Rep. 17 [see subd. VI., *supra*]; *James v. McMinimy* (1892) 93 Ky. 471, 40 Am. St. Rep. 200, 20 S. W. 435; and *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32. There are some other cases in which the subject has been approached solely from the point of view of master and servant, although not without dissent. These decisions we are not prepared to follow. *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267; *Tibbetts v. Knox & L. R. Co.* (1873) 62 Me. 437; *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404. Compare *Stone v. Cheshire R. Corp.* (1849) 19 N. H.

427, 51 Am. Dec. 192; Wright v. Holbrook (1872) 52 N. H. 120, 13 Am. Rep. 12."

The antagonistic cases here cited, and others to the same effect, are cited in subd. VII., b, 9, of note to *Sallotte v. King Bridge Co. ante*, 620, on *General rule as to absence of liability of employer for torts of independent contractor*.

VIII. *Liability where work is dangerous to persons invited onto defendant's premises.*

The duty of a landowner is to take reasonable care to keep his premises in such a state that those whom he invites to come thereon shall not be unduly exposed to danger. *Blackburn, J., in Welfare v. London, B. & S. C. R. Co.* (1869) L. R. 4 Q. B. 693, 38 L. J. Q. B. N. S. 241, 20 L. T. N. S. 743, 17 Week. Rep. 1065.

This duty being absolute and nondelegable, he cannot escape liability for an injury occasioned by its nonperformance by showing that the immediate cause of the injury was the existence of a danger created by the fault of an independent contractor. The mere fact that he negligently failed to guard against it is sufficient to render him responsible. *Samuelson v. Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499, where it is pointed out that *Pickard v. Smith* (1861) 10 C. B. N. S. 470, 4 L. T. N. S. 470, which has been already discussed under subd. VI., c, *supra*, may be regarded as an illustration of this doctrine.

In *Welfare v. London, B. & S. C. R. Co.* (1869) L. R. 4 Q. B. 693, 38 L. J. Q. B. N. S. 241, 20 L. T. N. S. 743, 17 Week. Rep. 1065, where a railway passenger at a station was injured by the fall of a heavy plank from the roof of a station which was being repaired by a mechanic, the plaintiff's counsel argued that the defendant should be held liable under this doctrine. This contention did not prevail, for the reason that there was deemed to be no evidence to show that the company knew it was exposing the persons coming on its premises to undue danger.

A street railway company was liable for an injury received by a spectator at an exhibition of marksmanship given at a pleasure resort owned and advertised by it, although the performance was provided and conducted by an independent contractor, where a small fragment of a bullet or other metallic substance, which flew from the impact when the bullet hit the butt, struck the plaintiff in the eye. *Thompson v. Lowell, L. & H. Street R. Co.* (1898) 170 Mass. 577, 40 L. R. A. 345, 64 Am. St. Rep. 323, 49 N. E. 913.

Contrast with this ruling *Knottnerus v. North Park Street R. Co.* (1892) 93 Mich. 348, 17 L. R. A. 726, 53 N. W. 529, in which, on the ground that the operations contemplated were not such as necessarily involved injury to visitors, it was held that the owner of a pleasure resort and street railway leading to it did not, by leasing the privilege of operating a switch-back railway at the resort, and advertising it as one of the attractions of the place, become an insurer against accidents to persons patronizing the leasee, or become liable for his carelessness.

Where a party who contracted with a school district for drilling a well in the schoolhouse grounds left his drilling machine unlocked and unguarded, and in his absence one of the children was injured while playing with it, it was held that the employer could not be held liable on the ground that the work was dangerous in 65 L. R. A.

itself, and that he failed to take such precautions as were appropriate under the circumstances. *Wood v. Independent School District* (1876) 44 Iowa, 30.

In other words, "when the owner of premises which are under his control employs an independent contractor to do work upon them which, from its nature, is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, the owner is not relieved, by reason of the contract, from the obligation of seeing that due care is used to protect such persons." *Curtis v. Kiley* (1891) 153 Mass. 123, 26 N. E. 421 (visitor to one of defendant's tenants was injured by falling into a trench dug near the passageway, by a contractor employed to do certain work on the premises).

This decision was followed in a case in which a street railway company which advertised a balloon ascension at a park owned and controlled by it was held liable for the death of a child at such ascension, caused by the fall of a pole to which the balloon was attached, although the person making the ascent was employed as an independent contractor; the evidence being that proper notice of the fact that it would fall was not given. *Richmond & M. R. Co. v. Moore* (1897) 94 Va. 493, 37 L. R. A. 258, 27 S. E. 70.

IX. *Liability where work is dangerous to tenants.*

A house owner, who undertakes to make repairs in the demised premises, is bound to adopt such precautionary measures as will protect the persons and property of his tenants and their subtenants in the building from any injury which will naturally result from the character of the work so undertaken. The employment of a contractor to execute the work will not relieve him from his responsibility for the proper performance of this duty. *Wilber v. Follansbee* (1897) 97 Wis. 577, 72 N. W. 741, 73 N. W. 559 (tenant stumbled over rubbish left in the hall, and fell down a staircase); *Sulzbacher v. Dickle* (1876) 6 Daly, 469 (damage done to the goods of a tenant by rain which found its way into the building while a new roof was being put on); *Malony v. Brady* (1891) 38 N. Y. S. R. 803, 14 N. Y. Supp. 794; *Second Appeal*, (1892) 45 N. Y. S. R. 864, 18 N. Y. Sup. 757 (similar occurrence); *Wertheimer v. Saunders* (1897) 95 Wis. 573, 37 L. R. A. 146, 70 N. W. 824 (similar occurrence); *Meyers v. Easton* (1878) 4 Viet. L. Rep. (L.) 283 (similar occurrence).

With these rulings may be contrasted one to the effect that a landlord is not liable, under an implied covenant of quiet enjoyment, for injuries to the personal property of a tenant, caused by the tortious acts of the servants of an independent contractor for a one-story extension to the building, while using a part of the demised premises as a means of access to their work. *Hyde v. Wilmore* (1895; C. P.) 14 Misc. 340, 70 N. Y. S. R. 456, 35 N. Y. Supp. 681.

X. *Liability where work is dangerous to owners of vessels navigating rivers.*

A person whose vessel has been sunk on the fairway of a navigable river is bound to use reasonable care to warn other vessels of the position of the wreck and cannot escape the responsibility attaching to him by delegating

the discharge of that duty to a contractor. *The Snark* [1899] Prob. 74, 80 L. T. N. S. 25, 47 Week. Rep. 398, 68 L. J. Prob. N. S. 22, 8 Asp. Mar. L. Cas. 483. Affirmed by the court of appeal in [1900] Prob. 105, 69 L. J. Prob. N. S. 41, 82 L. T. N. S. 42, 48 Week. Rep. 279, 9 Asp. Mar. L. Cas. 50. In this case a barge belonging to the defendants, without negligence on their part, was sunk in the fairway of the River Thames. They employed an underwaterman to conduct the salvage operations necessary to raise her, and, for that purpose, put him in possession and control; but, owing to the guard vessel placed by him, with lights upon it, to mark the submerged barge having been negligently allowed to get out of position, the plaintiff's steamship, coming up the river, without negligence, ran upon the wreck and sustained damage.

In the lower court Gorell Barnes, J., stated his conclusions in the following language: "If the owner transfer the wreck to some other person, who takes from him the possession and control thereof, that person takes over the duties and liabilities of the owner. *White v. Crisp* (1854) 10 Exch. 312, 2 C. L. Rep. 1215, 28 L. J. Exch. N. S. 317, 2 Week. Rep. 624. The owner's position is correctly stated in *Addison, Torts*, 7th ed. p. 622, and in *Garrett, Nuisances*, 2d ed. p. 93. If, however, the owner, having the possession and control, in the sense above stated, merely employs another person to raise and remove the wreck for him, there is no transfer of the wreck; and, although the person employed may be placed in actual physical custody of the wreck, the owner does not, in my opinion, discharge himself from the duty towards the public, which rested upon him, of using reasonable care to warn other vessels of the position of the wreck which remains his property. Even if the other person be expressly employed on the terms that he shall light the wreck properly during the salvage operations, he is employed by the owner to discharge for the owner a duty which rested upon the latter. The owner does not get rid of his liability by employing someone to perform it for him. The case is not precisely the same, but presents analogy to the cases of which *Hardaker v. Idle District* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196, is one. . . . The argument forcibly addressed to me by counsel for the defendants, that there is no difference between the case of an owner of a wreck sunk in and obstructing a navigable river and that of an owner who employs a contractor to navigate her in ordinary circumstances from one place to another, as regards his duty to the public, appears to me to be fallacious. In the one case the wreck is a dangerous nuisance, and the owner's rights and liabilities are such as I have already stated. In the other case there is only an employment by the owner of a contractor to do work about which there is no danger if properly performed, and not an employment to discharge a duty which rests upon the owner. See the judgment in *Hardaker v. Idle District* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196."

The court of appeal rejected the special contention of the defendant's counsel, *viz.*, that the doctrine discussed in the present note, although it might apply to matters arising on land, did not apply to matters arising on water, or mat-

ters arising, as in the case under review, with regard to a sunken barge in the River Thames.

The defendants were also held to be liable for an additional reason, *viz.*, that they were under an obligation to protect other vessels from receiving injury from the sunken barge, as the employment of the contractor did not amount to an abandonment or transfer of the possession, management, and control of the wreck. On this part of the case the judgment of the privy council, delivered by Sir Francis Jeune in *The Utopia* [1898] A. C. 492, 62 L. J. P. C. N. S. 118, 1 Reports, 394, 70 L. T. N. S. 47, 7 Asp. Mar. L. Cas. 408, and referred to by Gorell Barnes, J., in his judgment, was regarded as controlling. C. B. L.

Albert L. LANCASTER, *Piff. in Err.*,
v.

Harry HAMBURGER.

(70 Ohio St. 156.)

***A patron of a street railway company incurs no liability to a conductor by reporting to the superintendent of the company such conductor's misconduct while on duty toward a passenger, though in making the report he is prompted by ill will and a desire to secure the conductor's discharge from the service of the company.**

(April 28, 1904.)

ERROR to the General Term of the Superior Court of Cincinnati to review a judgment affirming a judgment of a Trial Term in favor of defendant in an action brought to recover damages for maliciously securing the discharge of plaintiff from his employment. *Affirmed.*

Statement by **Shauck, J.:**

Lancaster brought suit against Hamburger, the substance of the allegations of his petition being that he had for a long time been in the employ of the Cincinnati Street Railway Company in the capacity of a conductor on its Madison avenue line; that at some time prior to December 31, 1898, the defendant, who had conceived a violent dislike to him, and who had repeatedly threatened to procure his discharge from said employment, did, without excuse, cause, or justification, and actuated solely by a malicious desire to injure plaintiff, falsely and maliciously say to the superintendent of said company that plaintiff, while on duty as conductor, had been guilty of misconduct and of violation of the rules of the company, in consequence of which charge

*Headnotes by the COURT.

NOTE.—As to effect of bad motive to make actionable what would otherwise not be, see also, in this series, *Passaic Print Works v. Ely & W. Dry Goods Co.* 62 L. R. A. 673, and *State ex rel. Durner v. Huegin*, 62 L. R. A. 700, and note thereto.

plaintiff was on that day discharged from said employment, to his damage in the sum of \$10,000. The defendant, answering, denied the allegations of malice, and averred that, while he and others were traveling as passengers on the car of said company which was in charge of plaintiff as conductor the plaintiff was guilty of rude and ungentlemanly conduct towards them, which defendant reported to the superintendent of the company, and that the superintendent, after investigating the subject, discharged the plaintiff from the company's service. The bill of exceptions taken upon the trial is as follows:

"The plaintiff, to maintain the issues on his behalf, offered evidence tending to prove that prior to the month of December, 1898, he was employed by the Cincinnati Street Railway Company as conductor; that on or about the 31st of December, 1898, he was discharged; that, with continued service and good behavior, his wages would, had he remained in said employment, have been increased, according to a uniform and regular system of promotion then and thereafter practised by said company and its successor; that he was not able, after his said discharge, though having used diligent and reasonable effort in that behalf, to earn as much as he had earned prior to his discharge; that prior to said discharge, during November and December, 1898, the defendant made complaint two or three times to the superintendent or other officer of said street railway company of the plaintiff, and of his manner of performing his duties as such servant of said company, and represented that he had been guilty of misconduct, impoliteness, or rudeness, and of the violation of some rule of said company while on duty as conductor, and that he did not perform his duties as such servant of said company according to certain of the rules of said company then in force; that, in consequence of said complaints and representations of defendant, the plaintiff was discharged as aforesaid; that said complaints and representations were induced by the dislike and ill feeling of the defendant for the plaintiff, and a desire to cause his discharge, without justification, and were not warranted by the facts; that the defendant said to or in the presence of third persons in November and December, 1898, that he would have the plaintiff discharged, even if it cost him all he was worth; that during said months he threatened and informed the plaintiff that he would have him discharged, and that after said threats and avowal of said purpose the defendant complained of the plaintiff to the superintendent or other officer of said company, with the purpose of causing and procuring his discharge, and did there-

65 L. R. A.

by cause and procure his discharge; that the plaintiff and defendant had two or three disputes during said months of November and December, 1898, in which disputes the defendant had threatened to have the plaintiff discharged as aforesaid, and on one of the occasions a personal encounter, was threatened between the plaintiff and the brother-in-law and friend of the defendant, then in defendant's company; and that the plaintiff did not violate any of the rules of said company then in force in his dealings with the defendant.

"And to maintain the issues on his part, the defendant offered evidence tending to prove that the complaints made by the defendant were made absolutely, entirely, and completely without malice, and in the best of good faith, and were true in every respect and particular; that the plaintiff had repeatedly been guilty of rudeness and impoliteness to the defendant and his wife while on duty as conductor, and that he had, in reference to the defendant and in his presence, violated the rules of said company governing its servants, or some one or more of said rules,—particularly the rule against permitting smoking; that no threats were made at any time by defendant with the purpose of causing the discharge of the plaintiff from the employment of said street railway company, neither to the plaintiff nor to any third person; that the defendant had no ill will against, or dislike of, the plaintiff, but, on the contrary, that he refrained from complaining of the plaintiff on many occasions when the facts would have warranted such complaint; that the discharge of the plaintiff was caused in no respect by the defendant, or by any complaints or representations made by him, but was caused by the plaintiff's own neglect of his duties, and by his disobedience of the rules of the said street railway company; and that the plaintiff had violated certain rules of the company in his relations, as an employee of the company, with the defendant and his wife."

The portion of the charge which is now material is the following instruction, given at the request of the defendant:

"It was the duty of the plaintiff not to conform to any fanciful degree of conduct, nor to observe that degree of conduct which, perhaps, we would like to observe at all times as ideal, but he was obliged to observe such degree of deportment, decorum, politeness, and courtesy as is common among ordinary men in their dealings with one another; and, if he failed to observe such a standard, then he would be guilty of rudeness, and the defendant in the case would have a right to make complaint. If, therefore, he was guilty of failure to enforce the

rules in respect to smoking, or guilty of impertinence, or if, in enforcing the rules of his employers, he did so in such a manner that would intentionally cause defendant to be held up to the ridicule of fellow passengers, then, if the defendant in the case made complaint, it made no difference what his motive was in making the complaint. He had the right to make the complaint, and defendant would be entitled to the verdict."

The jury returned a verdict for the defendant, and, the plaintiff's motion for a new trial having been overruled, judgment followed the verdict. The judgment was affirmed by the superior court at general term.

Messrs. Charles B. Wilby, Charles E. Tenney, and Oliver S. Bryant, for plaintiff in error:

Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, an action there lies in all cases.

Keeble v. Hickeringill, 11 East, 574, 11 Revised Rep. 273, note; *Moran v. Dunphy*, 177 Mass. 485, 52 L. R. A. 115, 83 Am. St. Rep. 289, 59 N. E. 125.

In an action of slander for defaming a person in his avocation defamatory words are actionable *per se* without proving actual damage.

Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303; *Dial v. Holter*, 6 Ohio St. 228.

The right to carry on one's business—to earn one's living—is a right which the law recognizes and protects; and, this being so, anyone who interferes with that right must in some way justify his interference, or he is liable for the damage.

Plant v. Woods, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Earle*, Trade Unions, p. 12; *Keeble v. Hickeringill*, 11 East, 574, note, 11 Revised Rep. 273, note; *Carrington v. Taylor*, 11 East, 571, 2 Campb. 258, 11 Revised Rep. 270; *Lumley v. Gye*, 2 El. & Bl. 216, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432; *Temperton v. Russell* [1893] 1 Q. B. 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 665, 57 J. P. 676; *Quinn v. Leatham* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708; *Mogul S. S. Co. v. McGregor* [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, L. R. 23 Q. B. Div. 598; *Frazier v. Brown*, 12 Ohio St. 294; 8 Harvard Law Rev. 9; *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934; *Lucke v. Clothing Cutters' & T. Assembly*, 65 L. R. A.

No. 7,507, K. of L. 77 Md. 396, 19 L. R. A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Graham v. St. Charles Street R. Co.* 47 La. Ann. 214, 27 L. R. A. 416, 49 Am. St. Rep. 366, 16 So. 806; *Ertz v. Produce Exchange*, 79 Minn. 140, 48 L. R. A. 90, 79 Am. St. Rep. 433, 81 N. W. 737; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Walker v. Cronin*, 107 Mass. 555; *Moran v. Dunphy*, 177 Mass. 485, 52 L. R. A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Blumenthal v. Shaw*, 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954; *Connell v. Stalker*, 20 Misc. 425, 45 N. Y. Supp. 1048; *Curran v. Galen*, 2 Misc. 553, 22 N. Y. Supp. 826; *Doremus v. Hennessy*, 62 Ill. App. 391; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; *Dels v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Robison v. Texas Pine Land Assn.* (Tex. Civ. App.) 40 S. W. 843; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *Lally v. Cantwell*, 30 Mo. App. 524; *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869; *Dannerberg v. Ashley*, 10 Ohio C. C. 558; *Mattison v. Lake Shore & M. S. R. Co.* 3 Ohio N. P. 190; *Moore v. Bricklayers' Union No. 1*, 23 Ohio L. J. 48; 46 Am. Law Reg. 273; 16 Harvard Law Rev. 237.

Messrs. Kelley & Hauck, for defendant in error:

Mere persuasion, unaccompanied by threats, intimidation, or putting in fear, is not an actionable wrong, irrespective of any motives actuating the person to make this request.

Payne v. Western & A. R. Co. 13 Lea, 507, 49 Am. Rep. 666; *Heywood v. Tillson*, 75 Me. 227, 46 Am. Rep. 373; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; *Lally v. Cantwell*, 30 Mo. App. 524; *Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co.* 138 Mo. 439, 36 L. R. A. 804, 60 Am. St. Rep. 560, 40 S. W. 93; 16 Am. & Eng. Enc. Law, p. 1116.

When a person has the legal right to do a certain act, the motive with which it is done is immaterial.

Kelley v. Ohio Oil Co. 57 Ohio St. 327, 39 L. R. A. 705, 63 Am. St. Rep. 721, 49 N. E. 399; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 198, 48 L. R. A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033; *Hamilton, G. & C. Traction Co. v. Parish*, 67 Ohio St. 189, 60 L. R. A. 531, 65 N. E.

1011; *Letts v. Kessler*, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765; *Frazier v. Brown*, 12 Ohio St. 294; 16 Am. & Eng. Enc. Law, 2d ed. p. 1109; 18 Am. & Eng. Enc. Law, 2d ed. p. 87.

If the defendant in this case committed no legal wrong, though his acts resulted in damage to the plaintiff, the law afforded him no remedy.

Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co. 138 Mo. 439, 36 L. R. A. 804, 60 Am. St. Rep. 560, 40 S. W. 93; *Townshend, Slander & Libel*, 4th ed. § 42.

If the complaints were true, there was a legal right irrespective of whether the employment was at will or under a term contract; and the motive which actuated the defendant is only material upon the question of the aggravation of damages.

Cooley, Torts, 690; *Hunt v. Simonds*, 19 Mo. 583; *Anderson v. Public Schools*, 122 Mo. 67, 26 L. R. A. 707, 27 S. W. 610; *Randall v. Hazelton*, 12 Allen, 415; *Bowen v. Matheson*, 14 Allen, 499; *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 599; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; *Jenkins v. Fowler*, 24 Pa. 308; *Boyson v. Thorn*, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492; *Fisher v. Fielding*, 67 Conn. 106, 32 L. R. A. 236, 52 Am. St. Rep. 270, 34 Atl. 714; *Thornton v. Thornton*, 63 N. C. 211; *Chambers v. Baldwin*, 91 Ky. 121, 11 L. R. A. 545, 34 Am. St. Rep. 165, 15 S. W. 57; *Bourlier Bros. v. Macauley*, 91 Ky. 135, 11 L. R. A. 550, 34 Am. St. Rep. 171, 15 S. W. 60; *Rice v. Albee*, 164 Mass. 88, 41 N. E. 122; *May v. Wood*, 172 Mass. 11, 51 N. E. 191.

Shanck, J., delivered the opinion of the court:

In addition to the instruction set out in the foregoing statement of the case, the court gave to the jury a general charge, devoting much time to definitions and details; portions of it suggesting that there must have been some evidence whose tendency is not clearly shown in the bill of exceptions. The evidence not being before us, we are confined to the statement contained in the record with respect to its tendency. Counsel for the plaintiff now insist that the court erred in the general charge when it instructed the jury that no evidence had been offered by the plaintiff that the defendant had solicited his discharge. In support of the criticism, it is said that such solicitation might properly be inferred from the evidence tending to show that the defendant bore ill will toward the plaintiff, and that, prompted thereby, he had threatened to have 65 L. R. A.

him discharged, and had made complaints of his misconduct. The force of this criticism seems to be completely averted by the suggestion that the court might have added that the petition did not charge that the defendant had made such solicitation.

Not being willing to give apparent approval to all that was said in the general charge, and not desiring to consider questions whose solution would not aid in determining the rights of the parties, we observe that the portion of the charge which related to the measure of damages has been rendered immaterial by the finding of the jury that the plaintiff was not entitled to recover at all, and that, with respect to his right to recover, the general charge contained nothing to detract from the force of the instruction requested and given,—that, if the plaintiff was guilty of the misconduct charged in the complaints made by the defendant to the superintendent of the company, there could be no recovery, whatever motive prompted the defendant to make the complaints. The rights of the parties depend, therefore, upon the correctness of that instruction.

The ground of the present controversy, though lying near, is not within that covered by *Allen v. Flood* [1898] A. C. 1-81, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258. That case was reported at such great length that it is difficult to rescue the principles of the decision from the ocean of words in which they are submerged. But it is obvious that, in the opinions favorable to the right to recover, much weight was given to the fact that Allen, having control of so large a number of the workmen of the employers that he was able, by withdrawing them from their service, to occasion serious injury to their business, used that power to coerce the employers to discharge the complainants, with whose service they were entirely satisfied. In that case a recovery was denied, and, following counsel for the plaintiff in an examination of the dissenting opinions, it seems quite clear that they proceeded upon considerations which are not presented here. Although a civil liability was held to have been incurred in the somewhat similar case of *Quinn v. Leatham* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708, where *Allen v. Flood* was much discussed, it was because of "a combination of two or more, without justification or excuse, to injure a man in his trade." Neither of these cases, nor any of the others cited by counsel for the plaintiff, can have the effect to disturb the rule generally recognized and well established in this state,—that it is immaterial by what motive one is prompted in the exercise of a clear legal right or the performance of a

duty. *Frazier v. Brown*, 12 Ohio St. 294; *Letts v. Kessler*, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765; *Kelley v. Ohio Oil Co.* 57 Ohio St. 327, 39 L. R. A. 765, 63 Am. St. Rep. 721, 49 N. E. 399. Certainly the motive which prompts one to the commission of a wrongful act may be very material, for it may determine whether the injured party may recover exemplary or only compensatory damages. The record does not admit a doubt that the defendant exercised a legal right, if, indeed, he did not perform a duty, in making complaint to the superintendent of the company of the plaintiff's misconduct. The evidence tended to show, and the instruction required the jury to find, that the plaintiff had been guilty of the misconduct of which complaint was made. The defendant and his wife were patrons of the street railway company, a common carrier of passengers, and entitled, in common with the public generally, to civil treatment while aboard its cars, and to the benefit of the rules designed for the safety and comfort of passengers. The plaintiff was the representative of the company who came in contact with its patrons, and through whom it discharged some of the most important duties it owed the public. Since it would not be practicable for the company to institute and maintain such supervision of the conduct of all its conductors as would secure the full performance of all their duties toward passengers, the patrons of the road should be encouraged to report their misconduct fairly and justly; nor should a patron of the company be required, by the consciousness of ill will toward the offender, to abstain from making a truthful report of such misconduct. Seeing that such misconduct naturally arouses resentment in all who observe it, it would result from the contrary rule that a conductor's immunity from complaint would be in proportion to the offensiveness of his misconduct.

To prevent a possible misunderstanding of the point decided, it seems proper to say that we have no occasion to determine whether the instruction was as favorable to the defendant as it should have been. It required, as a condition to a verdict for the defendant, that the evidence should show that plaintiff had been actually guilty of the misconduct charged against him. It did not permit the defense to be made out by evidence that the defendant had made the complaints in the belief that they were true, and with reasonable grounds for such belief. Another question might be presented if the instruction had been requested by the plaintiff, and it had been followed by verdict and judgment in his favor. Restricting ourselves to the requirements of the case, we conclude 65 L. R. A.

that the instruction was not affected by any error prejudicial to the plaintiff.

Judgment affirmed.

Spear, Ch. J., and Davis, Price, Crow, and Summers, JJ., concur.

MAHONING VALLEY RAILWAY COMPANY, Plff. in Err.,

v.

Vincenzo DE PASCALE.

(70 Ohio St. 179.)

- *1. Words of provocation may be considered in mitigation of punitive, but not compensatory, damages.
2. In an action for personal tort, the compensatory damages which may be recovered from the principal for the wrongful and unlawful act of its agent are not subject to mitigation, nor is the liability of the principal for such damages defeated, by proof that the act which caused the injury was provoked or induced by abusive language used by the plaintiff to such agent.
3. Where, in such action, the jury, by the direction and instruction of the court, is restricted to the allowance of compensatory damages only, it is not error to refuse to charge "that, in determining the question of compensatory damages to the plaintiff, they may consider, in mitigation thereof, the provocation brought about by the insulting words used by the plaintiff to defendant, if they find such words were used."

(*Davis, J., dissents.*)

(June 7, 1904.)

ERROR to the Circuit Court for Mahoning County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for alleged wrongful ejection of plaintiff from defendant's car. *Affirmed.*

The facts are stated in the opinion.

Messrs. Arrel, MoVey, & Tayler, for plaintiff in error:

Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff, by giving him less than that measure.

2 Sedgw. Damages, 7th ed. 521; 1 Sutherland, Damages, 229; 2 Greenl. Ev. 8th ed. ¶ 93; *Mogle v. Black*, 5 Ohio C. C. 51;

*Headnotes by the Court.

NOTE.—For other cases in this series as to effect of words of provocation in mitigation of damages for personal tort, see *Goldsmith v. Joy*, 4 L. R. A. 500; *Willey v. Carpenter*, 15 L. R. A. 853; *Baltimore & O. R. Co. v. Barker*, 26 L. R. A. 220 (abuse by passenger to excite assault by conductor); and *Berkner v. Dannenberg*, 60 L. R. A. 559.

Barholt v. Wright, 45 Ohio St. 177, 4 Am. St. Rep. 536, 12 N. E. 185; *Fraser v. Berkeley*, 7 Car. & P. 621; *Perkins v. Vaughan*, 5 Scott, N. R. 881; *Burke v. Melvin*, 45 Conn. 243; *Bartram v. Stone*, 31 Conn. 159; *Robison v. Rupert*, 23 Pa. 523; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *Mowry v. Smith*, 9 Allen, 67; *Tyson v. Booth*, 100 Mass. 259; *Bonino v. Caledonio*, 144 Mass. 299, 11 N. E. 98; *Aldrich v. Harvey*, 50 Vt. 162, 28 Am. Rep. 501; *Peavy v. Georgia R. & Bkg. Co.* 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70; *Harrison v. Fink*, 42 Fed. 787.

The wrongful act of the servant could not be regarded as authorized by the master.

Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398, 45 N. E. 634; *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 46 L. R. A. 314, 71 Am. St. Rep. 729, 54 N. E. 471.

Mr. Ensign N. Brown, for defendant in error:

A master is liable in damages for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service.

Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373.

Even though the acts be malicious.

Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634; *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 46 L. R. A. 314, 71 Am. St. Rep. 729, 54 N. E. 471.

A conductor has charge of his train or car, and one of his duties is to maintain order on the train or car, and one of his rights is that of ejecting passengers therefrom who violate any of the rules of the company, or are disorderly.

Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601; Ohio Rev. Stat. § 3434.

If the defendant in error had been guilty of using the language complained of, it clearly was within the scope of the conductor's employment to eject him from the car.

Ohio Rev. Stat. § 3436; *Railway Co. v. Valleley*, 32 Ohio St. 350, 30 Am. Rep. 601.

In removing passengers from the car he must do so with prudence, and not wantonly or so as to inflict unnecessary injury.

Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601; *Cincinnati, S. & C. R. Co. v. Skillman*, 39 Ohio St. 444.

If unnecessary force is used by the servant of the railroad company in ejecting a passenger, even though such ejection be lawful in itself, the company is liable in damages for injuries sustained.

Coleman v. New York & N. H. R. Co. 106 Mass. 160; *Toledo & O. C. R. Co. v. Marsh*, 17 Ohio C. C. 379; *Cincinnati, H. & D. R.* 65 L. R. A.

Co. v. Boyer, 18 Ohio C. C. 327; *Railway Co. v. Boucsein*, 66 Ohio St. 682, 65 N. E. 1132.

Insulting language used by a person physically injured, immediately before the receipt of such injuries, to one who causes such physical injury, cannot be considered by a jury in mitigation of compensatory or actual damages.

Mogle v. Black, 5 Ohio C. C. 51; *St. Louis S. W. R. Co. v. Berger*, 64 Ark. 613, 39 L. R. A. 784, 44 S. W. 809; *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. 501; *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468; *Donnelly v. Harrie*, 41 Ill. 126; *Ogden v. Claycomb*, 52 Ill. 365; *Gizler v. Witzel*, 82 Ill. 322; *Norris v. Casel*, 90 Ind. 143; *Johnson v. McKee*, 27 Mich. 471; *Jacobs v. Hoover*, 9 Minn. 204, Gil. 189; *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Goldsmith v. Joy*, 61 Vt. 488, 4 L. R. A. 500, 15 Am. St. Rep. 923, 17 Atl. 1010; *Willey v. Carpenter*, 64 Vt. 212, 15 L. R. A. 853, 23 Atl. 630; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L. R. A. 220, 45 Am. St. Rep. 319, 30 Atl. 560.

Crew, J., delivered the opinion of the court:

This was an action by the defendant in error, Vincenzo De Pascale, to recover damages for personal injuries alleged to have been sustained by him in consequence of his having been wrongfully and forcibly ejected from a car of the plaintiff in error while traveling thereon as a passenger. Upon the trial of this cause to a jury, a verdict was returned for De Pascale for \$450. A motion for new trial was overruled, and judgment entered on said verdict, by the court of common pleas. This judgment was affirmed by the circuit court.

On the trial of the cause in the court of common pleas, Charles Lyttle, who was the conductor on duty and in charge of the car from which De Pascale was ejected, was called as a witness on behalf of the railway company, and testified as follows:

Direct examination:

Q. Mr. Lyttle, what is your full name?

A. C. L. Lyttle.

Q. What is your occupation?

A. Street-carring.

Q. Conductor upon the street car last July?

A. I was.

Q. Were you acting as conductor on the morning of July 8th?

A. I was.

Q. Did you see this plaintiff, Mr. Pascale, that morning?

A. Yes, sir.

Q. Where did you first see him.

A. Duesing's store.

Q. Where was it?

A. At Duesing's store.

Q. Did he board your car there?

A. Yes, sir.

Q. Tell the jury just what way that was done,—how he got on the car?

A. The car was stopped, and a passenger got off, and I gave the bell a pull to start the car; and Pascale was up along the car, and boarded the car while it was moving. As soon as he got on, he asked me what I started the car for, before he got on. I told him I did not see him; he was not at the place he said he was—and began arguing with me, swore he could break my face, and all such stuff, and finally called me a damned bastard and a — of a b—, and I took him by the coat and threw him off the car.

Q. Did he swear any there?

A. He did.

Q. Were there any ladies on that car?

A. There were ladies on the front of the car.

Q. What did you do to him?

A. Pushed him off the car.

Q. How did you take a hold of him?

A. Took him by, I think, the front of the coat.

Q. And then where did your car go?

A. Passed on; never stopped.

Q. Oh, I guess that is all.

There was some conflict in the evidence as to just what was said by De Pascale to Lyttle. Two witnesses say that the language testified to by Lyttle was used by De Pascale. De Pascale himself denies having used any such language towards Lyttle and in this he is corroborated by the testimony—negative in form—of at least two witnesses who were at the time passengers on said car, and heard the altercation between De Pascale and the conductor Lyttle.

At the conclusion of the evidence, and before argument, counsel for the railway company submitted to the court the following request: "Defendant requests the court to instruct the jury that, in determining the question of compensatory damages to this plaintiff, they may consider in mitigation thereof the provocation brought about by the insulting words used by the plaintiff to defendant, the conductor, if they find such words were used." The court refused to give this instruction, and thereafter, in its general charge, having theretofore withdrawn from the consideration of the jury the question of allowing exemplary damages, instructed the jury, in part, as follows: "If this plaintiff used the words that are claimed here by the witnesses who have testified as to them, in relation to the names he called the conductor, it is no justification of the defendant railway company for any 65 L. R. A.

injury to his person that may have accrued to the plaintiff by reason of being forcibly ejected from a moving car. It may have been a perfectly natural thing on the part of the conductor to have done it, in case these words were used; but, under our law, words of that kind are never a justification, conclusively, as to damages that may result from an assault and battery following. . . . If this man, the plaintiff, used the words attributed to him, on the car, the conductor had the right to do either one of two things,—one, to arrest him and deliver him to the police authorities; or he had the right to eject him from the car. But, in ejecting, he must first stop the car, and then use only the necessary force to remove him. It would not justify him in causing the injury to the plaintiff by removing him therefrom when the car was running, if the effect of that forcible ejection was to so injure him."

To the refusal to charge as requested, and to the charge as given, counsel for the railway company at the time excepted, and now assigns the action of the court in that behalf as error. The theory of the instruction asked by counsel for the railway company is that, in an action for personal tort, words of provocation spoken by the plaintiff should be taken and considered by the jury in mitigation of actual or compensatory damages, as well as in mitigation of exemplary or punitive damages. Whether or not they may properly be so taken and considered, and such effect be given them, is the question here presented by this request to charge. On this proposition the authorities are not in entire harmony. While in perfect accord upon the proposition that mere oral provocation or abusive language is not a defense, and will not of itself justify the offended party in assaulting or in inflicting injury upon the person so offending, there is some conflict and contradiction in the decisions of the courts of last resort on the question whether mere provocative language can have the effect to mitigate or reduce compensatory damages, or whether it is to be limited in its office and effect to the mitigation and reduction of punitive damages in those cases where punitive damages may be properly awarded. We think that the better rule and the clear weight of authority are in favor of the proposition that actual or compensatory damages are not in any case subject to mitigation by proof of mere provocation. The malice of the defendant can never have the effect to increase the damages which a plaintiff may recover for actual pecuniary loss or injury, but such damages are wholly unaffected by either the presence or absence of malice on the part of the defendant. How, then, or upon what principle, can it re-

sonably be held that provocation on the part of the plaintiff, which does not in law amount to a justification, may mitigate such damages? To so hold would, in effect, be to allow such provocation to be used as a defense, and to thus permit by indirection that which could not be done directly. A leading case on this subject is that of *Goldsmith v. Joy*, 61 Vt. 488, 4 L. R. A. 500, 15 Am. St. Rep. 923, 17 Atl. 1010, in which numerous authorities, both English and American, are collected and reviewed. The learned judge who delivered the opinion in that case, in discussing the question whether words of provocation could properly be held to mitigate compensatory damages, says: "If provocative words may mitigate, it follows that they may reduce the damages to a mere nominal sum, and thus practically justify an assault and battery. But why, under this rule, may they not fully justify? If in one case the provocation is so great that the jury may award only nominal damages, why, in another, in which the provocation is far greater, should they not be permitted to acquit the defendant, and thus overturn the well-settled rule of law that words cannot justify an assault. On the other hand, if words cannot justify, they should not mitigate. A defendant should not be heard to say that the plaintiff was first in the wrong, by abusing him with insulting words, and therefore, though he struck and injured the plaintiff he was only partly in the wrong, and should pay only part of the actual damages." The court in this case held that words of provocation would not justify an assault, nor could they be given or considered in mitigation of actual or compensatory damages. To the same effect are the following authorities: *Oslor v. Walton*, 67 N. J. L. 63, 50 Atl. 590; *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L. R. A. 220, 45 Am. St. Rep. 319, 30 Atl. 560; *Wilson v. Young*, 31 Wis. 574; *Mangold v. Oft*, 63 Neb. 397, 88 N. W. 507; *Johnson v. McKee*, 27 Mich. 471; *Donnelly v. Harris*, 41 Ill. 126.

Of the cases cited in the brief of counsel for plaintiff in error which it is claimed hold a contrary doctrine, we need only notice the case of *Robison v. Rupert*, 23 Pa. 523, inasmuch as the principle which governed the determination of that case seems to have been the same that controlled the decisions in the other cases cited. That principle is this: That the doctrine of punitive damages should be mutual and reciprocal, and that because, in cases of assault, punitive damages are recoverable from malicious defendants, like treatment by way of punishment, should be meted out to a plaintiff who provokes an assault upon him—65 L. R. A.

self, by giving him, in damages, less than will compensate him for the actual loss or injury he has suffered. However much of reason there may be in this in good morals, we submit it is not good law. It is a recognized and established principle of the law of torts, founded, as we think, in sound reason, that the compensation awarded to one who is injured, either in person or property, by the wrongful and unlawful act of another, shall at least be equivalent to, and should in all cases be commensurate with, the loss or injury actually sustained. It may not, therefore, properly be said, in any case where the law awards or permits the recovery of damages, that the damages recovered as compensation shall be for a part only of the loss or injury sustained by the plaintiff. Yet such would necessarily be the effect and result of the adoption of a rule that would permit mere provocation, which in law is neither a justification nor defense, to mitigate and reduce the amount of recovery to a sum less than full compensation. Certainly that which will not justify or warrant an assault cannot, in law, excuse the making of full compensation for the injury actually inflicted by such assault. In this case the jury was informed by the court "that, under the circumstances of the case, he would not submit to them any question of punitive damages, or any question of damages in favor of the plaintiff for humiliation in being ejected from the car." And in the charge as given, on the matter of damages, he submitted to the jury only the question of allowing to plaintiff his actual or compensatory damages, inasmuch, then, as the plaintiff, if entitled to recover at all, was entitled to recover full compensation for the injury actually sustained by him, the instruction requested by the plaintiff in error was not a proper instruction, and the refusal to give it was not error. Neither do we think that, in the charge as given, there was anything of which the plaintiff in error may rightfully be heard to complain, for it would seem to us, upon the undisputed facts of this case, that the charge was quite as favorable to the railway company as it had the right to ask.

It is further suggested in this case, although not very strenuously contended for or insisted upon by counsel for plaintiff in error, that De Pascale was without right to recover against the railway company, because the act of its conductor, which caused the injury complained of, was not within the scope of his employment. As to such claim, it is enough to say that it finds no warrant in the testimony in this case; and, if it did, such claim is fully met and answered, against the contention of plaintiff in error, by the decisions of this court in the cases of

Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634, and *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 46 L. R. A. 314, 71 Am. St. Rep. 729, 54 N. E. 471.

We find no error in this record to the prejudice of the plaintiff in error, and the

judgment of the Circuit Court is therefore affirmed.

Spear, Ch. J., and Shauck, Price, and Summers, JJ., concur.

Davis, J., dissents.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

John ARBUCKLE *et al.*, *Piffs. in Err.*,
v.

Joseph E. BLACKBURN, Dairy and Food
Commissioner.

(51 C. C. A. 122, 113 Fed. 616.)

1. A Federal court has no jurisdiction of a suit to enjoin a state food commissioner from proceeding to enforce a pure-food statute of the state by criminal prosecutions, as he is required to do by the statute, on the ground that he has erroneously construed the statute to include matters not within it.
2. That property rights are involved will not give equity jurisdiction to enjoin criminal prosecutions.
3. A statute prohibiting the coloring, coating, or polishing of an article intended for food, whereby damage or inferiority is concealed, is not in conflict with the power of Congress to regulate commerce, although applied to articles sold in original packages imported from other states.
4. The constitutionality of a pure-food law is to be determined by its language and purpose, and not by the alleged wrongful institution of prosecutions under it by those charged with its enforcement against those guiltless of a violation of its provisions.
5. Equity will not enjoin an officer charged with the execution of a pure-food law from publishing the opinion that a specified product is within the prohibition of the law.
6. That an article intended for food is produced under a United States

patent will not prevent it from coming within the operation of a state pure-food law.

7. That an article of food is widely sold throughout a state will not enlarge the jurisdiction of a court of equity to enjoin the institution of prosecutions against its sale as violating the pure-food laws.

(January 7, 1902.)

ERROR to the Circuit Court of the United States for the Southern District of Ohio to review a judgment in favor of defendant in an action brought to restrain defendant from prosecuting vendors of a product manufactured by plaintiffs on the ground that it violated the pure-food laws of the state. *Affirmed.*

Statement by **Day**, Circuit Judge:

This case was brought by Arbuckle Brothers to restrain Joseph E. Blackburn, dairy and food commissioner of Ohio, from prosecuting the vendors of Ariosa, an article sold by the complainants to many dealers in Ohio, because of alleged violation of pure-food laws of the state. The substance of the bill and an amendment thereof is as follows:

The general assembly of the state of Ohio passed in the year 1884 an act entitled "An Act to Provide against the Adulteration of Food and Drugs" (81 Ohio Laws, p. 67), the substance of which is recited. For more than thirty years the complainants and their predecessors had been engaged, and still are

NOTE.—As to right to injunction to restrain criminal proceedings, see also, in this series, *Crighto v. Dahmer*, 21 L. R. A. 84, and *note*; *Paulk v. Sycamore*, 41 L. R. A. 772; and *State ex rel. Kenamore v. Wood*, 48 L. R. A. 596.

For other cases in this series as to ordinances and statutes regulating the sale of food products, see (as to milk) *State v. Dupaquier*, 26 L. R. A. 162; *Deems v. Baltimore*, 26 L. R. A. 541; *Littlefield v. State*, 28 L. R. A. 588; *State v. Nelson*, 34 L. R. A. 318; *State v. Broadbelt*, 45 L. R. A. 438; *State v. Schlenker*, 51 L. R. A. 347; *State v. Crescent Creamery Co.* 54 L. R. A. 466; (dairy products generally) *People v. Biesecker*, 57 L. R. A. 178; (oleo-margarine) *State v. Marshall*, 1 L. R. A. 51, and *note*; *Com. use of Allegheny County v. Miller*, 6 L. R. A. 638, and *note*; *Com. use of Allegheny County v. Weiss*, 11 L. R. A. 530, and *note*; *Re Gooch*, 10 L. R. A. 830; *Com. v.* 65 L. R. A.

Huntley, 15 L. R. A. 839; *Com. v. Paul*, 30 L. R. A. 396; *Com. use of Philadelphia County v. Schollenberger*, 22 L. R. A. 155; *State v. Myers*, 35 L. R. A. 844; *State ex rel. Monnett v. Capital City Dairy Co.* 57 L. R. A. 181; (meat) *Newson v. Galveston*, 7 L. R. A. 797; *Jacksonville v. Ledwith*, 9 L. R. A. 69; *Atkins v. Phillips*, 10 L. R. A. 158; *Helena v. Dwyer*, 39 L. R. A. 266; (bread) *State v. Schlemmer*, 10 L. R. A. 135; *People v. Wagner*, 13 L. R. A. 286; (fruit) *Frost v. Chicago*, 49 L. R. A. 657; (lard) *State v. Snow*, 11 L. R. A. 355; *State v. Hanson*, 54 L. R. A. 468; (baking powder) *State v. Sherod*, 50 L. R. A. 660; *State v. Layton*, 62 L. R. A. 163; (as to mixing articles of food without labeling product) *Dorsey v. State*, 40 L. R. A. 201; (sale of food in department stores) *Chicago v. Netcher*, 48 L. R. A. 261; (forbidding sale of certain products in private markets) *New Orleans v. Faber*, 53 L. R. A. 165.

engaged, in the manufacture and sale throughout the United States, including the state of Ohio, of a certain compound or mixture known as "Ariosa," composed of roasted coffee, compounded and mixed with eggs and sugar, packed in sealed packages, ready for use by the consumer. In order to preserve said product from deterioration, and to retain the original strength and aroma in the coffee, the complainant Arbuckle more than thirty years ago invented, and thereafter patented, adopted, and used, and complainants still use, a certain process whereby the compound or mixture known as "Ariosa" was, and still is, mixed and compounded, and the separate beans thereof coated, and to a large extent hermetically sealed, after roasting, with a compound of sugar and eggs, at first in composition with a quantity of Irish moss, also a wholesome article of food, and for twenty years without such Irish moss. That said letters patent were issued in the year 1868, and after the expiration of the said patent, trade therein was greatly increased, and still continues to increase, by reason of the increased sale and reputation of said Ariosa. That the good will of said business of making and vending said Ariosa has become, and now is, wholly dependent upon the reputation and sale of Ariosa, and the good will aforesaid. That for many years the complainants, at great expense, widely advertised the use of the aforesaid process, that the purchasers might be informed of the good qualities of coffee so mixed, compounded, and coated. That for many years prior to 1894 every package of Ariosa was labeled in conspicuous type in the words and figures following:

Ariosa is a compound made from coffee, sugar, and eggs. The coffees are selected especially for their strength, flavor, and superior drinking qualities, are pure, sound coffees, and absolutely free from all the poisonous coloring substances which are now so largely used to improve the appearance of coffee. Coffee, when roasted, is porous, and, unless prevented, loses its best qualities, and absorbs others which are inferior to it. By our process of hermetically sealing the pores of roasted coffee, we secure a three-fold object: (1) The retention of the full strength and aroma for any length of time; (2) the prevention, through absorption, of any injurious flavors; (3) the saving to the consumer of the additional expense of eggs incurred when any other coffee is used. Ariosa is self-settling. Choice eggs and pure granulated sugar are the only articles used in hermetically sealing Arbuckle's Ariosa Coffee.

(5 J. R. A.

Formula.

| | |
|-------------|-------|
| Coffee..... | 99278 |
| Eggs..... | 00361 |
| Sugar..... | 00361 |

Four pounds roasted coffee go as far as five pounds green, as coffee loses 20 per cent in roasting.

That being advised of the character of the preparation known as "Ariosa," and as a result of experience in the use thereof, great numbers of people have preferred and do prefer the use of Ariosa to other brands, mixtures, or compounds of coffee so treated, and the same is sold and purchased in large quantities throughout the United States, and has been so sold and purchased for more than thirty years last past. That the extent and profit of the complainant's business depends upon the good will thereof, and the confidence of consumers that, so long as the same is manufactured and sold by the complainants, it shall be identical in quality and composition with that which, under the same brand and appearance, consumers have theretofore purchased. Certain inferior compounds and mixtures are described and sold in competition with the said Ariosa; said compounds and mixtures being so treated as to conceal defects, or misrepresent the real condition thereof, so as to retain water which would otherwise be eliminated from the coffee in process of roasting, so treated as to increase the weight of roasted coffee, while decreasing its worth for use; mixed and compounded with unhealthful ingredients; none of which processes or methods are used by the complainants, but the process adopted by them is for the purpose of retaining in the coffee the full strength and aroma thereof; preventing the absorption of any injurious or noxious gases or flavors; settling the same when prepared for use. There is nothing in said process which conceals damage or inferiority in coffee, or makes it appear better or of greater value than it really is. On the contrary, the coffee used in said compound or mixture is of a good quality and undamaged. The articles of food used in the coating thereof are in themselves pure, wholesome, and healthful. Said coating is colorless and transparent. Said process was adopted and used, and still is used, at great expense, for the benefit of the consumer. Complainants have on hand at various points throughout the United States large stocks of the compound and mixture known as "Ariosa,"—in Ohio, about 1,000,000 pounds, more or less, of the value of \$100,000; in the United States, 10,000,000 pounds, more or less, of the value of about \$1,000,000. Complainants have a large number of agents in Ohio and else-

where engaged in the sale of Ariosa, and a great number of dealers, to wit, more than 10,000 in Ohio, have in their possession large quantities of Ariosa for sale, and will continue to sell the same in preference to other brands of coffee not similarly prepared, to the profit of complainants, and the increase of their aforesaid business, and of the good will thereof.

The respondent herein, Joseph E. Blackburn, dairy and food commissioner as aforesaid, without authority of law, and falsely and erroneously construing the provisions of said statutes above set forth, notwithstanding the fact that the process used in the manufacture of the said compound or mixture known as "Ariosa" is not in violation of the said statute, and that the said statute is not applicable to the premises, and that there is no law of the state of Ohio warranting his acts, and notwithstanding the healthful character of said Ariosa, and that the same is composed of healthful ingredients, each package plainly marked as aforesaid, personally and through his agents has heretofore, and does now, and will, unless restrained by the order of the court, continue to widely advertise throughout the state that said process used in the manufacture of Ariosa is within the prohibition of, and in violation of, the aforesaid statute. Said Blackburn falsely claims and pretends that the sixth clause of said statute wholly forbids the glazing of the coffee used in the manufacture of Ariosa. Yet in fact said process does not conceal damage or inferiority, or make said coffee appear to be better or of greater value than it really is. That said coating is for the uses and purposes above set forth, and is not used to affect or change the appearance of said coffee; any change in the appearance thereof due to said glazing being incidental and immaterial in the use thereof, and not such as to assimilate said coffee in appearance to other or better grades. Respondent has menaced and threatened with prosecution, and still menaces and threatens to prosecute, dealers in and vendors of Ariosa in the state of Ohio, for a violation of the aforesaid statute, and will, unless restrained by the order of the court, institute a large number of prosecutions upon the wrongful and erroneous charge that the treatment of said Ariosa by the process aforesaid is a violation of the statute aforesaid, and that the same is an adulterated food product, within the said statute. That by reason of the official capacity of the respondent, and the fact that he claims to act under said statute intended to prevent the adulteration of food products, said respondent's statements and threats of prosecution have led and do lead and will hereafter continue to lead dealers in and con-

sumers of said Ariosa throughout the United States, and more particularly in Ohio, to doubt the healthful character and proper preparation of the same, and will deter wholesale and retail dealers and consumers from purchasing, vending, or using the same, greatly decreasing the repute and sale thereof, to the great and irreparable damage of complainants.

That on or about the 5th day of February, 1901, said respondent issued a certain circular to dealers and vendors of Ariosa within the state of Ohio, of which the following is a copy:

State of Ohio.

Office of Dairy and Food Commissioner.

Dear Sirs:—

Replying to your inquiry about the coffee situation, would say that this matter is now under consideration and investigation by the chemists of this department. As soon as conclusions are reached, a circular notice will be sent to all the jobbers in Ohio, and a sufficient number will be furnished to supply all their salesmen. I might say that the following firms have agreed to accept the law as construed by this department: Andrus, Scofield & Co., Columbus; Dayton Spice Mills, Dayton; Woolson Spice Company, Toledo. W. F. McLaughlin & Co., of Chicago, have agreed to comply with the laws as soon as construed by the court. The only firm that has refused and still refuses to accept the ruling of this department, or abide by the laws of the state as construed by our supreme court, is Arbuckle Bros., of New York.

Very truly yours,

J. E. Blackburn,

Dairy and Food Commissioner.

Columbus, Ohio, February 5, 1901.

Said circular letter is wholly false, in this, to wit: That complainants have not at any time refused to accept the construction of the law of Ohio as construed by the supreme court of the state; and the complainants are informed and believe that the Woolson Spice Company has not agreed to accept the said law as construed by respondent, but, on the contrary, refused, and still refuses, to accept said construction of said law, and still continues to sell coffee prepared and glazed by the processes used by it. That said circular was sent generally to jobbers and dealers in food products in the state of Ohio. That few, if any, of them had inquired of the respondent as therein stated, but said circular was sent to dealers without any such inquiry. That said circular, by falsely and wrongfully singling out complainants as alone refusing to accept the ruling of respondent to abide by the laws of

Ohio as construed by the supreme court thereof, necessarily implied that, of the food products manufactured and sold by manufacturers, those made by complainants (particularly the product Ariosa) alone fell short of the standard of purity imposed by said statute; thus wrongfully and falsely implying that Ariosa is inferior in quality, grade, purity, and wholesomeness to the products of other manufacturers, whereas the standard of said Ariosa in the respects stated is at least as high as that of any like product manufactured and sold by like manufacturers. And, unless restrained by order of court, said respondent will issue other and further circulars to dealers of food products in Ohio, in large quantities, cause the same to be widely published and distributed throughout the state and elsewhere, and said subsequent circulars will be directed against the complainants alone, with intent, purpose, and effect of discriminating against complainants and their said product, and to the irreparable injury of the sale thereof, and the trade of complainants, and the good will of their business. By said circular the respondent threatens to accuse complainants and dealers in Ohio in complainants' product of a crime, and to do an injury to the property of complainants, with intent to compel complainants and the dealers in said product to cease from selling and offering for sale the same within the state of Ohio. Such prosecution is threatened by said respondent under his false and erroneous construction of said statute, is without authority of law, and will deprive complainants of their property, of the value of the product already manufactured, and the trade and good will of their business of vending said product within the state of Ohio, without due process of law. That said acts and the menaces and threats have worked, and will continue to work, irreparable injury to the property rights of complainants, and, if respondent be permitted to institute or conduct proceedings or prosecutions against the vendors of said product, or be permitted to institute or conduct proceedings or prosecutions against them, will work further irreparable injury to said property rights. Said statute, construed as respondent claims it should be, is in conflict with the 14th Amendment to the Constitution of the United States, in that it would deprive complainants of their property, by prohibiting them from selling in Ohio, and dealers in and vendors of food products from purchasing from the complainants, pure food products which are not injurious to health, and will destroy the value of said product as an article of commerce, by prohibiting the sale thereof in the state of Ohio, and would deprive complainants of the just and lawful 65 L. R. A.

benefits accruing to them by reason of their property rights in said food product, and largely destroy the market value of existing stocks of Ariosa in possession of complainants in Ohio and elsewhere, and will deny to complainants and to dealers in said product in the jurisdiction of the state of Ohio the equal protection of the law. Ariosa is manufactured and treated according to the aforesaid process at complainants' factories in New York and Pennsylvania, and not in Ohio. After being so manufactured and treated, it is at said factory packed in said packages, and in said original packages shipped by complainants to Ohio, and sold in said original packages; and said statute, if construed as respondent claims it should be, is a regulation by the state of Ohio of interstate commerce, and is therefore repugnant to and in violation of the third clause of § 8 of article 1 of the Constitution of the United States. Owing to the large number of dealers in Ariosa in Ohio who will be prosecuted, if said respondent be permitted to carry out his said threats and menaces, a multiplicity of suits will arise, and thereby complainants' property rights will be determined in litigation to which complainants will not be, and could not be, parties. The interests of such dealers are in many cases not in common with, nor representative of, the interests of complainants. Therefore they are in great and imminent danger that in many such suits and prosecutions no defense will be made, either through lack of interest, or in wrongful collusion and conspiracy with respondent, to the great and lasting injury and prejudice of complainants, for which they have no adequate remedy at law. Although such prosecutions shall uniformly result in the acquittal of the person charged, yet, by reason of the multiplicity thereof said prosecutions will result in deterring many, if not all, dealers in food products in Ohio from dealing in Ariosa.

The bill prays relief as follows: "(1) From stating or charging that complainants' said food product, Ariosa, being a compound of pure roasted coffee, mixed, treated, coated, and glazed with a preparation of sugar and eggs according to the formula and by the process hereinbefore set forth, is an article of food adulterated within the meaning of said statute, and that the use of complainants' said process of coating and glazing the coffee, constituting the chief ingredient of Ariosa, with a preparation of sugar and eggs, as hereinbefore more particularly described, constitutes a violation of said statute, and that the importation of said Ariosa into Ohio, or the selling of or offering for sale the same, constitutes a violation of said statute; (2) from charging the complainants herein, or any of them, or said firm of

Arbuckle Brothers, or any dealers in Ariosa, with violating said statute by selling or offering for sale Ariosa, or with adulterating food, in violation of said statute, by reason of the aforesaid treatment and coating of the coffee forming an ingredient of Ariosa with a preparation aforesaid; (3) from charging the complainants, or any of them, or said firm of Arbuckle Brothers, with violating the said statute by adopting and using said process of coating above described, or by selling or offering for sale Ariosa so glazed; (4) from charging any dealer in Ariosa with the possession, offering for sale, or sale of an adulterated food product, within the meaning of said statute, in having in their possession, offering for sale, or selling Ariosa so glazed; (5) from menacing and threatening any dealer in Ariosa so glazed with prosecution for having in his possession, offering for sale, or selling such Ariosa; (6) from instituting or commencing against any person, partnership, or corporation having in his, their, or its possession, offering for sale, or selling, Ariosa, any action, suit, proceeding, or prosecution based upon the treatment and coating of the coffee forming an ingredient of said Ariosa with a preparation of sugar and eggs, according to the formula and by the process more particularly above described; and (7) that your orator may have such further relief as to the court shall seem equitable and proper in the premises."

The complainants filed an amendment to the bill as follows: "(20) The wrongful acts which said respondent threatens to do, and, unless restrained, will do, as in complainants' said bill of complaint alleged, will make unmarketable in Ohio, and to a very large extent impair and destroy the market value of, the large stocks of Ariosa, which complainants now have on hand in Ohio, and will, to a large extent, deprive them of their said business, and the good will thereof in Ohio, and greatly injure, if not wholly destroy, the value of the same, and enable complainants' competitors, selling in Ohio coffees treated by processes similar to, but not identical with, complainants' said process, to obtain complainants' said business, which can only be regained after long time and at great expense; and complainants will be put to other great expense in defending their said property rights in Ohio. And if, pending the final determination of this cause, said respondent shall be permitted to commit the threatened wrongs, the same will, as complainants are informed and believe, damage complainants to the extent of more than \$100,000,—an amount largely in excess of respondent's ability to respond in judgment,—and thereby complainants will suffer irre-
65 L. R. A.

parable injury unless a preliminary injunction shall be granted herein."

Argued before *Lurton* and *Day*, Circuit Judges, and *Wanty*, District Judge.

Messrs. John DeWitt Warner and Clarence Brown, with *Messrs. Peckham, Warner, & Strong, Harrison, Olds, & Henderson*, and *Brown, Geddes, & Bodman*, for the plaintiffs in error:

The court below had jurisdiction to enjoin the respondent in the premises.

This is not an action against the state of Ohio.

Rhodes & J. Mfg. Co. v. New Hampshire, 70 Fed. 723; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *Western U. Teleg. Co. v. Myatt*, 98 Fed. 335; *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. 258.

Even though, if rightly construed, the Ohio statute is constitutional, the Federal courts still have jurisdiction to restrain respondent from his threatened enforcement thereof in accord with his erroneous construction, by which it would be made unconstitutional.

Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Re Smith*, 146 N. Y. 68, 28 L. R. A. 820, 48 Am. St. Rep. 769, 40 N. E. 497; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Jew Ho v. Williamson*, 103 Fed. 10.

Where equitable considerations demand it, a court of equity has jurisdiction to restrain a threatened criminal proceeding.

Turner v. Turner, 15 Jur. 218; *Re Briton Medical & General Life Assur. Assn.* L. R. 32 Ch. Div. 503, 55 L. J. Ch. N. S. 416, 54 L. T. N. S. 152, 34 Week. Rep. 390; *Snell*, Eq. 12th ed. (Lond. 1898) 648; *High*, *Inj.* ed. 1890, § 68; *Re Wadley*, 1 Va. Law Reg. 79; *Auckland v. Westminster Local Bd. of Works*, L. R. 7 Ch. 597, 41 L. J. Ch. N. S. 723, 26 L. T. N. S. 961, 20 Week. Rep. 845; *Atlanta v. Gates City Gaslight Co.* 71 Ga. 106; *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106; *Birmingham v. Alabama G. S. R. Co.* 98 Ala. 134, 13 So. 141; *Nashville, C. & St. L. R. Co. v. Attalla*, 118 Ala. 362, 24 So. 450.

This jurisdiction can be exercised by Federal courts in restraint of criminal proceedings in state courts.

Louisiana v. Lagarde, 60 Fed. 186; *Donald v. Scott*, 67 Fed. 854; *Wong Wai v. Williamson*, 103 Fed. 1; *Jew Ho v. Williamson*, 103 Fed. 10; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Re Debs*, 158 U. S. 565, 39 L. ed. 1093, 15 Sup. Ct. Rep. 900.

There being no debasement, deterioration, or treatment of Ariosa or its ingredients, either in fact or as compared with its appearance; and it not being injurious to health,—its sale is not validly prohibited by the Ohio statute.

Such statute is entitled "An Act to Provide against Adulteration of Food and Drugs."

Said process of glazing Ariosa, and said Ariosa so glazed, are neither of them an "adulteration."

The title of an act should control construction in doubtful cases.

Garrick v. Florida C. & P. R. Co. 53 S. C. 448, 69 Am. St. Rep. 874, 31 S. E. 334; *South Park v. First Nat. Bank*, 177 Ill. 234, 52 N. E. 365; *State v. Robinson*, 32 Or. 43, 48 Pac. 357; *Lawless v. Fleming*, 56 N. J. Eq. 815, 40 Atl. 638; *Territory ex rel. Jones v. Hopkins*, 9 Okla. 133, 59 Pac. 976; *United States v. Gue Lim*, 176 U. S. 459, 44 L. ed. 544, 20 Sup. Ct. Rep. 415.

The Ohio statute does not make unlawful such preparation and display for sale in Ohio of food products as shall attract or please customers, provided this does not constitute a misrepresentation or fraud.

Mace v. Buchanan (Tenn. Ch. App.) 52 S. W. 505; *Austin v. State*, 22 Ind. App. 221, 53 N. E. 451; *Wilson v. State*, 19 Ind. App. 389, 46 N. E. 1050; *Ex parte Bailey*, 39 Fla. 734, 23 So. 552; *People ex rel. Mitchell v. Sturges*, 156 N. Y. 580, 51 N. E. 295; Maxwell, Interpretation of Statutes, 3d ed. 1896, London, 113, 369, 399.

Of possible constructions permitted by the words of an act those will be adopted which would leave it constitutional and in accord with common sense, and an opposite construction rejected, rather than one more nearly in accord with the precise language used.

Cooley, Const. Lim. Anno. ed. p. 218; Black, Interpretation of Statutes, 93; *Camp v. Rogers*, 44 Conn. 291; *Newland v. Marsh*, 19 Ill. 376; *Dow v. Norris*, 4 N. H. 16, 17 Am. Dec. 400; *United States v. Central P. R. Co.* 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; *United States v. 152 Packages of Spirituous Liquors & Wines*, 22 C. C. A. 228, 40 U. S. App. 333, 76 Fed. 364; *Mace v. Buchanan* (Tenn. Ch. App.) 52 S. W. 505; *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 510, 28 N. E. 525; *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566; *Platt v. Union P. R. Co.* 99 U. S. 48, 25 L. ed. 424; *Condon v. Mutual Reserve Fund Life Assn.* 89 Md. 99, 44 L. R. A. 149, 73 Am. St. Rep. 169, 42 Atl. 944; *State, Brown, Prosecutor, v. Union*, 62 N. J. L. 142, 40 Atl. 632; *Hartman v. Weitmeyer*, 8 Pa. Dist. R. 223; *Codlin v. Kohlhausen*, 9 N. M. 565, 58 Pac. 499; *Singer Mfg. Co. v. McCollock*, 24 Fed. 65 L. R. A.

667; *People ex rel. Wood v. Lacombe*, 99 N. Y. 43, 1 N. E. 599.

The makers and vendors of Ariosa have a right, which they propose to exercise, to attract customers by every legitimate means that enterprise can suggest.

Wynehamer v. People, 13 N. Y. 378; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *Re Marshall*, 102 Fed. 323; *People v. Meyer*, 44 App. Div. 1, 60 N. Y. Supp. 415.

If this law is to be construed and enforced as respondent claims, then, in a matter not affecting health or public order, tradesmen are limited in the right attractively to set forth their goods, or to sell, in Ohio, property, the subject of interstate commerce, there marketed, on the ground that it is too attractively set forth; this though no fraud or deceit is alleged, or, under the circumstances, possible.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Moore v. Bahr*, 82 Fed. 19; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *People v. Buffalo Fish Co.* 30 Misc. 130, 62 N. Y. Supp. 543; *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776; *People v. Biesecker*, 58 App. Div. 391, 68 N. Y. Supp. 1067; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

The particular glazing here in question is the characteristic demanded by the purchaser when he asks for Ariosa instead of some other brand. He has a right to have it; the vendor has a right to sell it to him; the state has no business to interfere with either in this regard.

Dorsey v. State, 38 Tex. Crim. Rep. 527, 40 L. R. A. 201, 70 Am. St. Rep. 762, 44 S. W. 514.

A bill in equity is a most appropriate method of raising questions such as those presented in this case.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Haverhill Gaslight Co. v. Barker*, 109 Fed. 694; *Western U. Teleg. Co. v. Poe*, 61 Fed. 449.

The existence of a special statutory mode of redress under the law of the state is no

bar to the equity jurisdiction of the circuit court of the United States.

Third Nat. Bank v. Mylin, 76 Fed. 385; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135; *Coeur d'Alene Consol. Min. Co. v. Miners' Union*, 19 L. R. A. 382, 51 Fed. 260; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. 310.

Messrs. Walter F. Brown and E. B. Dillon for defendant in error.

Day, Circuit Judge, delivered the opinion of the court:

As the circuit court dismissed the bill, it is unnecessary to consider the testimony offered in support of the application for a temporary injunction. The matter to be reviewed is the sufficiency of the bill and amendment to warrant the intervention of a court of equity to restrain the defendant as prayed. An analysis of the bill shows the claim to be that respondent, the dairy and food commissioner of the state of Ohio, is proceeding, upon an alleged false and erroneous construction of the statutes of Ohio, to prosecute persons in Ohio dealing in the complainants' product known as "Ariosa," and is giving out the statement that this product is sold in violation of the laws of the state. The act passed March 20, 1884 (2 Bates's Anno. Stat. [Ohio] §§ 4200-4 to 4200-8), provides against the adulteration of foods and drugs, makes it an offense within said state to manufacture for sale, offer for sale, or sell any article of food which is adulterated, within the meaning of the act; and the term "food," used therein, includes all articles used as food or drink by man, whether simple, mixed, or compound. It is further provided in the act that food shall be deemed to be adulterated, among other things, "if it is colored, coated, polished, or powdered, whereby damage or inferiority is concealed, or if, by any means, it is made to appear better or of greater value than it really is." It appears that the coffee of the complainants is coated, after roasting, with a compound of sugar and eggs, for the purpose, as alleged in the bill, of retaining the full strength of the coffee, "preventing the absorption of any injurious or noxious gases or flavors, and settling the same when prepared for consumption;" thus bringing Ariosa within the terms of the Ohio law, which provides that the act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food "if each and every article sold or offered for sale shall be distinctly labeled as a mixture or compound with the name and per cent of each ingredient therein, and are not in- 65 L. R. A.

jurious to health." It is claimed that notwithstanding Ariosa is thus labeled with a statement of the elements of the compound, and is not injurious to health, the food commissioner is threatening proceedings, and is claiming that the same is within the prohibition of the 6th clause of the statute above quoted, making it an offense to coat an article of food, whereby damage or inferiority is concealed, and the same made to appear better or of greater value than it really is. It is urged that this statute, "construed as respondent claims it should be," is in conflict with the 14th Amendment of the Constitution, as it deprives the complainants of their property, by prohibiting them from selling it in Ohio, and dealers from selling the same in that state, notwithstanding the same are ordinary articles of food and not injurious to health, and will destroy the market value of the product, and deny to the complainants within the jurisdiction of Ohio the equal protection of the laws. The argument is that, conceding, for this purpose, that the statute is constitutional when properly construed and enforced, the respondent's wrongful construction thereof results in an infraction of the constitutional rights of the complainants. This alleged wrong construction, when analyzed, amounts to this: The complainants claim that their compound is not within the terms of the statute. The food commissioner wrongfully claims that it is. Upon this branch of the case the question is, May a court of equity entertain a bill to inquire into this matter, and, if it finds that the complainant is right in its contention, enjoin the food commissioner from instituting proceedings under the laws of Ohio? The jurisdiction of courts of equity has never been carried to this extent in authoritative decisions. On the contrary, the Supreme Court, in more than one instance, has denied such jurisdiction to a court of equity. The rule is thus stated by Mr. Justice Gray in *Re Sawyer*, 124 U. S. 200-211, 31 L. ed. 402, 406, 8 Sup. Ct. Rep. 482-488: "The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. *Atty. Gen. v. Cleaver*, 18 Ves. Jr. 211, 220; *Turner v. Turner*, 15 Jur. 218; *Saull v. Browne*, L. R. 10 Ch. 64, 44 L. J. Ch. N. S. 1, 31 L. T. N. S. 493, 23 Week. Rep. 50, 13 Cox, C. C. 30; *Kerr v. Preston*, L. R. 6 Ch. Div. 463, 46 L. J. Ch. N. S. 409, 25 Week. Rep. 264. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. *Story, Eq. Jur. § 893*. And in the American courts, so far as we are informed, it has been strictly and

uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state or under municipal ordinances. *West v. New York*, 10 Paige, 539; *Davis v. American Soc. for Prevention of Cruelty to Animals*, 75 N. Y. 362; *Tyler v. Hamersley*, 44 Conn. 419, 422, 26 Am. Rep. 479; *Stuart v. La Salle County*, 83 Ill. 341, 25 Am. Rep. 397; *Devron v. First Municipality*, 4 La. Ann. 11; *Levy v. Shreveport*, 27 La. Ann. 620; *Moses v. Mobile*, 52 Ala. 198; *Gault v. Wallis*, 53 Ga. 675; *Phillips v. Stone Mountain*, 61 Ga. 386; *Cohen v. Goldsboro*, 77 N. C. 2; *Waters Peirce Oil Co. v. Little Rock*, 39 Ark. 412; *Spink v. Francis*, 19 Fed. 670, and 20 Fed. 567; *Suess v. Noble*, 31 Fed. 855."

In the later case of *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119, the same rule is recognized and enforced. Mr. Justice Shiras, at page 169, 172 U. S., page 406, 43 L. ed., and page 127, 19 Sup. Ct. Rep., speaking for the court, says: "No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. In the present case the commonwealth's attorney in the prosecution of an indictment found under a law admittedly valid, represented the state of Virginia; and the injunctions were therefore, in substance, injunctions against the state. In proceeding by indictment to enforce a criminal statute, the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state. As was said in *Re Ayers*, 123 U. S. 443, 497, 31 L. ed. 216, 226, 8 Sup. Ct. Rep. 179: 'How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court, as an actual and real defendant?'"

Upon the authority of this case and others decided in the Supreme Court, it seems clear that this action cannot be maintained consistently with the 11th Amendment to the Constitution, withholding the judicial power of the United States from suits in law or equity commenced or prosecuted against one of the United States by citizens of another state, or citizens or subjects of any foreign state. In *Poindester v. Greenhow*, 114 U. S. 270-287, 29 L. ed. 185-191, 5 Sup. Ct. Rep. 903, 962, quoted with approval in *Re Ayers*, 123 U. S. 443, 497, 31 L. ed. 216, 226, 8 Sup. Ct. Rep. 179, it was said, "that the question whether a suit is within the pro-

hibition of the 11th Amendment is not always determined by reference to the nominal parties to the record." In the *Ayers Case* the suit for injunction, which the court held could not be entertained, was brought against the attorney general and treasurers of counties, cities, and towns in Virginia, just as the present case is brought against Joseph E. Blackburn, dairy and food commissioner of Ohio. The injunction sought is against the prosecution of suits in the Ohio courts which are about to be instituted by Blackburn, not in his individual capacity, but as an officer of the state. By the terms of the statute the dairy and food commissioner is an officer of the state expressly charged with the enforcement of all laws against frauds and adulterations or impurities in foods, drink, or drugs, and unlawful labeling in the state of Ohio. It is made his duty by statute to prosecute, or cause to be prosecuted, any person or persons, firm or firms, corporation or corporations, engaged in the manufacture or sale of any adulterated article or articles of food or drink, or adulterated in violation of or contrary to any laws of the state of Ohio. 1 Bates's Anno. Stat. (Ohio) §§ 409-7, 409-8. It is also provided that food so coated as to conceal damage or inferiority shall be deemed to be adulterated. Paragraph 6 of § 4200-6, 2 Bates's Anno. Stat. (Ohio). What, then, is the object of the injunction sought in this case? It is no more nor less than to restrain the officer of the state from bringing prosecutions for violations of an act which such officer is expressly charged to enforce in the only way he is authorized to proceed,—by bringing criminal prosecutions in the name of the state. This is virtually to enjoin the state from proceeding through its duly qualified and acting officers. If the food commissioner may be enjoined from instituting such prosecutions, why may not the prosecuting attorney, or any officer of the state charged with the execution of the criminal laws of the state? While the state may not be sued, if the bill can be sustained against its officers it is as effectually prevented from proceeding to enforce its laws as it would be by an action directly against the state. This view of the case, in our judgment, is amply sustained by the cases above cited, and by the later case of *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269, in which the subject is fully discussed by Mr. Justice Harlan. In so far as this action seeks an injunction against the respondent from proceeding to enforce by prosecution the provisions of the statutes of Ohio above cited, the courts of the United States are deprived of jurisdiction by the 11th Amendment to the Constitution.

We are now dealing with an officer of a state proceeding under a valid law of the state, and whose error lies in wrongfully construing the statute so as to include the complainant's product. To entertain the bill in this aspect would be to subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. It would be the extension of equity jurisdiction to cases where prosecutions in state courts by the state officers are sought to be enjoined, with a view to determining whether they shall be allowed to proceed under valid statutes in the courts of law. We think this an enlargement of the jurisdiction opposed to reason and authority. It is claimed, however, that conceding that a court of equity cannot enjoin the prosecution of criminal offenses, as a general thing, the rule is different when property rights are involved; and we are cited to cases holding that equity has jurisdiction to enjoin acts likely to be destructive of property rights, although the acts complained of constitute infractions of the criminal law. This is quite a different proposition from enjoining criminal proceedings alleged to be indirectly destructive of property rights. Many criminal prosecutions may affect the property of the person accused. A property may be greatly injured by the wrongful and unfounded charge that it is used for immoral purposes. Such prosecution may destroy its rental value and prevent its sale, yet a court of equity could not usurp the right of trial which both the state and the accused have in a common-law court before a jury. Every citizen must submit to such accusations, if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages. It is often a great hardship to be wrongfully accused of crime, but it is one of the hardships which may result in the execution of the law, against which courts of equity are powerless to relieve. *Suess v. Noble*, 31 Fed. 855; *Hemley v. Myers*, 45 Fed. 283; *Kramer v. Police Department*, 21 Jones & S. 492; *Predigested Food Co. v. McNeal*, 1 Ohio N. P. 266.

It is further claimed that the act is unconstitutional as an interference with the right of Congress to regulate interstate commerce; and we are cited to *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, in which a law of that state was held invalid to the extent that it prohibited the introduction of oleomargarine into the state from another state in original packages. The case was distinguished from the prior case of *Plumley v. Massachusetts*, 65 L. R. A.

155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154, in which the Supreme Court upheld a statute punishing the sale of oleomargarine when colored in imitation of butter. In other words, the Supreme Court held it to be within the power of the state to require an article of food to be sold for what it really is, and to protect the public from imposition in buying one article of food in the belief that it is another, but beyond the power of the state to prohibit the introduction and sale in original packages of a pure article sold upon its merits. As we read the Ohio statute, it does not undertake to prohibit the introduction and sale of a pure article of food, sold for what it really is, but the coloring, coating, or polishing of an article, whereby damage or inferiority is concealed; the act providing in this connection that it shall not apply to mixtures or compounds recognized as ordinary articles of food, if every package sold or offered for sale be distinctly labeled as a mixture or compound, with the name and per cent of each ingredient therein, and is not injurious to health. The enactment of such a law is clearly within the police powers of the state, upon the principles enunciated in the case of *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154, for the protection of purchasers of food from imposition by the concealment of damage or inferiority in food. As in the *Oleomargarine Case*, the article is thus required to be sold for what it really is, without misleading the purchaser to buy it for what it is not. In the *Plumley Case*, Mr. Justice Harlan, speaking for the court said: "If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate, in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states."

But it is argued that coffee treated so as to make *Ariosa* is a pure article of food, and a compound labeled as required by the statute. Again, the act is argued to be unconstitutional because of the construction put upon it by the food commissioner, and this "construction" is his contention that *Ariosa* is coffee so coated as to conceal damage or inferiority, and that it is not a compound or mixture within the meaning of the statute. These are the very questions the decision of

which the statute vests in the discretion of the commissioner, as a preliminary matter, in determining to institute prosecutions in the enforcement of the law which he is charged to execute, leaving the guilt or innocence of the party charged to be decided by the proper tribunals when prosecutions are instituted under the law. The constitutionality of the act is to be determined by its language and purpose, and not by the alleged wrongful institution of prosecutions thereunder against those guiltless of a violation of its provisions. There are cases, as insisted by the learned counsel for the complainant, where the operation of a statute constitutional in itself, as administered by the state authorities, may deprive the citizens of rights secured by the Constitution of the United States, where a Federal court will interfere by injunction to secure to persons aggrieved the benefits of the Federal Constitution; but they are not cases where a court of equity must draw to itself the administration of the criminal law of the state, sought to be enforced by the officers of the state, and thus determine whether crimes may be prosecuted under valid enactments, because a party may be able to satisfy the court that he is in fact innocent of the charge. Such a construction of the powers of a court of equity would result in a confusion of jurisdiction, and an embarrassment of the ordinary processes of the law without precedent. If this bill can be entertained, it remits to the Federal courts the supervision of the pure-food laws of the states, and their dockets will be crowded with cases of those claiming that their particular articles of food and drink are not within the terms of the law.

Nor do we think that there is ground for

injunction in the allegations of the bill that the food commissioner is publishing the fact that the product of the complainant is within the prohibition of the law. If this publication is made to those dealing in the article, it would be within the duty of the commissioner, in advising of contemplated prosecutions. If such publications are libelous, the law affords other means of redress. *Francois v. Flinn*, 118 U. S. 385, 30 L. ed. 165, 6 Sup. Ct. Rep. 1148.

The fact that complainants produced Arissa under a process protected by letters patent of the United States does not prevent it from coming within the operation of laws passed in the exercise of the police power of the state. The enactment of laws for the protection of health and to prevent imposition in the sale of food products is within this power, and the fact that the process by which it is made is protected by a patent, while it may prevent others from using it during the life of the patent, does not deprive the state of this power of regulation for the general good. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429.

The fact that complainants' product is widely sold in Ohio, and many persons may be subject to prosecution, does not enlarge the jurisdiction of a court of equity to interfere by injunction to control prosecutions for alleged violation of the laws of the state.

We think this case comes within the principles settled by the Supreme Court in the cases above cited, and *the Circuit Court did not err in dismissing the bill*.

Appeal dismissed by Supreme Court of United States December 7, 1903.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

Rudyard KIPLING, *Plff. in Err.*,
v.

G. P. PUTNAM'S SONS *et al.*

(57 C. C. A. 295, 120 Fed. 631.)

1. That the publisher of an author's copyrighted work is not authorized to sell unbound copies will give the author no right of action against another publisher who purchases unbound sheets, which he binds and sells.

2. The copyright of a new edition of an author's works covers only new matter contained in them.

3. One has a right to make and publish an index of copyrighted works, although it contains words and phrases found in the text.

4. Merely placing a design on the covers of an edition of an author's works without registering it as a trademark, or giving notice that it is claimed as such, does not protect it from use by others.

5. The use upon the cover of an edition

NOTE.—As to common-law rights of authors and others in intellectual productions, see *Press Pub. Co. v. Monroe*, 51 L. R. A. 353, and *note*.

As to protection of trade name of article, even when there is no valid trademark, see, in this series, *Weener v. Brayton*, 8 L. R. A. 641; *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 17 L. R. A. 129; *Scott v. Standard Oil Co.* 81 65 L. R. A.

L. R. A. 374; *American Waltham Watch Co. v. United States Watch Co.* 43 L. R. A. 826; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162; *Fuller v. Huff*, 51 L. R. A. 332; *Francaise v. Saratoga Vichy Springs Co.* ante, 830, and *Shaver v. Heller & Mers Co.* post, 878.

of an author's works of a design appearing upon an edition published under the author's supervision does not indicate unfair competition in trade, where the two editions differ in almost all essential features, so that one will not be taken for the other.

6. Upon the issue of unfair competition with an authorized edition of the works of an author, evidence is admissible of his acts in authorizing other editions, which, in regard to the edition sought to be protected, were in many respects identical with the conduct complained of.

(January 8, 1903.)

ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of defendants in an action brought to recover damages for infringement of copyright and unfair competition in trade. *Affirmed.*

The facts are stated in the opinion.

Argued before *Wallace, Townsend, and Coxe*, Circuit Judges.

Messrs. John L. Hill and A. T. Gurwitz for plaintiff in error.

Mr. Stephen H. Olin, for defendants in error:

No violation of copyright was shown.

When the defendants bought copyrighted books, they became absolute owners of the volumes so purchased, which then passed out of the protection of the copyright act. The purchasers had, so far as the statute is concerned, all the incidents of ownership, the right to bind the books as they pleased, and to dispose of them in any way.

Doan v. American Book Co. 45 C. C. A. 42, 105 Fed. 772; *Harrison v. Maynard, M. & Co.* 10 C. C. A. 17, 26 U. S. App. 99, 61 Fed. 689; *Henry Bill Pub. Co. v. Smythe*, 27 Fed. 914; *Robinson, Patents*, § 824; *Cutter v. Gudebrod Bros. Co.* 36 App. Div. 373, 55 N. Y. Supp. 298.

An author cannot sell copyrighted books without restriction, or publish his books without protection of copyright, and then prohibit the collection of the volumes over which he has voluntarily given up control.

Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co. 92 Fed. 774; *Holmes v. Hurst*, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606, 76 Fed. 757, 25 C. C. A. 610, 51 U. S. App. 271, 80 Fed. 514.

The defendants could make any use they pleased of the book purchased from Coates & Company, and of the Critic Leaflets, since these had been published without the protection of copyright.

Clemens v. Belford, 11 Bias. 459, 14 Fed. 728; *Merriam v. Famous Shoe & Clothing Co.* 47 Fed. 411; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Black v. Ehrlich*, 44 Fed. 793.

65 L. R. A.

The defendants had a right to sell the Ken of Kipling or any other biography of the plaintiff, which was not libelous, scandalous, or blasphemous, and might adorn the volume with the plaintiff's portrait.

Corliss v. E. W. Walker Co. 31 L. R. A. 283, 57 Fed. 434, 64 Fed. 282.

The defendants had a right to publish an index of Mr. Kipling's books as sold by them.

Lawrence v. Dana, 4 Cliff. 1; *West Pub. Co. v. Lawyers Co-op. Pub. Co.* 25 L. R. A. 441, 64 Fed. 360, Reversed in 35 L. R. A. 400, 25 C. C. A. 648, 51 U. S. App. 216, 79 Fed. 756; *Folsom v. Marsh*, 2 Story, 100.

If, in a revision, the alterations are "so few and slight that it would require an expert to detect them," no valid copyright can be granted.

Snow v. Laird, 39 C. C. A. 311, 98 Fed. 816; *Mifflin v. Dutton*, 50 C. C. A. 661, 107 Fed. 708, 61 L. R. A. 134, 50 C. C. A. 661, 112 Fed. 1004.

In a suit at law for infringement of the copyrights of the Century Company and D. Appleton & Company, they were necessary parties plaintiff.

Hanson v. Jaccard Jewelry Co. 32 Fed. 202; *Pulte v. Derby*, 5 McLean, 328; *Birdsell v. Shaliol*, 112 U. S. 485, 28 L. ed. 768, 5 Sup. Ct. Rep. 244; *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. Rep. 334; *Adams v. Howard*, 23 Blatchf. 27, 22 Fed. 656; *Van Orden v. Nashville*, 67 Fed. 331; *Robinson, Patents*, §§ 937-940.

The plaintiff has attempted to make the owners of the copyright parties defendant against whom no personal claim is made. Such an attempt in a common-law action is a mere nullity.

Porter v. Mount, 45 Barb. 422; C. C. P. §§ 446, 448, 449, 488, 498.

When the publisher, with the knowledge of the author, takes the copyright in his own name, the publisher is the lawful owner.

Pulte v. Derby, 5 McLean, 328.

Mr. Kipling could not allege that the real authority of the publishers was less than their apparent authority.

Mechen, Agency, § 279.

Trademarks protect books as mere merchandise, and not as literary productions.

Browne, Trademarks, § 116; *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.* 51 C. C. A. 302, 113 Fed. 471; *Richter v. Reynolds*, 8 C. C. A. 220, 17 U. S. App. 427, 59 Fed. 577; *Kohler Mfg. Co. v. Beeshore*, 8 C. C. A. 215, 17 U. S. App. 352, 59 Fed. 572.

For an injury to, or trespass upon, the Outward Bound edition, Kipling could not sue, because he is not the manufacturer or the owner of the edition; and it does not matter how great his other interest may be therein.

Edison v. Hawthorne, 106 Fed. 172, 48 C. C. A. 67, 108 Fed. 839.

Every suit based on unfair simulation of the dress of merchandise is based on the fact that the defendant will thereby deceive the purchaser into buying his goods as those of the plaintiff. The question is whether there is such similarity as is likely to impose upon the ordinary purchaser, having regard to the class of persons who purchase the particular article for consumption. Fraud must be proved.

Centaur Co. v. Marshall, 38 C. C. A. 413, 97 Fed. 788; *Apollinaris Co. v. Scherer*, 23 Blatchf. 459, 27 Fed. 22; *Van Camp Packing Co. v. Cruikshanks Bros. Co.* 33 C. C. A. 280, 61 U. S. App. 454, 90 Fed. 814; *Blakey v. National Mfg. Co.* 37 C. C. A. 27, 95 Fed. 136; *Coats v. Merrick Thread Co.* 149 U. S. 564, 37 L. ed. 848, 13 Sup. Ct. Rep. 966; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.* 23 C. C. A. 554, 45 U. S. App. 190, 77 Fed. 869; *Kann v. Diamond Steel Co.* 32 C. C. A. 324, 61 U. S. App. 22, 89 Fed. 706; *American Washboard Co. v. Saginaw Mfg. Co.* 50 L. R. A. 609, 43 C. C. A. 233, 103 Fed. 281; *Davies County Distilling Co. v. Martinoni*, 117 Fed. 186.

In trademark cases compensatory damages should be given. A mere possible injury affords no ground for damages.

Browne, Trademarks, §§ 503, 505; *Taylor v. Carpenter*, 2 Woodb. & M. 1, Fed. Cas. No. 13,765; *Parker v. Hulme*, 1 Fisher Pat. Cas. 44, Fed. Cas. No. 10,740; *Carter v. Baker*, 1 Sawy. 512, 4 Fisher Pat. Cas. 404, Fed. Cas. No. 2,472; *Williams v. Mitchell*, 45 C. C. A. 265, 106 Fed. 168.

Coxe, Circuit Judge, delivered the opinion of the court:

This action was commenced April 24, 1899, to recover \$25,000 damages for infringements of plaintiff's copyrights and trademark, and for unfair competition in trade. In 1898 the defendants, who, for many years prior thereto had been engaged in publishing and selling books in the city of New York, purchased from authorized publishers about 30 sets of various copyrighted volumes of the plaintiff's writings, bound them in uniform and attractive binding, and sold them without protest or complaint from any source. This enterprise being successful, the defendants, in the following year, determined to collect from his authorized publishers a more complete set of the plaintiff's works and sell them under the name of the Brushwood edition. About 200 copies of unbound sheets were thus collected. One hundred of these were for the defendants and 100 for E. P. Dutton & Company, a publishing house having its place of business near the defendants on Twenty-third street, New 65 L. R. A.

York. The defendants bound the sets thus purchased in 12 volumes in the exact form in which they were received from the publishers.

Volume 13 contained poems of the plaintiff, which had been published without copyright protection, the sheets being purchased from Coates & Company, who printed them from stereotype plates of an edition, apparently authorized by the plaintiff, under contracts by which he was to receive a royalty of 10 per cent. These plates were purchased by Coates & Company of the receiver of the United States Book Company.

Volume 14 was made up of unbound copyrighted sheets of *The Seven Seas*, purchased from D. Appleton & Company, and two uncopyrighted poems,—*The Vampire* and *Recessional*.

Volume 15 contained *A Ken of Kipling*, by Will M. Clemens, and an index. The only portion of the edition printed by the defendants was this index; all else was in the precise form in which it was purchased by them. The binding was uniform for each set, but some sets were more expensively bound than others. Fifteen sets were bound in buckram, and on the back of each volume there was stamped in gold, on dark green leather, an elephant's head inclosed in a circle. On the front cover, near the top, there was stamped in gold, on a panel of green leather, a similar elephant's head, and also a fac simile of the plaintiff's signature. The elephant's head appeared only on the books composing these 15 sets.

The Brushwood edition, thus made up, was advertised and sold in the usual way.

Briefly stated, these are the acts of the defendants of which the plaintiff complains.

In 1896 the plaintiff arranged with Messrs. Charles Scribner's Sons to publish a new subscription edition of his works, under his supervision, to be known as the *Outward Bound* edition. The first instalment of this edition consisted of 12 volumes, the first volume being published in January, 1897, the last in October, 1898, and the others at intervals between these dates. The *Outward Bound* volumes were larger, wider, and thicker than those sold by the defendants. On the center of the front cover of each volume was a medallion, stamped in low relief, of an elephant's head in white, surrounded by golden circles. The head also appears on the title page of each volume, and is called a "seal" by the author.

There was evidence that, some ten years prior to the *Outward Bound* edition, an elephant's head had appeared on the paper covers of several small volumes of the plaintiff's works printed in India, but under circumstances which indicated to the public that, if it were intended as a trademark at

all, it was the mark of the publishers, and not of the author. There is no evidence in the record which can be regarded as constituting direct or constructive notice to the public that, at the time in controversy, the plaintiff was attempting to protect by a trademark his profession as a novelist and poet.

In May or June, 1899, the plaintiff authorized a Big Syndicated Set of his works, which was handled by the publishing house by Doubleday & McClure Company. It was revised and corrected by him, and was called the "Swastika" authorized edition. It was printed from plates held by his publishers, and consisted of 300,000 volumes, or 20,000 sets. No elephant's head appears on the volumes of this edition. Instead thereof, and occupying the same position, there is stamped on the cover of each volume a medallion in the center of which appear, in script, the letters "R. K."

The advertisements of the Brushwood edition, first put out by the defendants, caused some inquiries to be made by the Scribners, and, in order to meet objections then suggested, new circulars and notices were immediately issued and published, making perfectly clear the genesis of the Brushwood books, and the defendants' position regarding the same.

The plaintiff maintains that the selling of the Brushwood edition by the defendants violated his copyrights and trademark, and that the defendants' conduct with reference to the Outward Bound edition, published by the Scribners and authorized by him, amounted to unfair competition in trade. The defendants insist that all the books sold by them, which were copyrighted, were purchased of plaintiff's authorized publishers, that the plaintiff has failed to establish a trademark, and that in the sale of the Brushwood edition their conduct was in all respects fair and honorable.

The trial judge, being of the opinion that the plaintiff had failed to establish a cause of action, either for infringement or for unfair competition, directed a verdict in favor of the defendants. The plaintiff insists that this ruling was error, and he also assigns as error various rulings upon the rejection and reception of testimony.

First. It is contended by the plaintiff that in selling the Brushwood edition of his works the defendants have infringed his copyrights. There is no matter published in the Brushwood edition, secured to the plaintiff under the copyright law of the United States, which was not purchased by the defendants of publishers duly authorized by the plaintiff to sell. The edition was made up, first, of volumes copyrighted by the plaintiff or his publishers, which, in

legal effect, the defendants purchased of him; second, of certain poems written by the plaintiff, but published without the protection of a copyright, and, third, of matter written or compiled by others, and over which the plaintiff exercised no ownership or control. Upon what theory, then, have the plaintiff's copyrights been infringed? Each one of them, whether valid or invalid, was respected by the defendants. That the defendants, having purchased unbound copyrighted volumes, were at liberty, so far as the copyright statute is concerned, to bind and resell them, is a well-recognized principle of law. *Harrison v. Maynard, M. & Co.* 10 C. C. A. 17, 26 U. S. App. 99, 61 Fed. 689; *Doan v. American Book Co.* 45 C. C. A. 42, 105 Fed. 772.

It is of no moment that each volume of the Outward Bound edition authorized by the plaintiff and published by Charles Scribner's Sons, in 1897-1898, was copyrighted. This new copyright protected only what was original in the Outward Bound edition. It did not operate to extend or enlarge prior copyrights, or remove from the public domain the author's works which, by his own act, he had dedicated to the public. If, for instance, the Messrs. Scribner should publish a new edition of Fielding's works, their copyright would cover only that part of the edition which is new. It would not enable them to hold a monopoly in Fielding's writings. Any other publisher could publish Fielding's works with perfect propriety. So, if the defendants were legally authorized to sell the works of the plaintiff found in the Brushwood edition, that right was not lost or impaired by the copyrighting of the Outward Bound volumes. It is contended that the plaintiff's copyrights were infringed by the defendants because the books or sheets which they purchased of his licensed publishers were unbound at the time, and the publishers were unauthorized to sell them in this condition. It is not quite apparent how the intent and purpose of the copyright act can be limited by a private agreement between the author and his publisher. There is nothing in the law, surely, which prohibits the owner of a copyright from selling unbound books, if he desires to do so; and what he may do, his agent or licensee may do also. If Mr. Kipling had personally sold the unbound volumes to defendants, it probably would not be contended that he could recover damages under the statute because they were bound and resold. He stands in no more favorable condition because the sale was conducted by his agents.

We are unable to find any provision in the agreements with plaintiff's publishers which prohibited the sale of the copyrighted

sheets to the defendants; but, if such a provision were present, the plaintiff's remedy would be an action against the publishers for breach of contract. Whether such an action could be maintained by one who had participated in the profits of the sale is a question which would probably cause the pleader many moments of anxious thought. *Harrison v. Maynard, M. & Co.* 10 C. C. A. 17, 26 U. S. App. 99, 61 Fed. 689.

The Ken of Kipling, which appears in the Brushwood edition, was not copyrighted by plaintiff, and the defendants, so far as the copyright law is concerned, had an absolute right to publish it in any form they saw fit.

They also were at liberty to make and publish an index of the matter contained in their volumes, even though the index, as it necessarily must, contains words and phrases found in the text.

The court is not permitted to enter the domain of ethics, and attempt a determination of the controversy according to the theoretical code of morals which, it is contended, should govern the relations between author and publisher. We must adhere strictly to the law, as we understand it, and, with the issue thus limited, we have no difficulty in agreeing with the circuit court that the plaintiff has failed utterly in establishing a cause of action under the copyright law.

Second. The plaintiff insists that he has a valid trademark, consisting of an elephant's head, by which his productions have been known and protected, and that the defendants have infringed by placing an elephant's head upon thirty sets of the Brushwood edition. The proposition that an author can protect his writings by a trademark is unique and, at first blush, seems somewhat startling. It is certainly offensive to the æsthetic and poetic taste to place such poems as the *Recessional* and *The Last Chantey* in the same category with pills and soap, to be dealt in as so much merchandise. We do not intend to decide that such a trademark is sanctioned by the law; but, even if it were, it is manifest that the mark does not lose its characteristics because used to designate an unusual variety of "goods." In other words, the author, assuming that he may have such protection, must comply with the law if he would have a valid trademark.

A trademark is a word, symbol, or device by which the wares of the owner are known in trade. Its object is, first, to protect the party using it from competition with inferior articles, and, second, to protect the public from imposition. The trademark brands the goods as genuine, just as the signature to a letter stamps it as authentic. *The ele-* 65 L. R. A.

phant's head was not registered as a trademark until long after the commencement of this action, and there is no evidence that it was ever so used by the plaintiff until placed upon the *Outward Bound* edition; certainly there is no evidence that it was ever so used in this country or in England. There is proof that, in 1888, an elephant's head appeared upon six books written by the plaintiff and published at Allahabad, in India, by A. H. Wheeler & Company. There is nothing to show that the plaintiff ever publicly claimed the elephant's head as his trademark. On the contrary, it appeared to be the mark of the publishers, and not of the author. In each instance the head was surrounded by the words "A. H. Wheeler & Co.'s Indian Railway Library." If the words "Charles Scribner's Sons, Fifth Avenue, New York," had surrounded the medallion on the cover of the volumes published by that firm, it is not probable that it would be seriously contended that this was notice to the world that the medallion was the trademark of Mr. Kipling. In short, there is nothing to show that the plaintiff ever publicly used the elephant's head as his trademark prior to its use on the *Outward Bound* edition, and there was nothing connected with, or incident to, that use to inform the public that the plaintiff asserted any right therein as a trademark. The court will take judicial knowledge of the fact that it is customary to publish books with ornamental designs stamped or printed on the covers; but no one, we venture to think, from the discovery of the art of printing to the present day, ever imagined that such pictures and ornaments were the trademarks of the authors of the books. Indeed, there is a design, probably intended to represent a lotus flower, printed upon the back of each volume of the *Outward Bound* edition. So far as any knowledge of the public is concerned, this lotus flower, or the initials "R. K." on the *Swastika* edition, might be claimed as trademarks with as much reason as the elephant's head. The suit, in so far as it is based upon the infringement of a trademark, should be considered as if this were the only cause of action stated. It is thought that it must fail because of insufficiency of proof to establish a common-law trademark, either by direct notice or prior public use, and because there is an absolute failure to prove damages.

Third. Has the plaintiff established a cause of action under the allegations of his complaint alleging unfair competition in trade? Actions of this character are based essentially upon fraud. Fraud must be proved; it cannot be inferred from unimportant similarities not calculated to mis-

lead the purchaser. The action may be maintained where it appears that the defendant is destroying, or attempting to destroy, an honest business by dishonest means. The gravamen of the action is a fraudulent purpose on the part of the defendant to represent to the public that the plaintiff's business is his business, and by fraudulent misstatements to deprive the plaintiff of profits which he would otherwise receive. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 549, 34 L. ed. 997, 1004, 11 Sup. Ct. Rep. 396.

Has the plaintiff proved the defendants guilty of such fraud? In answering this question we start with the proposition, about which we think there can be no doubt, that the defendants had an unquestioned legal right to sell all of the plaintiff's writings contained in the Brushwood edition. It is well-nigh impossible to suppose that anyone intending to purchase the Outward Bound edition could be induced to purchase the Brushwood instead. There is no proof that anyone was deceived. The two editions differ in almost all essential features. The volumes are unlike in size, shape, binding, color, arrangement, and typography. In their advertisements the aim of the defendants was not to make the public believe that their edition was the same as the Outward Bound, but that it was more complete than that or any other edition.

What, then, is the accusation against the defendants? When reduced to its last analysis it will be found to be the use of the elephant's head upon 15 sets printed for themselves and 15 printed for E. P. Dutton & Company. The use of this device was an impropriety, but, in view of all the surrounding facts and circumstances, it was wholly insufficient to sustain a charge of

intentional deception. The conduct of the defendants was that of fair-minded competitors, who had no purpose to misrepresent their own edition as the Outward Bound edition. They showed a disposition to remove all grounds of complaint, both real and imaginary, and, upon being informed of them, promptly discontinued all the objectionable features of which the plaintiff had the least right to complain.

There is no proof of direct damage, and the theory of consequential and remote injury, advanced by the plaintiff, is too speculative to be entertained.

The Swastika edition, published, in the spring of 1899, through the house of Doubleday & McClure Company, was properly received in evidence. As before stated, this was an edition of 20,000 sets "authorized" by the plaintiff and made up, precisely as the Brushwood was made up, by purchasing unbound sheets from authorized publishers. On each of the 300,000 volumes were the words, "Authorized Edition," but there was no elephant's head. On the Swastika boxes containing the volumes are the words "This Edition Sold Only in Sets." It was competent to show that, after the publication of the Outward Bound edition the plaintiff's conduct regarding that edition had been in many respects identical with the defendants' conduct of which he complains. The Swastika proof shows the plaintiff's acts to be in conflict with the law of unfair competition as interpreted by his counsel, and wholly inconsistent with the theory of damages advanced in his behalf.

In view of the opinion entertained upon the merits, we deem it unnecessary to pass upon the numerous exceptions taken to the rejection and admission of testimony.

The judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Isaac H. SHAVER *et al.*, Appts.,
v.

HELLER & MERZ COMPANY.

(48 C. C. A. 48, 108 Fed. 821.)

- *1. The sale of the goods of one manufacturer or vendor as those of another is unfair competition, and consti-

*Headnotes by SANBORN, Circuit Judge.

tutes a fraud which a court of equity may lawfully prevent by injunction.

2. Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles cannot be monopolized as trademarks.
3. But the use of such geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another, and to carry on unfair competition, may be lawfully enjoined by a court of equity

NOTE.—As to protection of trade name of article, even when there is no valid trademark, see also, in this series, *Weener v. Brayton*, 8 L. R. A. 641; *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 17 L. R. A. 129; *Scott v. Standard Oil Co.* 31 L. R. A. 374; *American Waltham* 65 L. R. A.

Watch Co. v. United States Watch Co. 43 L. R. A. 826; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162; *Fuller v. Hoff*, 51 L. R. A. 332, and *Francaise v. Saratoga Vichy Springs Co. ante*, 830.

to the same extent as the use of any other terms or symbols.

4. A proprietary interest in the terms or symbols used to palm off the goods of one manufacturer or vendor as those of another, or to commit any other fraud, is not essential to the maintenance of a suit to enjoin the perpetration of the wrong; but an interest in the good will of the business or in the other property threatened is sufficient.
5. A manufacturer had applied to certain articles which it made the names "American Ball Blue" and "American Wash Blue" until they became well known to the trade and the public by these names, and commanded a large and lucrative trade. A firm of merchants applied these names to goods of other manufacturers, and offered them for sale under these names for the purpose of diverting complainant's trade to themselves. *Held*, the use of these names and of the word "American" therein by the defendants was properly enjoined.
6. One who offers the goods of one manufacturer under the well-known names and established reputation of articles of another manufacturer for the purpose of deceiving the public and defrauding the latter aggravates, rather than justifies, his wrong by placing his own name upon the packages.
7. The principle, "He who comes into equity must do so with clean hands," repels a complainant only when his iniquity has an immediate and necessary relation to the equity for which he sues.

(*Thayer, Circuit Judge, dissents.*)

(April 29, 1901.)

A PPEAL by defendants from a judgment of the Circuit Court of the United States for the Northern District of Iowa in favor of plaintiff in a suit to enjoin the alleged wrongful use of words which had been applied by plaintiff to designated goods manufactured by it. *Affirmed*.

Statement by **Sanborn**, Circuit Judge:

This is an appeal from a decree which enjoins the appellants, Isaac H. Shaver, Frederick H. Shaver, James E. Blake, and Ella Bever-Blake, copartners as Shaver, Blake, & Company, from using the brands or names "American Ball Blue" and "American Wash Blue" to palm off bluing made by parties other than the appellee, the Heller & Merz Company, a corporation, as the bluing made and sold by that corporation. 102 Fed. 882. The chief objection assigned to the decree is that it forbids the appellants to use the word "American" to deceive the public and to defraud the appellee, while the latter has no proprietary interest in that word, or in its exclusive use.

Argued before **Caldwell**, **Sanborn**, and **Thayer**, Circuit Judges.
65 L. R. A.

Messrs. Charles K. Offield, Henry S. Towle, Charles C. Linthicum, and U. C. Blake for appellants.

Messrs. Edmund Wetmore and Archibald Cox for appellee.

Sanborn, Circuit Judge, delivered the opinion of the court:

May a court of equity lawfully enjoin one from using the word "American" to sell the goods of one manufacturer as those of another to the damage of the latter and the deceit of the purchasers? This is the real issue which this case presents. It arises out of this state of facts: The appellee is a corporation which succeeded in 1889 to the business of manufacturing and selling bluing which had been established in the state of New Jersey by Heller & Merz in 1869. In 1872 the predecessors of the appellee put upon the market bluing of their manufacture in small round balls under the name of "American Ball Blue," and from that time until 1898 they continued to make and sell this form of bluing under this name. By energy, enterprise, and perseverance they established a large demand for, and a lucrative trade in, this specific article of their manufacture. In 1898 there were many different names used to distinguish the origin or ownership of the various bluing upon the market in the form of balls. Among these were the "American Ball Blue" of the appellee, the "National Ball Blue," the "Royal Ball Blue," "Sauer's Ball Blue," and "Fischer's Ball Blue." The article made by the appellee became known to the trade by its name, quality, and character, and it was generally ordered, bought, and sold by its title "American Ball Blue." No one but the appellee had ever made or sold any bluing under this name, and the appellee's use of it had been continuous, notorious, and exclusive. In 1897 the appellants bought the business of a firm of soap makers at Cedar Rapids, in the state of Iowa, styled G. M. Olmsted & Company. Olmsted & Company had for many years purchased of the appellee bluing of its manufacture styled "American Wash Blue," but they had never bought or sold the American ball blue. In the early part of the year 1898 the appellants bought bluing made by others than the appellee, and very properly issued notices to the trade that after May 1, 1898, the American wash blue which their predecessors, Olmsted & Company, had been selling, would be succeeded by the Salome laundry blue. But in July of that year, after an effort to sell the Salome blue for two months, their cupidity seems to have overcome their honesty, and they proceeded to solicit purchasers, and to make sales of bluing not made by the ap-

pellee at greatly reduced prices, under the names "American Ball Blue" and "American Wash Blue." In their correspondence they called these names their brands, and styled themselves "Manufacturers of American Ball Blue, American Wash Blue," although they never made any bluing of any kind, and never purchased any of these articles which they pretended to sell. Upon the packages in which they shipped the articles which they sold they placed their own names and their residence, Cedar Rapids, Iowa, and by colors and in other ways differentiated the dress of their goods from that of those manufactured by the appellee. But, as the appellee's bluing was generally ordered and sold by correspondence and by its names, these differences in the dresses of the packages did not prevent, and cannot prevent, the fraud and deceit which the appellants perpetrate by the use of these names, and by soliciting orders for and selling their goods under them. The result of this course of action on the part of the appellants was that they diverted to themselves a large portion of the trade of the appellee in the west, and reaped the benefit of the established reputation of its goods.

The history of the American wash blue differs to some extent from that of the American ball blue. The predecessors of the appellee applied the former name in 1874 to bluing of their manufacture in the form of lozenges packed in small cylinders, and proceeded to sell it. From 1878 to 1897 the predecessors of the appellants, Pomeroy & Olmsted and G. M. Olmsted & Company, purchased this article from the appellee and from its predecessors, and sold it from their place of business at Cedar Rapids, in the state of Iowa. They advertised this article of bluing in connection with their advertisements of the soaps they were selling, and at their request the manufacturers of the bluing, in addition to putting upon the packages their trademark, which was the letter "U" surrounded by a triangle and the name of their factory, "American Ultramarine Works," placed the names of Pomeroy & Olmsted and G. M. Olmsted & Company thereon. During five years of this term G. M. Olmsted & Company bought the American wash blue of the Consolidated Ultramarine Company, Limited, but that company was a distributor for the appellee and other manufacturers, and the bluing was made and packed by the appellee or its predecessors during all this time. The customers who purchased of Pomeroy & Olmsted and of G. M. Olmsted & Company knew the bluing, its character, and its name, but they did not know who manufactured it, and supposed Pomeroy & Olmsted or G. M. Olm-

sted & Company to be its manufacturers. When the appellants purchased the business of G. M. Olmsted & Company, they bought its good will, and they insist that they thereby became entitled to use the name "American Wash Blue" upon any bluing which they may buy and sell, whether it is manufactured by the appellee or not. The facts which condition this claim were stated more at length and were carefully considered by the court below in its opinion in *Heller & M. Co. v. Shaver*, 102 Fed., at pages 882, 886. That court came to the conclusion that the appellants had no better right to use the name "American Wash Blue" to palm off the goods of other manufacturers as those made by the appellee than G. M. Olmsted & Company had, and that the latter firm stood in such a fiduciary relation to the appellee that they could not be permitted to take such action. It held that the good will of the business established under the name "American Wash Blue" was the property of the appellee. These conclusions are, in our opinion, well founded in fact and in law. The brand "American Wash Blue" was conceived and applied to their manufacture by the predecessors of the appellee. The excellence of the article, and the introduction which the appellee gave it or induced Olmsted & Company to give it, by the character and price of the bluing it furnished, established the trade in it, and gave that trade its value. Purchasers in the trade and the public came to know, to demand, and to buy the appellee's manufacture by this brand. The inevitable result is that the good will of this trade became the appellee's property, which neither Olmsted & Company nor their successors could lawfully lead away from it by fraud or falsehood. One does not lose the good will of his trade in an article of his manufacture by placing upon it the names of his customers who are engaged in selling it, nor by the fact that the consumers know only the name and excellence of the article, and neither know nor care who makes it. *Birmingham Vinegar Brewery Co. v. Powell* [1897] A. C. 710, 716, 66 L. J. Ch. N. S. 763, 76 L. T. N. S. 792; *Lichtenstein v. Goldsmith*, 37 Fed. 359.

The conclusions which must be drawn from the facts of this case, therefore, are that by industry and energy the appellee has built up an extensive and lucrative trade in the specific articles of its manufacture, which have become known to the trade and the public as "American Ball Blue" and "American Wash Blue;" that these articles are ordered, bought, and sold by mail and telegraph by their names or brands, without a view of the packages in which they are inclosed; that the appellants have put these

names or brands on goods made by other manufacturers, have offered these goods to the public at reduced prices, and have solicited purchasers to buy them under these names, for the purpose and with the intent of selling these goods as the manufactures of the appellee; that they succeeded in this way in deceiving purchasers and defrauding the appellee of a portion of its trade; and that these brands cannot be used as the names of the products of other manufacturers than the appellee without creating confusion in the trade and purloining the latter's custom.

In this state of the case the appellants have been enjoined from using these names, and one of their loudest complaints is that the goods they sell are made in America, and that they are forbidden to use the word "American" to notify the public of this fact. There are two answers to this objection: (1) That the injunction does not prohibit the appellants from using the word for that purpose, and (2) that they neither need nor seek so to use it, but their only object in trying to make use of it is to filch the good will and trade of the appellee. The injunction restrains them only from "holding themselves out to the public as the owners of the names or brands 'American Ball Blue' and 'American Wash Blue,' or as the manufacturers of the commodities heretofore known and sold under these names, or from selling or offering for sale under these names or brands, or names or brands intended to simulate the same, any blue or bluing manufactured by parties other than complainants." They insist that they have the right to state that the goods they sell are made in America, and the right to use the word "American" for that purpose. The injunction does not forbid them from doing so. They may state in their correspondence or upon their packages, notwithstanding the inhibition of the court, that their ball blue or wash blue is an American manufacture, an American article, or an American product. They may express the same idea by the declaration that it is a New York, or a New Jersey, or an Iowa product, as the case may be, and they may convey the same thought in many other ways without impinging upon the decree of the court. The truth is, however,—and there could be no more conclusive proof of it than the prosecution of this appeal,—that they do not desire to use the word "American," or any other word, for the purpose of declaring that the articles which they sell are made in America. Everyone who purchases them either knows or presumes that to be the fact already. What they seek, and the only thing they really desire, is to use this word to divert to themselves the appellee's trade

65 L. R. A.

in American ball blue and in American wash blue, and they well know that they can accomplish this only by using it in those brands for the sole purpose of conveying to the public the falsehood that the goods they sell are made by the appellee.

Another proposition of counsel for the appellants is that the appellee has, and can have, no proprietary interest in the word "American," or in its exclusive use; and therefore it is entitled to no injunction to restrain its use by another. But an ownership and an interest in the means by which a fraud or wrong is about to be committed are not essential to the maintenance of a suit to enjoin its perpetration. A title to the property about to be injured is sufficient. One gathers the seeds of pernicious weeds, and threatens to sow them on the field of his neighbor. The latter has no proprietary interest in the seeds, but he owns the field and the crop it is producing, and these facts are sufficient to warrant any court in granting him summary relief by injunction against the threatened injury. The appellants scatter throughout the land, for the purpose of deceiving the public and diverting to themselves the trade, custom, and good will of the appellee, words and names which convey the false statements that the goods they are selling were made by the Heller & Merz Company. That company has no property in the words or in the means by which this fraud is committed, but it owns the good will—the custom—which the false and fraudulent use of these words and names injures and destroys; and its proprietary interest in this good will is ample to warrant the court in enjoining its destruction by the fraud. The contention of counsel for the appellants here is a confusion of the bases of two classes of suits,—those for infringements of trademarks, and those for unfair competition in trade. Suits of the former class rest on the ownership of the trademarks. Suits of the latter class are founded upon the damage to the trade of the complainants by the fraudulent passing of the goods of one manufacturer for those of another. In the former, title to the trademarks is indispensable to a good cause of action; in the latter, no proprietary interest in the words, names, or means by which the fraud is perpetrated is requisite to maintain a suit to enjoin it. It is sufficient that the complainant is entitled to the custom—the good will—of a business, and that this good will is injured, or is about to be injured, by the palming off of the goods of another as his. *Lee v. Haley*, L. R. 5 Ch. 155, 161, 39 L. J. Ch. N. S. 284, 22 L. T. N. S. 251, 18 Week. Rep. 242; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C.

A. 386, 406, 86 Fed. 608, 628; *Coats v. Merriok Thread Co.* 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002. This is not a suit for the infringement of a trademark. It is a suit for unfair competition, for selling goods of the appellants as those of another. For this reason no proprietary interest in the word "American," or in the names whose use is enjoined, was essential to the issue of the injunction.

For the same reason, this case is not governed nor affected by the principle that geographical terms and words descriptive of the character, quality, or place of manufacture of an article are not capable of monopolization as trademarks. *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 321, 20 L. ed. 581, 583; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 464, 37 L. ed. 1144, 1147, 14 Sup. Ct. Rep. 151; *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 509; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 546, 35 L. ed. 247, 250, 11 Sup. Ct. Rep. 625; *Continental Ins. Co. v. Continental Fire Asso.* 96 Fed. 846. There is no claim that the words whose use is enjoined constituted trademarks; but this case rests upon the broad proposition that every man must so use his own as to inflict no unnecessary damage upon his neighbor. Under this principle the appellants had the right to buy and sell ball blue, but they had not the privilege to so exercise that right as to unnecessarily injure the business of the appellee. Right here is the broad distinction between this case and *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Centaur Co. v. Heinsfurter*, 28 C. C. A. 581, 584, 56 U. S. App. 7, 13, 84 Fed. 955, 958; and *Centaur Co. v. Marshall*, 38 C. C. A. 413, 97 Fed. 785. In those cases the words whose use the plaintiffs sought to enjoin, "Singer" and "Castoria," had become the names of the things which the defendants had the same right as the complainants to make and sell. It was indispensable to their exercise of these rights that they should use the names of the things, because these were the only names by which the articles were known. The result in those cases was that the use of these names was held to inflict no legal injury on the plaintiffs, and for this reason their use was not enjoined, but the defendants were required to distinguish as far as possible the goods which they sold from those made by the plaintiffs. In the case at bar the appellants have no right to make or sell American ball blue or American wash blue. The names of the articles in which they have the right to deal are ball blue and wash blue. These terms per-

fectly describe the articles, and it is not necessary for them to use the names of the articles manufactured by the appellee in the exercise of any right which they possess.

Nor is this case ruled by that class of authorities illustrated by *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 546, 35 L. ed. 247, 249, 11 Sup. Ct. Rep. 625, in which there was no satisfactory proof of an intent by the defendants to sell their goods as those of the complainants, and the dresses of the articles so distinguished them that confusion and deceit would not be likely to result. The proof of the intent of the appellants here to sell the goods of other manufacturers as those of the appellee amounts to a demonstration, and there is no practicable way other than by prohibition of the use of the name by which filching the trade of an article whose sale is solicited and made by its name can be effectually prevented.

Thus, the issue in this case finally narrows to the question whether or not one has the right to use the word "American" to sell the property of one manufacturer as that of another. From the facts that "American" is a geographical term, that it may not constitute a trademark, that no one may have a proprietary interest in it, counsel for the appellants draw the conclusion that everyone has the right to use it to palm off the goods of one vendor as those of another. Does the conclusion necessarily follow from the premises? Everyone has the right to use and enjoy the rays of the sun, but no one may lawfully focus them to burn his neighbor's house. Everyone has the right to use the common highway, but no one may lawfully apply it to purposes of robbery or riot. Everyone has the right to use pen, ink, and paper, but no one may apply them to the purpose of defrauding his neighbor of his property, of making counterfeit money, or of committing forgery. The partner has the right to use his firm's name, but he may not lawfully employ it to cheat his copartner out of his property. Everyone has the right to use his own name, but he may not lawfully apply it to the purpose of filching his property from another of the same name. The use of a geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general, and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter's injury. It prohibits the perpetration of such a fraud by the use of descrip-

tive and geographical terms which are not susceptible of monopolization as trademarks as effectually as it prohibits its commission by the use of any other expressions. The most instructive case upon this subject, in view of the claim of counsel for the appellants that the injunction should be so modified as to permit them to use the word "American" in the names of the articles they sell on condition that they state upon their packages and circulars the names of the manufacturers or vendors, is *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35, 38, 47, 51, 58 L. J. Ch. N. S. 374, 60 L. T. N. S. 766, 37 Week. Rep. 637, on appeal, [1891] A. C. 217, 220. In that case the plaintiffs and their predecessors had operated a brewery at Stone, a place of about 6,000 inhabitants, and had called the ale they brewed "Stone ale." After this ale became well known to the trade and the public, the defendant built a brewery at Stone, and called ales which he manufactured there by the same name. The question presented by the case was whether an injunction should be granted against the defendant prohibiting him from using the words "Stone ale" without any qualification, or should simply enjoin him from using these words "so as to induce the belief that the ale sold by the defendant is the ale sold by the plaintiff." Page 38. Chitty, J., in considering the question, said: "Now, he is clearly entitled to set up his brewery at Stone, and he is clearly entitled to brew beer and ale at Stone, and to sell them in such a manner as is not calculated to deceive. He may mention on any ale that he makes that the ale is brewed at Stone. But that is not the question. Can he honestly use the term 'Stone ale,' having regard to what the plaintiffs have shown to be the present market meaning of that term?"—and then held that he could not do so, and granted an unqualified injunction against the use of the words. Pages 40, 41.

This injunction was sustained in the court of appeal, where Lindley, J., said: "The evidence in this case convinces me that any ale which may be sold by this particular defendant as 'Stone ale' will be intended by him to be passed off as the plaintiff's ale. I am satisfied that he does not use the words 'Stone ale' for any honest purpose whatever, but, according to the evidence, with a distinctly fraudulent purpose. Is there any reason, then, why the court should not deal with him accordingly, and prevent him from carrying out such intention by restraining him from using the words which he will only use for that purpose?" Page 51.

An appeal was taken to the House of Lords, and there the decree for the injunction was affirmed. Lord Herschell, delivering his opinion, said: "They insisted that 65 L. R. A.

the appellant ought not to have been restrained from 'selling or causing to be sold any ale or beer not of the plaintiff's manufacture under the term "Stone ales" or "Stone ale."' They contended that such an injunction was too wide in its language; that the plaintiffs had no property in the word 'Stone,' as applied to ale; and that they could not monopolize the use of the name of that town merely because for a time they had been the only brewers there, and exclude the rest of the public from employing it to describe the place of origin of such beer as they might choose to brew there. I do not think the principle on which the court ought to act in such a case as the present is open to doubt. The respondents are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name. . . . The court having come to the conclusion that he could not sell the liquor manufactured by him under that name without inducing the belief in the mind of the purchaser that he was obtaining the plaintiff's ale,—a conclusion from which I see no ground for differing,—I do not think that it was improper to frame the injunction in the form adopted, and thus to determine the question at once, instead of leaving it to be raised and contested on an application to commit." *Montgomery v. Thompson* [1891] A. C. 217, 220, 221.

The case before us is on all fours with that from which these quotations have been made. The appellants used the word "American" for the purpose and with the intention of selling the goods of other manufacturers for those of the appellee. They cannot use that word in the names whose use is enjoined without producing the effect which they intend. They have no right to produce this effect, or to use them for this purpose, and the action of the court below was not without the support of high authority.

In the leading case of *Seixo v. Provezende*, L. R. 1 Ch. 192, 194, 12 Jur. N. S. 215, 14 L. T. N. S. 314, 14 Week. Rep. 357, decided in 1866, an injunction was issued against the use of the word "Seixo," which was the name of a region from which the wine of both parties to the suit was derived.

In *Lee v. Haley*, L. R. 5 Ch. 155, 161, 39 L. J. Ch. N. S. 234, 22 L. T. N. S. 251, 18 Week. Rep. 242, an injunction was granted against the use by the defendant, who was doing business in Pall Mall, of the name "The Pall Mall Guinea Coal Company" in

Pall Mall, because the plaintiff had previously become known by that name. The judge said: "I quite agree that they have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name . . . with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

In *Knott v. Morgan*, 2 Keen, 213, the use of the word "London" was forbidden. Lord Langdale said: "The right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others."

In *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 522, 523, 42 L. J. Ch. N. S. 130, 27 L. T. N. S. 393,—a case decided in 1872,—Wotherspoon and another were the successors of a firm which had manufactured starch for many years at Glenfield until their product had become known as "Glenfield starch." But the plaintiffs were then engaged in business at another place. Currie, the defendant, established a manufactory of starch at Glenfield, placed the name "Currie & Co." in large letters upon his packages as manufacturers thereof, and his agents proceeded to sell his product as Glenfield starch. An injunction was granted restraining him "from using the word 'Glenfield' in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be 'Glenfield starch,' . . . and from doing any act or thing to induce the belief that starch manufactured by or for him . . . is 'Glenfield starch.'"

In *Reddaway v. Banham* [1896] A. C. 199, 204, 211, 215, 64 L. J. Q. B. N. S. 381, 74 L. T. N. S. 289, 44 Week. Rep. 638, the plaintiffs sold "camel-hair belting" under that name until the name came to signify their belting. Thereupon the defendant made belting which was properly described by the same name because it was belting, and was made in part of camel's hair. But, notwithstanding the fact that these words were descriptive, and might not be monopolized as a trademark, the defendants were

enjoined from using them. Lord Halsbury, in delivering his opinion in the House of Lords, stated that the case rested on the principle "that nobody has any right to represent his goods as the goods of somebody else" (p. 204), and Lord Herschell said: "In my opinion, the doctrine on which the judgment of the court of appeal was based, that, where a manufacturer has used as his trademark a descriptive word, he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trademark—is not supported by authority, and cannot be defended on principle. I am unable to see why a man should be allowed in this way more than in any other to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival." Pp. 210, 211.

In *Birmingham Vinegar Brewery Co. v. Powell* [1897] A. C. 710, 716, 66 L. J. Ch. N. S. 763, 76 L. T. N. S. 792, the use of the words "Yorkshire relish" was enjoined.

In *North Cheshire & M. Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83, 68 L. J. Ch. N. S. 74, 79 L. T. N. S. 645, the use of the word "Manchester" in the name of the defendant was enjoined.

The principles of law and the practice illustrated by these cases from the English courts have been sustained and followed in the courts of the United States. In *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 73 Am. St. Rep. 263, 53 N. E. 141, a defendant engaged in the manufacture of watches in Waltham, Massachusetts, was enjoined at the suit of a prior manufacturer from using the words "Waltham watch" or "Waltham watches." In *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 406, 58 U. S. App. 490, 86 Fed. 608, 628, an injunction was issued forbidding the use of the words "Minneapolis" and "Minnesota." In *American Brewing Co. v. St. Louis Brewing Co.* 47 Mo. App. 14, 20, an injunction was issued against the use of the word "American." In *Cady v. Schultz*, 19 R. I. 193, 195, 29 L. R. A. 524, 61 Am. St. Rep. 763, 32 Atl. 915, a defendant was enjoined from using the term "U. S. Dental Rooms" at the suit of one who had established a business under the name "United States Dental Association." In *Neuman v. Alvord*, 49 Barb. 588, an injunction was issued against the use of the word "Akron" in the name or description of a cement. In the following cases the defendants were enjoined from using their own names to pass off their goods as those of others: *Croft v. Day*, 7 Beav. 84, 89, 90; *Meyer v. Dr. B. L. Bull Vegetable Medi-*

cine Co. 7 C. C. A. 558, 565, 18 U. S. App. 373, 378, 58 Fed. 884, 887; *Garrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 178, 179, 47 U. S. App. 250, 78 Fed. 472, 477, 478; *Waller Baker & Co. v. Sanders*, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889; *Tarrant & Co. v. Johann Hoff*, 22 C. C. A. 644, 646, 45 U. S. App. 143, 76 Fed. 959, 961; *Rogers v. Wm. Rogers Mfg. Co.* 17 C. C. A. 575, 576, 578, 35 U. S. App. 843, 847, 848, 70 Fed. 1017, 1019; *Clark Thread Co. v. Armitage*, 21 C. C. A. 178, 186, 45 U. S. App. 62, 73, 74 Fed. 936, 944. In *Block v. Standard Distilling & Distributing Co.* 95 Fed. 978, 980; *Fuller v. Huff*, 51 L. R. A. 332, 43 C. C. A. 453, 104 Fed. 141, 144; and *Williams v. Mitchell*, 45 C. C. A. 265, 106 Fed. 168, the use of descriptive words, such as "Standard Distilling," "Health Food," and "Carrom" was enjoined.

The leading cases in support of injunctions restraining the use of geographical terms for the purpose of selling the goods of one manufacturer as those of another are *Wotherspoon v. Currie*, where the use of the name "Glenfield" was enjoined, and *Montgomery v. Thompson*, where the use of the word "Stone" was forbidden. The principles upon which these cases rest have been repeatedly considered and affirmed by the Supreme Court of the United States. In *McLean v. Fleming*, 96 U. S. 245, 254, 255, 24 L. ed. 828, 832, that court said: "Nor is it necessary, in order to give a right to an injunction, that a specific trademark should be infringed; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant, and that he persists in so doing after being requested to desist. . . . Chancery protects trademarks upon the ground that a party shall not be permitted to sell his own goods as the goods of another; and therefore he will not be allowed to use the names, marks, letters, or other indicia of another, by which he may pass off his own goods to purchasers as the manufacture of another. *Croft v. Day*, 7 Beav. 84; *Perry v. Truefitt*, 6 Beav. 66; *Newman v. Alvord*, 51 N. Y. 192, 10 Am. Rep. 588."

In *Laurence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 549, 550, 551, 34 L. ed. 997, 1004, 1005, 11 Sup. Ct. Rep. 396, the court cites and reviews with approval *Wotherspoon v. Currie* and *Montgomery v. Thompson*, and says: "Undoubtedly an unfair and fraudulent competition against the business of plaintiff, conducted with the intent on the part of the defendant to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's, would, in a proper case, constitute ground for relief."

In the last case in which this subject is 65 L. R. A.

considered—*Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 674, 45 L. ed. 365, 381, 21 Sup. Ct. Rep. 270, — a suit for the infringement of a trademark—that court held, in accordance with the established rule, that the word "Elgin" was not susceptible of monopolization as a trademark. But it also reviewed with approval *Wotherspoon v. Currie* and *Reddaway v. Banham*, and said upon this subject: "But it is contended that the name 'Elgin' had acquired a secondary signification in connection with its use by appellant, and should not, for that reason, be considered or treated as merely a geographical name. It is undoubtedly true that, where such a secondary signification has been acquired, its use in that sense will be protected by restraining the use of the word by others in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached."

From the opinions which have now been reviewed and the authorities cited below, the following principles may be safely deduced:

1. The sale of the goods of one manufacturer or vendor as those of another is unfair competition, and constitutes a fraud which a court of equity may lawfully prevent by injunction. *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Seixo v. Provezende*, L. R. 1 Ch. 192, 194, 12 Jur. N. S. 215, 14 L. T. N. S. 314, 14 Week. Rep. 357; *Ooats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966.

2. Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles cannot be monopolized as trademarks. *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 321, 20 L. ed. 581, 583; *Columbia Mill Co. v. Alcorn*, 150 U. S. 464, 37 L. ed. 1146, 14 Sup. Ct. Rep. 161; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 546, 35 L. ed. 247, 249, 11 Sup. Ct. Rep. 625; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 56, 25 L. ed. 993, 995; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 602, 32 L. ed. 535, 536, 9 Sup. Ct. Rep. 166; *Continental Ins. Co. v. Continental Fire Asso.* 96 Fed. 846; *Brown Chemical Co. v. Frederick Stearns & Co.* 37 Fed. 361; *Rumford Chemical Works v. Muth*, 1 L. R. A. 44, 35 Fed. 524; *Illinois Watch Case Co. v. Elgin Nat. Watch Co.* 35 C. C. A. 237, 94 Fed. 667; *New York & R. Cement Co. v. Ooplay Cement Co.* 45 Fed. 212; *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 599; *Connell v. Reed*, 128 Mass. 477, 35 Am. Rep. 397.

3. But the use of such geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another, and to carry on unfair competition,

may be lawfully enjoined by a court of equity to the same extent as the use of any other terms or symbols. *Knott v. Morgan*, 2 Keen, 213; *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 522, 523, 42 L. J. Ch. N. S. 130, 27 L. T. N. S. 393; *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35, 58 L. J. Ch. N. S. 374, 60 L. T. N. S. 766, 37 Week. Rep. 637, [1891] A. C. 217, 220; *Lee v. Haley*, L. R. 5 Ch. 155, 39 L. J. Ch. N. S. 284, 22 L. T. N. S. 251, 18 Week. Rep. 242; *Seizo v. Provezende*, L. R. 1 Ch. 192, 194, 12 Jur. N. S. 215, 14 L. T. N. S. 314, 14 Week. Rep. 357; *Birmingham Vinegar Brewery Co. v. Powell* [1897] A. C. 710, 716, 66 L. J. Ch. N. S. 763, 76 L. T. N. S. 792; *North Cheshire & M. Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83, 68 L. J. Ch. N. S. 74, 79 L. T. N. S. 645; *McLean v. Fleming*, 96 U. S. 245, 255, 24 L. ed. 828, 832; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 550, 551, 34 L. ed. 997, 1005, 11 Sup. Ct. Rep. 396; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 673, 674, 45 L. ed. 365, 379, 21 Sup. Ct. Rep. 270; *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 41, 45 L. ed. 60, 77, 21 Sup. Ct. Rep. 7; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, 30 C. C. A. 386, 406, 58 U. S. App. 490, 86 Fed. 608, 628; *Carlsbad v. Kutnow*, 18 C. C. A. 24, 30, 35 U. S. App. 750, 763, 71 Fed. 167, 173; *Block v. Standard Distilling & Distributing Co.* 95 Fed. 978, 980; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 558, 565, 18 U. S. App. 372, 378, 58 Fed. 884, 887; *Garrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 178, 179, 47 U. S. App. 250, 78 Fed. 472, 478; *Walter Baker & Co. v. Sanders*, 26 C. C. A. 220, 51 U. S. App. 426, 80 Fed. 889; *Tarrant & Co. v. Johann Hoff*, 22 C. C. A. 644, 646, 45 U. S. App. 143, 76 Fed. 959, 961; *Rogers v. Wm. Rogers Mfg. Co.* 17 C. C. A. 575, 576, 578, 35 U. S. App. 843, 847, 848, 70 Fed. 1017, 1019; *Clark Thread Co. v. Armitage*, 21 C. C. A. 178, 186, 45 U. S. App. 62, 73, 74 Fed. 936, 944; *Fuller v. Huff*, 51 L. R. A. 332, 43 C. C. A. 453, 104 Fed. 141, 144; *Williams v. Mitchell*, 45 C. C. A. 265, 106 Fed. 168; *Genesee Salt Co. v. Burnap*, 20 C. C. A. 27, 30, 43 U. S. App. 243, 250, 73 Fed. 818, 821; *Saxlehner v. Apollinaris Co.* 13 Times L. R. 258; *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85, 43 L. R. A. 826, 73 Am. St. Rep. 263, 53 N. E. 141; *Cady v. Schultz*, 19 R. I. 193, 195, 29 L. R. A. 524, 61 Am. St. Rep. 763, 32 Atl. 915; *American Brewing Co. v. St. Louis Brewing Co.* 47 Mo. App. 14, 20; *Newman v. Alvord*, 49 Barb. 588; *Taylor v. Carpenter*, 11 Paige, 292, 42 Am. Dec. 114, 2 Sandf. Ch. 603; *Croft v. Day*, 7 Beav. 84, 89, 90; *Reddaway v. Banham* [1896] A. C. 199, 65 L. J. Q. B. N. S. 65 L. R. A.

381, 74 L. T. N. S. 289, 44 Week. Rep. 638; *Cochrane v. Macnish* [1896] A. C. 225, 229, 65 L. J. P. C. N. S. 20, 74 L. T. N. S. 109.

4. A proprietary interest in the terms or symbols used to palm off the goods of one manufacturer or vendor as those of another, or to commit any other fraud, is not essential to the maintenance of a suit to enjoin the perpetration of the wrong; but an interest in the good will of the business or in the other property threatened is sufficient. *Knott v. Morgan*, 2 Keen, 213; *Lee v. Haley*, L. R. 5 Ch. 155, 39 L. J. Ch. N. S. 284, 22 L. T. N. S. 251, 18 Week. Rep. 242; *Clark Thread Co. v. Armitage*, 21 C. C. A. 178, 186, 45 U. S. App. 62, 73, 74 Fed. 936, 944.

The decree of the circuit court is in perfect accord with these principles and authorities. The appellants were using the word "American" and the names of the appellee's manufactured articles with the intent and for the sole purpose of selling the manufactures of others as those of the appellee, and they were accomplishing this illegal end. The only effectual method of preventing the continuous perpetration of this fraud and of protecting the good will of the business of the appellee from injury or destruction was to enjoin the appellants from applying the names of the appellee's articles to the manufactures of others, and the court wisely and lawfully granted that relief. This conclusion ends the discussion of the real issue in hand, and practically determines the decision of this case. A few minor objections to the decree which do not require extended consideration will be briefly noticed.

Counsel for appellants maintain that the fact that they have placed their names and residence in conspicuous places on their packages, and have otherwise distinguished them from those of the appellee, should relieve them from the injunction. But the American ball blue and the American wash blue were articles well known to the trade and to the public as the manufactures of the appellee before the appellants entered upon the business of selling bluing. These articles, and the names by which they were known, had an established reputation, and commanded a lucrative trade. To the dealers in bluing the appellants were unknown. The only effect of placing their unfamiliar names and residence upon the packages of bluing under the names of the appellee's well-known articles was to give to the appellants the benefit of the established reputation of the appellee's articles, and thus to enable them to derive greater benefit from their fraud. "That is an aggravation, and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the proprietor." *Menendez v.*

Holt, 128 U. S. 514, 521, 32 L. ed. 526, 528, 9 Sup. Ct. Rep. 143; *Gillott v. Esterbrook*, 48 N. Y. 374, 378, 8 Am. Rep. 553.

It is said that the appellee was entitled to no relief because the names "American Ball Blue" and "American Wash Blue" do not denote origin or ownership, and therefore cannot constitute trademarks, and because the appellee registered its trademark, which did not consist of any of the words constituting these names, and it thereby disclaimed their use as trademarks. But this is not a suit for the infringement of trademarks, but to restrain the sale of the goods of one manufacturer as those of another; and a complainant has the same right to an injunction against the perpetration of such a fraud by the use of words or names which do not in themselves indicate origin or ownership, and which are incapable of use and are disclaimed as trademarks, as he has against its commission by the use of any other terms or expressions. Whether the brands "American Ball Blue" and "American Wash Blue" indicated the origin and ownership of the articles to which they were applied in 1872 and 1874, when they were first used, or not, the evidence is overwhelming that by association they came to point out to the trade articles made and owned by the appellee long before 1898, when the appellants first appropriated them, and it was for this reason alone that they used them in their endeavor to deceive the public and to filch the business of the appellee. These facts furnish ample grounds for the injunction whether the words were capable of use as trademarks or not.

The appellee has, since 1895, been engaged in manufacturing and selling bluing under the names "Germania Ball Blue" and "Bavarian Ball Blue" in boxes simulating foreign products, and counsel for appellants insist that these names were false and misleading, and that the appellee was entitled to no relief from a court of equity, because it did not come with clean hands. The principle that "he who comes into equity must do so with clean hands" is familiar and indisputable. But it does not repel all sinners from courts of equity, nor does it disqualify any complainant from obtaining relief there who has not dealt unjustly in the very transaction concerning which he complains. The iniquity which will repel him must have an immediate and necessary relation to the equity for which he sues. *Dering v. Winchelsea*, 1 Cox, Ch. Cas. 318, 319, 2 Bos. & P. 270; *Lewis's Appeal*, 67 Pa. 153, 166; *Bateman v. Fargason*, 2 Flipp. 660, 4 Fed. 32, 33; *Bispham*, Eq. 61. There is no evidence that the appellee has been guilty of any injustice, fraud, or wrong in acquiring the good will of its business in the American

ball blue and the American wash blue, which is the subject of this suit, or in its relations with the appellants, and relief cannot be denied to it because it may have been wicked in other transactions which affect neither the appellants nor the equity here under consideration.

The decrees below is affirmed.

Thayer, Circuit Judge, dissenting:

As I have reached a conclusion different from that announced by my associates, I deem it proper to state my views concerning the questions of law and fact which arise in the case, and, first, with respect to the facts. The Heller & Merz Company, hereafter termed the "complainant," or its predecessors, began the manufacture of bluing, as it seems, at Newark, New Jersey, about the year 1868 or 1869. At first they manufactured bluing only in the form of a powder. Later, in the year 1872, they began to put it up in the form of round pellets or balls about the size of small marbles; and later still, in the year 1874 or 1875, they began to manufacture bluing, to some extent, in the form of round lozenges or wafers. To the bluing which was put up in the form of balls they applied the name "American Ball Blue," and to that put up in the form of round lozenges they claim to have applied the name "American Wash Blue" when they first began to manufacture it in that form. The evidence shows, however, that what is now termed "American Wash Blue" was as commonly, and perhaps more frequently termed "Lozenger Blue" until the year 1878, when Pomeroy & Olmsted, a firm which subsequently became G. M. Olmsted & Company, took hold of the latter kind of bluing, and advertised it extensively in the northwest, with the consent of the complainant, as an article of their own manufacture, under the name "American Wash Blue." Even while Olmsted & Company were thus advertising and selling it as their own product under the name "American Wash Blue," the plaintiff company most frequently referred to it in their letters and bills as "Lozenger Blue." To my mind, the evidence leaves little room for doubt that the words "American ball blue" and "American wash blue" were originally adopted by the complainant itself solely for descriptive purposes,—that is to say, to describe a bluing made in the United States, and to be used for laundry purposes; the one kind put up in the form of balls, and the other in the shape of round lozenges. There is no evidence I think, which indicates that either name was chosen as an artificial brand, but the testimony rather indicates that the names were selected because they accurately described the articles to which they were ap-

plied, the word "American" differentiating them from several kinds of bluing which were made abroad, and imported into this country for sale. Olmsted & Company, who were soap makers at Cedar Rapids, Iowa, for twenty years succeeding the year 1878, advertised bluing put up in the form of round lozenges, extensively, as "American wash blue," throughout the states of Iowa, Minnesota, and the Dakota territories, and built up an extensive trade in the article in those states and territories. The bluing was put up in cylindrical-shaped blue paper boxes of sufficient diameter to contain the lozenges. The cylindrical boxes bore on one end a white label on which was stamped the letter "U" surrounded by a small triangle, and on the three sides of this triangle were printed in very small letters the words "American Ultramarine Works. Trade-Mark." Wrapped around the cylindrical box was another larger label, commending the qualities of the article, and giving directions for its use, which was signed as follows: "G. M. Olmsted & Company, Soap Makers, Cedar Rapids, Iowa." The small cylindrical paper boxes were packed in larger wooden ones, on the ends of which were stenciled the following words: "American Wash Blue. G. M. Olmsted & Co., Cedar Rapids, Iowa." The packages of American wash blue as put up and sold by Olmsted & Company with the full knowledge of the complainant bore no marks indicating to the public that the article was made by the complainant other than the above described label on the end of the cylindrical boxes, and the evidence shows beyond peradventure that nearly all of Olmsted's customers were ignorant of the existence of such a concern as the Heller & Merz Company, and supposed that the article was made by or for Olmsted & Company, and that the words "American wash blue" were wholly descriptive. While Olmsted & Company handled American wash blue,—that is to say, for twenty years succeeding the year 1878,—the complainant manufactured and sold no other lozenger bluing, except a small amount in the states of Illinois and Wisconsin. They manufactured bluing in that form for twenty years, principally to fill orders for Olmsted & Company. The defendants below, Shaver, Blake, & Company, acquired the good will of the business of Olmsted & Company when the latter firm was dissolved by the death of one of its members. Shortly thereafter, in the year 1898, they commenced to advertise and sell lozenger blue in the same form of package that it had been sold by Olmsted & Company, using the words "American wash blue," as their predecessor in interest had used them; but they ceased to affix the label at the end of the cylindrical boxes which

65 L. R. A.

bore the impress of the letter "U" surrounded by the triangle above described. The defendants purchased the bluing from, or had it manufactured for them by the International Ultramarine Works located at Staten Island, New York, and they ceased to patronize the complainant company. Thereupon, as it seems, the complainant began to sell American wash blue put up in the form of lozenges in the territory formerly occupied by Olmsted & Company, and—to retaliate apparently, as Olmsted & Company had never sold the ball blue—the defendants began to advertise and sell it as well as the wash blue. The boxes, however, in which the defendants packed and sold ball blue which was manufactured for them by the International Ultramarine Works, bore no resemblance whatever to the boxes in which the complainant had theretofore packed and sold its ball blue. The defendants' boxes were different in color, and had the words "Shaver, Blake & Company, Cedar Rapids, Iowa," prominently displayed on the face of the boxes. No one, in my judgment, could have possibly mistaken the defendants' ball blue for similar goods of the complainant's manufacture, if he had exercised the slightest care. Moreover, this record fails to show that there is any substantial difference in the bluing made by the complainant and by the International Ultramarine Works. The article manufactured by each concern is the same, and nothing in this record would indicate that one is a better article than the other. This litigation, as I view it, is the outgrowth of the foregoing facts.

The decree of the lower court, which is approved by the majority opinion, enjoins the defendants, among other things, from selling or offering for sale any blue or bluing under the name "American Wash Blue" or "American Ball Blue" unless it is manufactured by the complainant company. It is also said in the majority opinion that the defendants "have no right to make or sell American ball blue or American wash blue;" and, furthermore, that "the names of the articles in which they [the defendants] have the right to deal are 'Ball Blue' or 'Wash Blue.'" At the same time it is conceded in the majority opinion—and of this proposition there can be no doubt—that the words "American wash blue" and "American ball blue" are purely descriptive words and phrases, which cannot be monopolized as a trademark by any manufacturer of bluing. To my mind, the two propositions thus announced are antagonistic, namely, that a manufacturer of bluing cannot, as respects that article, obtain a monopoly of the aforesaid words and phrases, because they are confessedly descriptive, but that he may make use of the

words himself, and enjoin another manufacturer, who makes the same article, from using them to describe his own product. If the latter of these propositions is sound law, then it is apparent, I think, that the former proposition ought to be abandoned, and that it be henceforth conceded that one of the fundamental doctrines of the law of trademark is no longer tenable, namely, that no one is entitled to monopolize either words or phrases, which, as applied to a given article, are purely descriptive of its kind, or quality, or place of manufacture. It will be observed that the opinion of the majority concedes the defendants' right to sell their product under the names "Ball Blue" and "Wash Blue," but denies their right to make use of the word "American" in connection therewith, and I am unable to perceive any substantial reason why the right to use the former of these words should be admitted, and the right to use the latter denied. The word "American" is no less descriptive than the words "wash blue" or the words "ball blue." It indicates that the bluing is made in America, and is a domestic product, just as the word "wash" indicates that the bluing is designed for washing purposes, and the word "ball" indicates that the bluing is put up in the form of small pellets. The words in question are each purely descriptive, and, as the complainant company and as the defendants both employ them, they are used in a very natural relation to each other to aptly describe the two articles to which they are applied, and to show that they are a domestic, not a foreign, product.

Another observation to be made concerning the decree below and the majority opinion is that the relief afforded is not based on the ground that the descriptive words in question have been used on boxes or packages containing bluing which are made in imitation of the complainant's boxes and packages, and for that reason are liable to deceive the public, and lessen the complainant's trade. The injunction is so framed that the phrases "American wash blue" and "American ball blue" cannot be used by the defendants under any circumstances, even though they put up ball blue and lozenger blue in boxes which are so totally unlike those employed by the complainant that they would not mislead a customer who was grossly negligent. The injunction against using the words, therefore, is not founded upon any deception practised or attempted to be practised, except such as may result from the use of words in a purely natural relation to each other, which are confessedly descriptive, and cannot be monopolized as a trademark. The reason assigned for awarding such an injunction is that it may be granted on the ground that the defendants

employ these words with intent to purloin some of the complainant's trade, and that their conduct in so doing is fraudulent. But, in my opinion, an appropriate answer to this suggestion is that a person cannot be said to have been guilty of any such fraud as a court of law or equity will redress when he makes use of words or phrases to describe an article which he manufactures, which, as applied to that article, are purely descriptive, and hence are the common property of all who manufacture or deal in the article. The law, except in a few rare cases does not concern itself with the motives of men when their acts are lawful, and injuries which result to others from the exercise of lawful rights or privileges are *damnum absque injuria*. *Passaic Print Works v. Ely & W. Dry-Goods Co.* 62 L. R. A. 673, 44 C. C. A. 426, 105 Fed. 163. If the words "American wash blue" and "American ball blue," as the complainant contends, have become associated in the public mind with two articles which it manufactures in such a way that they have ceased to be descriptive of the articles, and have acquired a meaning which is secondary and arbitrary, then this result is attributable to the complainant's own fault. If such a result was liable to ensue, it should have chosen a brand originally which was arbitrary, and that might have been monopolized. It had no greater need of employing the descriptive words in question than the defendants have to describe the bluing which they sell. It cannot, therefore, by reason of the peculiar result above mentioned, insist that other manufacturers of bluing in this country shall not call their product "American Wash Blue" and "American Ball Blue" if it is so in fact. It requires but little penetration to see that, if this doctrine of "secondary signification" is adopted in these days of fierce competition, the most common descriptive words and phrases will be monopolized, or at least that attempts will be made repeatedly to monopolize them, and little difficulty will ordinarily be experienced in obtaining testimony to support the claim that common and necessary descriptive words have by long-continued use acquired a secondary meaning. I am willing to concede that one or two English cases cited in the majority opinion, particularly *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35, 58 L. J. Ch. N. S. 374, 60 L. T. N. S. 766, 37 Week. Rep. 637, and the same case as reported in [1891] A. C. 217, sustain the doctrine contended for by my associates that a descriptive word by association with an article may acquire a secondary signification, and that, when such secondary meaning has been acquired, the use of it by another may be enjoined; but, as I read and construe the

American decisions,—particularly the decisions of the Supreme Court, which are controlling authority here,—the doctrine in question has not been approved to the extent to which it has been carried in the case in hand. In *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002, as the right of the public to make use of the word "Singer" as descriptive of a particular sewing machine after the expiration of the patent on the machine was upheld, with the single limitation that one who makes such machines, and calls them by that name, must, by other marks and signs on the machines, clearly indicate to the public that they are made by him, and not by the original Singer Company. The recent case of *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270, as I construe it, inculcates the same doctrine, namely, that a manufacturer cannot be enjoined from making use of words or phrases which in their primary sense are clearly descriptive of the article which he manufactures; and that, even when such words, as used by another, have acquired a secondary signification, the most that a court of equity can do for his protection is to require third parties who have occasion to use them to affix other marks and signs, or indulge in such explanations, as will most effectually prevent a confusion of goods. These are the latest decisions by the Supreme Court on the subject, but prior thereto it was said in *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 547, 35 L. ed. 247, 250, 11 Sup. Ct. Rep. 625, concerning descriptive words which could not become a trademark: "If the words . . . cannot be lawfully appropriated as a trademark, it is difficult to see upon what theory a person

making use of these or similar words can be enjoined. We understand it to be conceded that these words do not in themselves constitute a trademark. It follows, then, that another person has the right to use them unless he uses them in such connection with other words or devices as to operate as a deception upon the public."

Similar views were also expressed in the case of *Goodyear's India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 602, 32 L. ed. 535, 537, 9 Sup. Ct. Rep. 166. See also *Illinois Watch Case Co. v. Elgin Nat. Watch Co.* 35 C. C. A. 237, 94 Fed. 667.

My conclusion is, therefore, that the injunction in its present form ought not to stand, because the defendants have the right to use the words "American wash blue" and "American ball blue," and to use the words in that relation to each other, these being clearly descriptive words and phrases, provided they neither simulate the complainant's boxes or packages, and provided they display their own name prominently on their boxes, circulars, and advertisements, and with equal prominence state that the bluing which they sell is manufactured for them by the International Ultramarine Works of Staten Island, New York, and is not the complainant's product. I have no fault to find with that part of the restraining order which enjoins the defendants from holding themselves out to the public as the owners of the names "American Wash Blue" and "American Ball Blue," or as the manufacturers of those articles, since no one, in my judgment, is or can be the owner of these names, or have an exclusive property therein.

Petition for rehearing denied.

NORTH CAROLINA SUPREME COURT.

Arthur DRUM, Appt.,

v.

Abel S. MILLER.

(135 N. C. 204.)

1. A teacher is not liable for permanent injuries inflicted without malice in

the correction of a pupil, unless they were of such a nature that a reasonably prudent person would reasonably foresee that a permanent injury of some kind would naturally or probably result from his act.

2. To render a teacher liable for injuries inflicted upon a pupil by an attempt to correct him in a wrongful manner, it is not necessary that he should

NOTE.—*Liability of school-teacher for personal injury to pupil.*

I. *Introductory*, 891.

II. *Reasonable restraint or correction.*

a. *In general*, 891.

b. *When injury results from punishment on account of defect in pupil's constitution unknown to teacher*, 892.

c. *When pupil is of age*, 892.

d. *When teacher is not regularly appointed*, 892.

III. *Excessive restraint or correction.*

a. *In general*, 893.

b. *Error of judgment.*

1. *The discretionary nature of the power to punish, vested in teachers*, 894.

2. *Presumption of proper motive*, 894.

3. *Effect of proper motive*, 895.

c. *Improper motive*, 896.

IV. *Punishment inflicted without proper cause*, 897.

be able to foresee that the particular injury inflicted would be the natural and probable consequence of his act.

3. A teacher is liable for the destruction of the sight of a pupil by throwing a pencil at him to attract his attention if he did not act with ordinary care, and the injury was the natural and probable result of his negligence, and he ought reasonably to have foreseen that a permanent injury would be the natural and probable consequence of his act.

(April 26, 1904.)

A PPEAL by the plaintiff from a judgment of the Superior Court for Catawba County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by de-

fendant's wrongful or negligent attempt to correct plaintiff, who was his pupil. *Reversed.*

Statement by Walker, J.:

This is an action brought by the plaintiff to recover damages for an injury to one of his eyes, which is alleged in the complaint to have been caused by the wrongful and negligent act of the defendant. There is not much dispute about the facts. At the time the injury was received the defendant was a teacher in a public school of Catawba county, and the plaintiff was one of his pupils. While the school was in session, and plaintiff's class was reciting one of its lessons, the attention of the plaintiff was attracted by some disturbance in the school-

V. When cause of punishment is unknown to pupil, 807.

VI. Reasonableness or excessiveness of punishment is for the jury.

a. In general, 897.

b. Material considerations, 898.

VII. Statutes, 899.

I. Introductory.

The school-teacher's authority to use force in the government of his pupils springs from the power and duty of restraint and correction vested by law in parents.

As parents are bound to maintain and educate their children, the law has given them a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust. 2 Kent, Com. 203.

When parents, in fulfilling their duty of training their child into a useful and virtuous member of society, place him in charge of a school-teacher for the purpose of acquiring certain forms of education, by that fact the school-teacher becomes *in loco parentis* in regard to all matters pertaining to that particular phase of the child's life which is intrusted to his guidance for development, including the power and duty of correction.

A schoolmaster, for the purpose of correction, represents the parent, and has the parental authority in this regard delegated to him. Reg. v. Hopley, 2 Fost. & F. 202.

But the power to inflict punishment thus delegated to and vested in the school-teacher is not the full extent of the parents' right, because the power of correction, vested in parents, is little liable to abuse, being continually restrained by natural affection, and the school-teacher, of course, has no such natural restraint, and, therefore, must be limited to temperately exercising the power to inflict such punishment as is necessary to answer the purposes for which he is employed. Lander v. Seaver, 32 Vt. 114, 78 Am. Dec. 156.

The delegation by the parent of part of his parental authority to a schoolmaster places the latter *in loco parentis*, and gives him the power to exercise such restraint and correction as may be necessary to answer the purposes for which he is employed. 1 Bl. Com. 453.

The schoolmaster's authority to correct his scholars is that part of the parental power of restraint and correction, delegated to him, which may be necessary to answer the purpose for 65 L. R. A.

which he is employed. Stevens v. Fassett, 27 Me. 266.

A parent, when he places his child with a schoolmaster, delegates to him all of his own authority, so far as it is necessary for the welfare of the child. Fitzgerald v. Northcote, 4 Fost. & F. 656.

The foundation of the schoolmaster's right to exercise discipline over his scholars is a duty vested by law in parents to maintain and educate their offspring, which includes such power of correction as may be requisite for the discharge of their sacred trusts; and so much of this power as is necessary for the purpose is delegated to the schoolmaster that he may the better accomplish the purpose of education. Boyd v. State, 88 Ala. 169, 16 Am. St. Rep. 31, 7 So. 268, *arguendo*.

To the same effect, in several cases the school-teacher's authority, thus delegated to him, is regarded as extending only to what is just and proper and necessary for the welfare of the pupil, under the circumstances.

The relation of master and pupil carries with it the right of reasonable corporal punishment, delegated from the parent. Cleary v. Booth [1893] 1 Q. B. 465, 62 L. J. Mag. Cas. N. S. 87, 5 Reports, 263, 65 L. T. N. S. 349, 41 Week. Rep. 391, 17 Cox, C. C. 611, 57 J. P. 375, *arguendo*.

The right of parents to inflict corporal punishment upon their children in a proper manner and to a proper degree is delegated to the teacher while the children are under his or her charge. Quinn v. Nolan, 7 Ohio Dec. Reprint, 585.

The teacher, who is charged with a part of the parents' duties to train up and qualify children for becoming useful and virtuous members of society, is by law invested with the parents' power to administer moderate correction when it shall be just and necessary in order to control stubbornness, quicken diligence, and reform bad habits. State v. Pendergrass, 19 N. C. (2 Dev. & B. L.) 365, 31 Am. Dec. 416.

II. Reasonable restraint or correction.

a. In general.

Thus, it follows from the principles above outlined (I.) that a teacher is not liable, either civilly or criminally, on account of the force or violence used by him in the reasonable, moderate, and proper correction of a pupil. Clasen v. Pruhs (Neb.) 95 N. W. 640, *obiter*.

room, and when he turned his head to see what it was the defendant threw at him a pencil, which he at the time had in his hand. The plaintiff turned his head back just at the time the pencil reached him, and it struck him in the eye, inflicting a very painful and serious wound, and causing partial, if not total, blindness. The plaintiff insisted that the act of the defendant in throwing the pencil was done maliciously, and that, even if there was no malice, the injury to the plaintiff was a permanent one, and, in either view of the case, the defendant was liable to him, without regard to any question of negligence or of proximate cause. The defendant contended, on the contrary, that there was no malice, and that, if a permanent injury was the result of the act, he

threw the pencil at the plaintiff for the purpose of attracting his attention, and in the exercise of his right of correction and discipline, without intending to cause any injury to the plaintiff, and not foreseeing at the time that such a result would flow from his act. Without objection, the court submitted to the jury two issues, as follows: "(1) Did the defendant wrongfully injure plaintiff, as alleged in the complaint? (2) What damage, if any, is plaintiff entitled to recover?"

There were no prayers for instructions asked by the plaintiff. The court charged the jury as follows: That, if they believed the evidence, they should find "that the defendant was a school teacher, and that plaintiff was his pupil, and was reciting his les-

Battery by a teacher giving moderate correction to his scholar is lawful. 3 Bl. Com. 120.

A master may justify the beating of his scholar if the beating is in the nature of correction inflicted in a reasonable manner and with a proper instrument. 3 Salk. 47; Bacon, Abr. title, *Assault and Battery*, C, p. 373.

As long as a teacher confines himself within the bounds of moderation, he is protected by law from liability for corporal punishment inflicted upon his scholars. *Morris's Case*, 1 N. Y. City Hall Rec. 52.

A schoolmaster may, for the purpose of correcting what is evil in a child, inflict moderate and reasonable punishment. *Reg. v. Hopley*, 2 Post. & F. 202; *Cooper v. State*, 8 Baxt. 324, 35 Am. Rep. 704.

A teacher is not liable in trespass for assault and battery for reasonable corporal punishment inflicted upon a pupil on account of the infraction of a reasonable regulation of the school. *Wilbur v. Berry*, 71 N. H. 619, 51 Atl. 904.

So, damages may not be recovered from a teacher for alleged injuries resulting from a reasonable and moderate chastisement by him for the infraction of a reasonable and needful rule. *Deskins v. Gose*, 85 Mo. 485, 55 Am. Rep. 387.

And a teacher is not liable, under a charge of assault and battery, for inflicting corporal punishment in a reasonable and proper spirit on account of the infraction of a reasonable rule. *Marlsbury v. State*, 10 Ind. App. 21, 37 N. E. 558.

A teacher has the right to punish disobedience of reasonable commands with kindness, prudence, and propriety; and, where the evidence does not show that he whipped a pupil with unreasonable severity, he will not be liable in an action for assault and battery. *Danenhoffer v. State*, 69 Ind. 205, 35 Am. Rep. 216.

The facts in *Danenhoffer v. State*, 69 Ind. 418, are stated to be substantially the same as those in 69 Ind. 295, 35 Am. Rep. 216, and the decision is therefore the same.

Corporal punishment may be inflicted without liability upon a teacher's part when the cause is sufficient, the instrument suitable to the purpose, the manner and extent of the correction, the part of the person to which it is applied, and the temper with which it is inflicted are all distinguished with the kindness, pru-

dence, and propriety which become the station. *Cooper v. McJunkin*, 4 Ind. 290, *arguendo*.

Teachers may inflict reasonable punishment and such force as is necessary to maintain order. *Com. v. Ebert*, 11 Pa. Dist. R. 199.

In Kansas a teacher may inflict reasonable corporal punishment. *State v. Ward*, 2 Lane. L. Rev. 272, as reported in 3 *Brightly's Digest*, p. 3165.

"A magistrate, being of opinion that caning on the hand was attended by risk of serious injury, convicted a schoolmaster of an assault for giving a pupil four strokes, though the boy deserved corporal punishment, and the caning was inflicted unobjectionably and did not cause injury. Held, that the magistrate's reasons were insufficient, and the conviction must be quashed." *Gardner v. Bygrave*, 53 J. P. 743, as reported in 14 *Mew's English Digest*, 647.

b. *When injury results from punishment on account of defect in pupil's constitution unknown to teacher.*

A teacher who inflicts only proper punishment upon a child is not liable for injurious consequences to the boy's health, which followed on account of some hidden defect in his constitution, when the teacher had no notice, by warning or by his appearance, that the child was so afflicted. It was the duty of the parents to see that the teacher was informed of the fact that the health or disposition of the child would render the punishment permitted by the rules of the school dangerous or improper. *Quinn v. Nolan*, 7 Ohio Dec. Reprint, 585.

c. *When pupil is of age.*

A teacher is not guilty of assault and battery when he, with the aid of another, unsuccessfully attempts by force to remove from the teacher's desk one who attends the school as a pupil, but is more than twenty-one years of age. If one over twenty-one years of age applies and is received as a pupil, he cannot, if disobedient, be exempt from liability to punishment; and it is the teacher's privilege to exert all the force necessary to remove him from the instructor's desk, which he refuses to leave. *Stevens v. Fassett*, 27 Me. 268.

d. *When teacher is not regularly appointed.*

One who, although not a public teacher by legal appointment, is a teacher in fact, being

son at the time of his alleged injury. A teacher has the authority to inflict upon his pupil such punishment as, in his judgment, may be necessary for the purpose of correction; and unless such punishment shall seriously endanger the life, limb, or health of the pupil, or shall disfigure him, or cause some permanent injury to him, or was inflicted not in the honest discharge of his duty as a teacher, but under the pretext of duty, to gratify his malice, then the teacher would not be responsible for the injury to the child; or, if the injury was not the proximate result of the punishment, the teacher would not be responsible therefor. An act is the proximate cause of an injury either when it is the direct cause thereof, or when the injury is the natural and probable con-

sequence of the act, and when, in the exercise of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby. A party is presumed to have intended the necessary, as well as the natural and probable, consequence of his acts." The court then explained to the jury what is malice, and further charged them that, if the plaintiff was inattentive, and defendant threw the pencil at him for the purpose of punishing him, and inflicted a permanent injury upon him, or if he threw the pencil at the plaintiff for the purpose of gratifying his malice, and injured him, and the injury was proximately caused by the throwing of the pencil, they should answer the first issue "Yes;" but if they found that the pencil was

in the occupation of the schoolhouse for the purpose of giving instruction to the scholars of the district, is not liable in an action against him for assault and battery on account of force employed by him in removing a pupil from the building who refuses to comply with a reasonable regulation of the school, when he uses no unnecessary force. *Kidder v. Chellis*, 59 N. H. 473.

III. Excessive restraint or correction.

a. In general.

A teacher who goes beyond the limits of his authority, and inflicts a greater punishment than is necessary for the welfare of the child whose training is intrusted to his care, is, as a general rule, and in the absence of extenuating circumstances (III. b), liable, either civilly or criminally, for the injury done.

The right of a schoolmaster to inflict punishment upon his pupils extends only to what is necessary for the maintenance of school discipline, the interest of education, and the degree proportionate to the offense committed. *Brisson v. Lafontaine*, 8 L. C. Jur. 173.

Thus, if the correction exceeds the bounds of due moderation, either in the measure of it or in the instrument used, and results in death, it will be either murder or manslaughter according to the circumstances. 1 Hale, P. C. 261; *Post*. C. L. 262; 1 Hawk. P. C. 111; *Reg. v. Hopley*, 2 *Post*. & F. 202.

Or if it be protracted beyond the child's power of endurance, and death ensues, it will be at least manslaughter. *Reg. v. Hopley*, 2 *Post*. & F. 202.

A plea of *immoderate castigavit* is a good reply to a plea of justification by a teacher in a declaration alleging a beating. 3 Salk. 47.

The infliction by a schoolmaster of punishment with a thick stick, continued two hours and a half, from which the boy almost immediately died, renders the schoolmaster guilty of manslaughter. *Reg. v. Hopley*, 2 *Post*. & F. 202.

And the killing by a preceptor of a pupil through an excessive correction of his person, being a great intemperance, will not be entirely pardoned; but it will not be considered murder unless the excess is so great that it can only be imputed to personal malice or a depraved temper. *Records of Justiciary* as re- 65 L. R. A.

ported in 1 Hume, *Crim. Law of Scotland*, p. 237.

So, if a schoolmaster exceeds the bounds of due moderation in administering correction to his scholars, he becomes criminally liable; and, if death ensues from the brutal injuries inflicted, he may be liable, not only for assault and battery, but to the penalties of manslaughter, or even murder, according to the circumstances of the case. *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 So. 268, *arguendo*.

And if school-teachers inflict such punishment as produces or threatens lasting mischief, they are liable criminally therefore. *State v. Long*, 117 N. C. 791, 23 S. E. 431.

So, any punishment inflicted by a teacher which seriously endangers life, limbs, or health, or disfigures the child, or causes other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which punishment is authorized to be inflicted by the teacher, viz., the welfare of the child. *State v. Pendergrass*, 19 N. C. (2 Dev. & B. L.) 365, 31 Am. Dec. 416.

A schoolmaster will not be permitted to deal so brutally with his pupil as to endanger life, limbs, or health; nor can he lawfully disfigure or perpetrate on his person any other permanent injury. *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 So. 268.

Corporal punishment that occasions permanent injury is not within the discretionary power of the teacher to inflict. *Com. v. Fell*, 11 Hazard, 1'a. Reg. 179.

It is not necessary that the injury inflicted be of a permanent nature in order to render the teacher liable civilly or criminally on the ground of excessive punishment.

Thus, any punishment with a rod, which leaves marks or welts on the person of the pupil for two months afterward or for a much less time, is immoderate and excessive. *State v. Mizner*, 50 Iowa, 145, 32 Am. Rep. 128.

A teacher who chastised two of her scholars with a stick $\frac{3}{4}$ of an inch in diameter at the larger end, and 3 or 4 feet in length, by striking and beating them upon the back, neck, arms, and legs to such an extent that ecchymosis resulted, is liable upon an indictment for assault and battery. *State v. Boyer*, 70 Mo. App. 156.

And a teacher who, while punishing a pupil, inflicts severe blows, knocks down, and wounds him, must be deemed to have gone beyond the

thrown, not for the purpose of punishing the plaintiff, but to recall his attention to the recitation, and they further found from all the surrounding circumstances that a reasonably prudent man, in the exercise of ordinary care, would not have foreseen that an injury would likely have resulted therefrom, then they should answer the first issue "No," although they should further find that the plaintiff was permanently injured, for, if injured under such circumstances, it was an accident; an accident being an event from a known cause. The jury were further instructed that, unless they found from the evidence that plaintiff's injury was the natural and probable consequence of defendant's act in pitching or throwing the pencil; and unless they found that a prudent man might

reasonably, or in the exercise of ordinary care, have expected or anticipated that the injury would likely result from the defendant's act,—they should answer the first issue "No." The court then gave the defendant's second prayer for instructions, as follows: "Unless you find from the evidence that the plaintiff's injury was the natural and probable consequence of the defendant's act in pitching or throwing the pencil, it will be your duty to answer the first issue 'No;'" and also the defendant's third prayer, as follows: "Unless you find from the evidence that a reasonable prudent man might reasonably, or in the exercise of ordinary care, have expected or anticipated that the injury complained of would likely result from the defendant's act in throwing or pitching the

limits of his lawful authority to inflict moderate correction, unless it appears that there is such resistance upon the pupil's part as to, perhaps, render the acts of the teacher necessary in self-defense. *Hathaway v. Rice*, 19 Vt. 102.

If, in inflicting punishment upon his pupil, a teacher goes beyond the limit of modern castigation, and either in the mode or degree of correction is guilty of any unreasonable or disproportionate violence or force, he is clearly liable for such excess in a criminal prosecution. *Com. v. Randall*, 4 Gray, 36.

So, excessive punishment will render a teacher liable to conviction upon an indictment for assault and battery. *Anderson v. State*, 3 Head, 455, 75 Am. Dec. 774.

A teacher is liable civilly or criminally if the correction is immoderate and unreasonable. *Clasen v. Pruhs* (Neb.) 95 N. W. 640.

A teacher is liable if he inflicts corporal punishment upon the pupil which the general judgment of reasonable men, after thought and reflection, would call clearly excessive. *Patterson v. Nutter*, 73 Me. 509, 57 Am. Rep. 818, 7 Atl. 273.

If, considering all the circumstances in the case, a punishment is excessive, a teacher is liable for assault and battery. *Marlsbury v. State*, 10 Ind. App. 21, 37 N. E. 558.

Whenever the correction inflicted clearly appears to have been excessive, it must be judged to have been illegal. *Hathaway v. Rice*, 19 Vt. 102.

Since a parent cannot delegate a greater authority than he himself possesses, therefore, although a father expressly authorizes a schoolmaster to chastise his son, that does not relieve the master from liability for excessive chastisement inflicted by him, resulting in killing the child. *Reg. v. Hopley*, 2 Fost. & F. 202.

b. Error of judgment.

1. The discretionary nature of the power to punish, vested in teachers.

The law recognizes that no one can have all of the facts of the situation before him as the teacher had,—the offense, and looks, actions, nature, and needs of the child, and the extent of the influence of his conduct upon others,—and therefore admits that the efforts of the teacher to fulfil the task committed to him in the training of the child must be looked upon with reasonable indulgence as admittedly of a 65 L. R. A.

discretionary nature. *Bolding v. State*, 23 Tex. App. 175, 4 S. W. 580; *Hathaway v. Rice*, 19 Vt. 102.

The reasonable exercise by the teacher of his power of judgment and discretion is, of course, required.

Thus, a teacher must exercise judgment and discretion, and be governed, as to the mode and severity of the punishment inflicted by him, by a consideration of the nature of the offense, the age, size, and strength of the pupil, and other appropriate circumstances. *Haycraft v. Grigsby*, 88 Mo. App. 354.

So, in inflicting corporal punishment a teacher must exercise reasonable judgment and discretion, and must be governed, as to the mode and severity of the punishment, by the nature of the offense, the age, size, and apparent powers of endurance of the pupil. *Com. v. Randall*, 4 Gray, 36.

And so, in inflicting punishment, a teacher should be governed, as to the mode and the severity of the punishment, by the nature of the offense committed, the previous good or bad conduct of the pupil, and the age, size, sex, and apparent power of endurance of the pupil. *State v. Ward*, 1 Kan. L. J. 370, as reported in 43 Century Digest, p. 2497.

2. Presumption of proper motive.

In recognition of the necessarily discretionary nature of the teacher's exercise of the right to punish, above referred to (III. b. 1), as well as by reason of the high character of a teacher's calling and the station in life of those following it, the law presumes that any punishment inflicted is necessary, reasonable, and proper, and the result of the exercise of correct judgment (*State v. Pendergrass*, 19 N. C. [2 Dev. & B. L.] 305, 31 Am. Dec. 416; *State v. Thornton* [N. C.] 48 S. E. 602; *Haycraft v. Grigsby*, 88 Mo. App. 354; *Anderson v. State*, 3 Head, 455, 75 Am. Dec. 774; *Stephens v. State*, 44 Tex. Crim. Rep. 67, 68 S. W. 281; *Marlsbury v. State*, 10 Ind. App. 21, 37 N. E. 558); and that there is an entire absence of any criminal or unlawful intent to injure (*Dowlen v. State*, 14 Tex. App. 61).

Ordinarily, in consideration of a preceptor's station, injuries caused by him in correcting his pupil will not be ascribed to a vindictive or cruel disposition. Records of Justiciary as reported in 1 Hume, Crim. Law of Scotland, 238.

pencil, you should answer the first issue 'No.'" The jury answered the first issue "No," and therefore did not answer the second. There was a judgment in accordance with the verdict in favor of the defendant, and the plaintiff appealed.

Mr. T. M. Hufham for appellant.

Messrs. Self & Whitener for appellee.

Walker, J., delivered the opinion of the court:

Several exceptions were taken by the plaintiff to the judge's charge, only two of which we deem it necessary to notice. One of these exceptions is based upon the plaintiff's contention that, if he was permanently injured by the act of the defendant, he is en-

titled to recover, whether that act was the proximate cause of the injury or not, or could or could not reasonably have been foreseen. We cannot agree with the plaintiff in this contention. It is undoubtedly true that a teacher is liable if, in correcting or disciplining a pupil, he acts maliciously, or inflicts a permanent injury; but he has the authority to correct his pupil when he is disobedient or inattentive to his duties, and any act done in the exercise of this authority, and not prompted by malice, is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably foresee that a permanent injury of some kind would naturally or probably result from the act. There is a distinction, we think, between the case of an

And the law not only presumes that a teacher is innocent who is charged with assault and battery on account of corporal punishment inflicted by him, but it also presumes that he has done his duty. *Marlsbury v. State*, 10 Ind. App. 21, 37 N. E. 558.

But the presumption thus raised is open to rebuttal. *Haycraft v. Grigsby*, 88 Mo. App. 354; *Anderson v. State*, 8 Head, 455, 75 Am. Dec. 774; *State v. Mizner*, 50 Iowa, 145, 32 Am. Rep. 128.

3. Effect of proper motive.

In view of the discretionary nature of the teacher's authority to inflict punishment, above shown (III. b, 1), and the difficulty of determining, after and apart from the scene of the punishment, whether the line between reasonable and excessive punishment was overstepped, and in view of the presumption which the law raises that an individual following the profession of teaching will exercise his authority to punish only so far as is proper, reasonable, and necessary (III. b, 2), there is a class of cases which holds that, in the absence of evidence of an improper motive, or of the infliction of punishment clearly excessive, such as results in injury of a permanent nature, the teacher will not be held liable, or will be excused from liability, on the ground of error of judgment, for punishment which, to the jury, seems to have gone somewhat beyond what was reasonable and necessary for a correction of the offense committed.

By early English authorities this doctrine is carried very far, it being held that, though the correction inflicted resulted in death, the teacher will not be liable, it being regarded as *per infortunium*. *Fost. C. L.* 262; 1 *Hawk. P. C.* 111; 1 *Hale, P. C.* 261, 473, 474; *J. Kelyng*, 28, 65.

But a belief in a teacher's mind that a boy is obstinate does not excuse extreme severity and excessive punishment resulting in death. *Reg. v. Hopley*, 2 *Fost. & F.* 202.

Modern cases do not go so far.

Thus, according to *DRUM V. MILLER*, even in the absence of malice a teacher may not escape liability for a permanent injury inflicted upon a pupil when, in the judgment of a reasonable man, a permanent injury of some kind might have been foreseen as naturally or probably resulting from the nature of the correction.

But when the correction administered is not 65 L. R. A.

in itself of a kind to seriously endanger life, limbs, or health, or to disfigure the child, or cause other lasting injury, and therefore is not beyond the authority of the teacher, its legality or illegality depends entirely upon the *quo animo* with which it is administered. *State v. Pendergrass*, 19 N. C. (2 Dev. & B. L.) 365, 31 Am. Dec. 416.

So, although the punishment is unnecessarily excessive, if it is not of a nature to cause lasting injuries, and if the teacher acts in good faith, he is not liable for an assault and battery. *Fox v. People*, 84 Ill. App. 270.

And a teacher is not liable under an indictment for assault and battery on account of the punishment inflicted by her upon a scholar, when the injury produced was temporary only, the marks left by the switching passing away in a few days, when the teacher acted honestly in the performance of duty according to her sense of right, and not for the purpose of gratifying malice. *State v. Pendergrass*, 19 N. C. (2 Dev. & B. L.) 365, 31 Am. Dec. 416.

And so, a teacher is not liable, in an action against him for assault and battery, for a punishment inflicted upon a pupil on account of error in judgment as to the necessity for, or the extent of, the correction imposed, when he has acted in good faith and without malice. *Heritage v. Dodge*, 64 N. H. 297, 9 Atl. 722.

A teacher, being intrusted with a discretion in the matter of inflicting punishment, cannot be held responsible for error of judgment, but only for wickedness of purpose. *State v. Thornton* (N. C.) 48 S. E. 602, *arguendo*.

A schoolmaster is not rendered liable to prosecution on account of error of judgment in inflicting punishment. *Com. v. Seed*, 5 Clark (Pa.) 78.

So, when there is no ground for the inference of an improper motive on the teacher's part in inflicting chastisement, and a proper weapon has been used, if the blows inflicted were really harder than were necessary, taking into consideration the nature of the offense, the age, the physical and mental condition, as well as the personal attributes, of the pupil, the error will be considered one of judgment only; and a conviction of assault and battery against the teacher is not justified. *Vanvactor v. State*, 113 Ind. 276, 3 Am. St. Rep. 645, 15 N. E. 341.

This doctrine, shown in the above cases, is not, however, unanimously approved and followed.

injury inflicted in the performance of a lawful act and one in which the act causing the injury is in itself unlawful, or is, at least, a wilful wrong. In the latter case the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not; but, when the act is lawful, the liability depends, not upon the particular consequence or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act. In the one case he is presumed to intend the consequence of his unlawful act, but in the other, while the act is lawful, it must be performed in a careful manner, otherwise it be-

comes unlawful, if a prudent man, in the exercise of proper care, can foresee that it will naturally or probably cause injury to another, though it is not necessary that the evil result should be, in form, foreseen. Cooley, in his work on Torts, 2d ed. *69, states the rule thus: "(1) . . . In the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary, and proximate result. Here the wrong itself fixes the right of action. We need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence. (2) When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any

Thus, in one late case, *Haycraft v. Grigsby*, 88 Mo. App. 354, the court expressly refused to follow the cases holding that a teacher is not liable save when, under the pretext of maintaining authority, he punishes to gratify vindictive feeling, and holds that, if he immoderately and unreasonably punishes a scholar, he is liable for the injury sustained regardless of whether the motive which prompts him is malicious or not.

And so, according to *Lander v. Seaver*, 82 Vt. 114, 70 Am. Dec. 156, if the punishment inflicted is clearly excessive in the judgment of reasonable men, then the schoolmaster is liable for such excess, even though he acts from good motives in inflicting the punishment, and in his own judgment considers it necessary, and not excessive. The court says, however, that when a teacher appears to have acted from good motives, and not from anger or malice, considerable allowance should be made by way of protecting him in the exercise of his discretion; and that he should not be held liable on the ground of excess of punishment unless the punishment was clearly excessive, and would be so held in the general judgment of reasonable men; that, if any doubt exists as to whether the punishment was excessive or not, the schoolmaster should have the benefit of it.

c. Improper motive.

The power to inflict punishment is vested in the teacher only so far as is necessary for the purposes on account of which the child is intrusted to his care (I.). It therefore follows that punishment inflicted for any reason not based on the child's welfare is unauthorized on the teacher's part, and an act for which he may be brought to account.

If a whipping is given maliciously,—that is, without reasonable cause,—it constitutes an assault, no matter how mild it is. *Haycraft v. Grigsby*, 88 Mo. App. 354.

Teachers have no right to inflict malicious corporal punishment. *State v. Boyer*, 70 Mo. App. 156.

If they do so under the pretext of duty, they are liable criminally. *State v. Long*, 117 N. C. 791, 23 S. E. 431.

In *State v. Stafford*, 113 N. C. 635, 16 S. E. 256, where the injuries extended only to bruises, a teacher was held liable to a conviction of assault and battery on the ground that he in-

flicted the punishment out of anger and to gratify his malice.

A schoolmaster is rendered liable to prosecution on account of punishment inflicted upon a pupil by malice of heart, as admitted in *Com. v. Seed*, 5 Clark (Pa.) 78; but the fact that there were, the next day after the infliction of a punishment upon a child by a teacher, marks caused by blows from the rattan used, is slight evidence merely of the teacher's motive in inflicting the punishment, as it is much greater evidence of the obstinacy and perverseness of the child.

A teacher may be liable for the infliction of punishment, although it does not produce lasting injury upon the scholar, if he administers the correction maliciously and for the purpose of gratifying his own bad passions. *State v. Pendergrass*, 19 N. C. (2 Dev. & B. L.) 363, 31 Am. Dec. 416, *obiter*; *State v. Thornton* (N. C.) 48 S. E. 602.

Any chastisement inflicted by a schoolmaster, springing from caprice, anger, or bad temper, constitutes an offense, punishable like ordinary wrongs. *Brisson v. Lafontaine*, 8 L. C. Jur. 173.

Revenge, or the punishment of a pupil for the misconduct of others, is a motive which, equally with malice, will render the punishment inflicted by a teacher unlawful. *State v. Thornton* (N. C.) 48 S. E. 602.

A teacher may not chastise a pupil out of spite. *Com. v. Ebert*, 11 Pa. Dist. R. 199.

Nor to gratify his own evil passions. *Com. v. Fell*, 11 Hazard, Pa. Reg. 179; *Bolding v. State*, 23 Tex. App. 175, 4 S. W. 580.

If punishment be administered to a pupil for the gratification of the teacher's passion or rage, and evil consequences to the child result, the teacher will be answerable to the law. *Reg. v. Hopley*, 2 Fost. & F. 202.

And if a schoolmaster hastily and passionately, but without deliberation, designs an immoderate or unreasonable correction for a scholar, resulting in the latter's death, he is guilty of manslaughter. 1 Hale, P. C. 454.

So, if a schoolmaster, without deliberation, designs an immoderate or unreasonable correction, either in respect of the measure, manner, or instrument used, and the scholar dies thereof, the master cannot be excused from murder. 1 Hale, P. C. 454.

If a teacher invents some extraordinary mode of punishment, or employs some unusual and

particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause. (3) If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But, if the original wrong only becomes injurious in consequence of the intervention of some distinct

wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Pollock in his treatise on Torts, pp. 14 to 35, discusses with great clearness and apt illustration this subject of proximate cause in its relation to the liability of persons for civil wrongs, and the following general principles (the most of them expressed in his words) may be gathered therefrom: A tort is an act or omission (not merely a breach of duty arising out of a personal relation, or undertaken by contract), which is related to harm suffered by a determinate person in the following ways: (1) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the

dangerous instrument of discipline, such as to indicate personal malice or a depraved temper, and, in correcting the pupil, kills him, he is guilty of murder. Records of Justiciary as reported in 1 Hume, Crim. Law of Scotland, 238.

Unreasonable and excessive force designedly used by a teacher in inflicting corporal punishment presents the criminal intent necessary in order to maintain a criminal proceeding against him for assault and battery. *Com. v. Randall*, 4 Gray, 36.

It is necessary that the violence used should have been used with the intention of inflicting an injury. *Dowlen v. State*, 14 Tex. App. 61.

If the punishment inflicted is cruel it is unjustifiable. *Marlsbury v. State*, 10 Ind. App. 21, 37 N. E. 558; *Hathaway v. Rice*, 19 Vt. 102.

The limit of lawful authority in the school-master is past when a jury of reasonable men would be authorized from the facts to infer that the punishment was induced by legal malice or wickedness of motive. *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 So. 268.

Teachers who administer correction in anger or insolence, or in any other respect immoderately or improperly, must be considered guilty of assault and battery. *Cooper v. McJunkin*, 4 Ind. 200.

The doctrine of *Cooper v. McJunkin* is expressly adhered to in *Gardner v. State*, 4 Ind. 632, an action for assault and battery against a school-teacher, who, becoming angry at his pupil, commenced beating him, wearing out two whips on him, and then administering blows with his fist upon the pupil's head, and kicks in his face. In the language of the court, it is said: "Such outrages on the child, even though he be truant and perhaps stubborn, are more than parental feeling can bear. To prevent retaliation and breaches of the peace, it becomes a matter of public policy to punish the offender."

Courts and juries should, therefore, hold a strong and stern hand over teachers who abuse their sacred and responsible position."

A teacher is liable to a conviction of assault and battery on the ground of having inflicted unreasonable and immoderate correction from an improper motive, when the facts shows that after administering a severe chastisement to the scholar in the school room, the teacher followed him into the yard and there struck him over the head with a limb or stick, and then struck him in the face several times with

his fist, from which blows the eye of the scholar was swollen and closed for several days, and there were marks on his head, made by the stick according to the physician's opinion; and it also appeared that the teacher was apparently very angry and excited, and that he boasted, after the infliction of the blows, that he "could whip any man in China Grove beat." *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 So. 268.

IV. Punishment inflicted without proper cause.

Punishment inflicted without proper cause will render a teacher liable to conviction upon an indictment for assault and battery. *Anderson v. State*, 3 Head, 455, 75 Am. Dec. 774.

The chastisement of a pupil for breaking an unreasonable rule renders a teacher liable in an action against him for assault and battery. *State v. Vanderbilt*, 116 Ind. 11, 9 Am. St. Rep. 820, 18 N. E. 266.

When compulsory education is not established in a state, a teacher may not inflict corporal punishment upon a pupil for not studying subjects which the parent has requested that the pupil be excused from. The remedy in such case is not corporal punishment, but expulsion. *State v. Mizner*, 50 Iowa, 145, 32 Am. Rep. 128.

A teacher is liable to a prosecution for assault and battery for inflicting punishment upon a pupil when she does so in attempting to exercise control over the child as to things outside of her jurisdiction. *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471.

V. When cause of punishment is unknown to pupil.

Punishment inflicted upon a pupil to whom the reason therefor is unknown cannot be justified on the teacher's part. *State v. Mizner*, 50 Iowa, 145, 32 Am. Rep. 128.

VI. Reasonableness or excessiveness of punishment is for the jury.

a. In general.

It is obvious that, although the broad principles above outlined (I.), viz., that a teacher has the right to administer such necessary, reasonable, and proper correction as is necessary for the welfare of the child intrusted to his charge, are, since the rise of the common law, unchanging, the real meanings of the words,

harm complained of. (2) It may be an act in itself contrary to law or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.

(3) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should, with due diligence, have foreseen and prevented. (4) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent. A special duty of this kind may be (1) absolute, (2) limited to answering for harm which is assignable to negligence. In some positions a man becomes, so to speak, an insurer to the public against a certain risk; in others he warrants only that all has been done for safety that reasonable care can do.

The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment. Even if the mischief to be prevented is not such as an ordinary man would foresee as the probable consequence of disobedience, there is some default in the mere fact that the law is disobeyed (at any rate, a court of law cannot admit discussion on that point), and the defaulter must take the consequences. "Then we have the general duty of using due care and caution.

"necessary," "reasonable," "just," "proper," "moderate," "cruel," "excessive," etc., as applied to the punishment inflicted by a teacher upon a scholar, are ever changing, according to the state of civilization of the passing period, and the ideas at the time prevalent in men's minds.

Therefore, it is always a question of fact, for the jury to determine from all the attending circumstances, whether a punishment inflicted was reasonable and proper, or excessive. *State v. Mizner*, 45 Iowa, 248, 24 Am. Rep. 769; *Com. v. Randall*, 4 Gray, 36; *Sheehan v. Sturges*, 53 Conn. 481, 2 Atl. 841; *State v. Boyer*, 70 Mo. App. 156; *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 So. 268; *Smith v. State* (Tex. Crim. App.) 20 S. W. 360; *Quinn v. Nolan*, 7 Ohio Dec. Reprint, 585; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156; *Claesen v. Pruhs* (Neb.) 95 N. W. 640.

b. Material considerations.

The provocation, danger of the instrument used, age, and condition of the scholar, must all be considered in determining the schoolmaster's liability for injuries inflicted upon the scholar by chastisement. 1 Hale, P. C. 454.

The nature of the offense, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size, and strength of the pupil to be punished are among the various considerations which must be regarded. *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

The offense, the size and apparent condition of the boy, the character of the instrument of punishment used, and the testimony as to the manner in which and the extent to which the punishment was inflicted should be considered. *Quinn v. Nolan*, 7 Ohio Dec. Reprint, 585.

The jury may infer malice from an excessive punishment. *State v. Thornton* (N. C. 48 S. E. 602.

So, the nature of the offense, the age, size, mental and moral qualities, and apparent powers of endurance of the pupil, as well as his prior and habitual conduct or misconduct, should be taken into consideration. *Sheehan v. Sturges*, 53 Conn. 481, 2 Atl. 841.

But, according to *Haycraft v. Grigsby*, 88 Mo. App. 354, the child's docile or refractory conduct at the time of his punishment should be considered, rather than his general disposition. 65 L. R. A.

It is for the jury to determine whether a chastisement was immoderate or not from the size of the rod used, character of the wounds inflicted, and all the attending circumstances. *Smith v. State* (Tex. Crim. App.) 20 S. W. 360.

So, in determining whether a schoolmaster, in punishing a scholar, was actuated by improper motive, the nature of the instrument of correction used is a material consideration. *Boyd v. State*, 88 Ala. 169, 16 Am. St. Rep. 31, 7 So. 268.

After a consideration of the question it was held that a small, smooth rattan is a reasonable and moderate instrument to be used by a teacher in the punishment of a pupil. *Com. v. Seed*, 3 Clark (Pa.) 78.

The nature of the instrument used was a very material consideration in determining the extent of the teacher's liability according to early authorities.

If punishment, resulting in death, is given with a dangerous or unfit weapon likely to kill or maim, as a pestle or great staff, it will be murder, due regard being had to the age and strength of the party. 1 Hale, P. C. 261, 473, 474.

So, if a schoolmaster, in correcting a scholar, makes use of an instrument improper for the purpose, and apparently dangerous, such as an iron bar or a sword, etc., and the scholar dies, the master is guilty of murder. 1 Hawk. P. C. 111.

And so, if the correction is made with a dangerous weapon likely to kill or maim, and death results, it is murder. *Fost. C. L. 262.*

If the punishment resulting in death is done with a cudgel or other thing not likely to kill, though improper for the purposes of correction, it will be manslaughter, due regard being had to the age and strength of the party. 1 Hale, P. C. 261; *Fost. C. L. 262.*

And so, if punishment be inflicted with an instrument unfitted for the purpose, and calculated to produce danger to life or limb, and death ensues, it will be manslaughter, or, according to the reporter, at least manslaughter. *Reg. v. Hopley*, 2 Fost. & F. 202.

A schoolmaster must correct his scholar with such things as are fit for correction, and not with such instruments as may probably kill him, such as a bar of iron. *J. Kelyng*, 64.

What is due care and caution under given circumstances has to be worked out in the special treatment of negligence. Here we may say that, generally speaking, the standard of duty is fixed by reference to what we should expect in the like case from a man of ordinary sense, knowledge, and prudence." In cases of tort the primary question of liability may itself depend, and it often does depend, on the nearness or remoteness of the harm or injury, and the liability itself must be founded on an act which is the immediate cause of the harm, or injury to a right; the rule of the law being that the proximate, and not the remote, cause is to be regarded. For, says Bacon: "It were infinite for the law to judge the causes of causes, and their impulsions one of another. Therefore it contenteth itself with the immediate cause, and

judgeth of acts by that, without looking to any further degree." For the purpose, therefore, of civil liability, in the law of torts, those consequences, and those only, are deemed immediate and proximate or natural and probable, which a person of average competence and knowledge being in the like case of a person whose conduct is in question, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether the consequence was immediate or not does not matter. That which a man actually foresees is to him, at all events, natural and probable. Pollock, *Torts*, p. 21. In the case of wilful or intentional wrong-

VII. Statutes.

The teacher's right to inflict corporal punishment, and the extent thereof, have been made the subject of legislative enactment in a very few instances.

In New York it has been provided that to use, or attempt to use, force or violence is not unlawful when committed by a teacher in the exercise of a lawful authority to restrain or correct a pupil, when the force or violence used is reasonable in manner and moderate in degree. Penal Code, § 223, subd. 4.

So, in Minnesota, force or violence, reasonable in manner and moderate in degree, used by a teacher in the exercise of a lawful authority to restrain or correct a pupil, is not unlawful. Minn. Stat. § 6477 (4).

And according to the Criminal Code of Canada it is lawful for every school-teacher to use force, by way of correction, towards any pupil under his care, provided such force is reasonable under the circumstances. Canada Anno. Crim. Code, § 55.

By the Civil Code of Lower Canada, it is provided that "the father, and, in his default, the mother, of an unemancipated minor have over him a right of reasonable and moderate correction, which may be delegated to and exercised by those to whom his education has been intrusted." L. C. Civ. Code, § 245.

A teacher exceeds his rights of "exercising reasonable and moderate correction," as allowed by statute, when he drags a child eight years old to the platform by his ear to compel him to kneel down, thereby injuring the ear so as to require medical attendance for several weeks. *Lefebvre v. Des Petits Freres*, Mont. L. Rep. 6 Super. Ct. 430.

According to the Texas Penal Code, violence does not amount to assault and battery when used in the exercise of the right of moderate restraint and correction, given by law to the teacher over the scholar. *White's Anno. Texas Penal Code*, title XV. chap. 1, art. 593 [490].

Violence used to the person is not unlawful, and does not amount to assault and battery, when used by a teacher in the exercise of moderate restraint or correction of a scholar. *Dowlen v. State*, 14 Tex. App. 61.

When, however, the limit of punishment which a teacher may inflict upon a pupil is set by statute, it may not be exceeded, although (5 L. R. A.

the pupil remains unsubdued; therefore a teacher who strikes a pupil sixty-six blows with his hand is guilty of simple assault, although the pupil remains insubordinate until sixty-three blows have been given, since such a punishment cannot be regarded as moderate within the statute. *Whitley v. State*, 33 Tex. Crim. Rep. 172, 25 S. W. 1072.

So, if a teacher, in chastising a pupil, exceeds the moderate correction allowed by statute, he may be convicted of an assault. *Spear v. State* (Tex. Crim. App.) 25 S. W. 125.

And so, a verdict that punishment inflicted by a teacher was excessive, in a prosecution against him for aggravated assault and battery, will not be disturbed when the facts show that there was, as a result of the chastisement, a bruised place on the child's shoulder larger than a hand, and that for several days marks of the switching remained. *Howerton v. State* (Tex. Crim. App.) 43 S. W. 1018.

A judgment against a school-teacher for aggravated assault and battery upon his pupil was affirmed in *Bell v. State*, 18 Tex. App. 53, 51 Am. Rep. 293. The points up on appeal, however, are not relative to the discussion herein.

The rules of a school can never be such as to authorize a school-teacher to inflict immoderate correction or violence upon a scholar. *Smith v. State* (Tex. Crim. App.) 20 S. W. 360.

But, according to *Stephens v. State*, 44 Tex. Crim. Rep. 67, 68 S. W. 281, the Texas statute confides in the teacher the discretionary power to punish pupils, and exonerates him from liability unless the whipping is excessive or malicious; and, therefore, a teacher is not liable for assault and battery, within the statute, when he whipped a boy thirty-three blows with switches for a serious offense, after thorough investigation and determination that the boy was guilty, although the chastisement left marks upon the boy's body.

And so, a teacher is not liable to conviction upon a charge of aggravated assault and battery for a moderate whipping, which resulted in no severe bruises, abrasions, or other serious injury, inflicted with a switch of reasonable size upon a pupil for an infraction of a rule against fighting. *Hutton v. State*, 23 Tex. App. 387, 59 Am. Rep. 777, 5 S. W. 122.

So, a teacher is not liable under an indict-

doing we have an act intended to do harm, and harm done by it, and the inference of liability from such an act may seem a plain matter under the general rule of liability and assuming that no just cause of exception to it is present. "It is clear law that the wrongdoer is liable to make good the consequences, and it is likewise obvious to common sense that he ought to be. He went about to do harm, and having begun an act of wrongful mischief, he cannot stop the risk at his pleasure, nor confine it to the precise objects he laid out, but must abide it fully and to the end." The principle is commonly expressed in the maxim that a man is presumed to intend the natural consequences of his acts. The doctrine of natural and probable consequence is most clearly illustrated, however, in the law of negligence, for there the substance of the wrong itself is failure to act with due foresight. It has been defined as "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do;" and for the purpose of civil liability the definition is sufficient and adequate, perhaps, to indicate the kind of act, or failure to act, which may be regarded as the immediate or proximate cause of any consequent harm or injury; for the prudent man, to whose ideal behavior we are to look as the true standard of duty, will be guided by a reasonable estimate of probability, and will not neglect what he can forecast as probable, but will order his precaution by the measure of what appears likely in the known course of things. If he fails so to order his conduct, and injury results, he is justly held to be the responsible author of it.

ment for assault and battery on account of punishment inflicted by him in good faith without passion, ill will, or spite for the infraction of a rule of the school, notwithstanding the chastisement inflicted was more severe than was actually necessary. *Dowlan v. State*, 14 Tex. App. 61.

So, a judgment against a teacher for aggravated assault and battery on account of the force used in compelling a pupil to surrender a pistol which he carried in violation of the rules of the school, was refused. In *Metcalf v. State*, 21 Tex. App. 174, 17 S. W. 142, on the ground that, according to the facts, it was not excessive.

And a teacher is not liable to conviction for assault and battery if he uses such force as is necessary in combatting the efforts of a large, strong youth to assault him while resisting compliance with a reasonable and necessary command of the teacher, when the previous record and conduct of the pupil have been unusually bad, and the wounds inflicted by the teacher are of a slight character. *Thomason v. State* (Tex. Crim. App.) 43 S. W. 1013.

Evidence of the teacher's intent in inflicting
65 L. R. A.

While, as we have said, a person charged with negligence is liable only for those injuries which a prudent man, in the exercise of care, could have reasonably foreseen or expected as the natural and probable consequence of his act or his omission of duty, it must not be supposed that the principle thus stated requires that he should have been able to foresee the injury in the precise form in which it in fact resulted, or to anticipate the particular consequence which actually flowed from his act or omission of duty. "It is not an essential element of negligence that the defendant should have anticipated, or have had reason to anticipate, that his carelessness would injure another person. The improbability of injury to another is a circumstance that might be taken into account, but which is not conclusive of the question. If, however, no reasonable person could have anticipated that injury to another might ensue, we think that there could be no negligence. It is certainly not essential that the negligent person should have anticipated injury to the particular person who was in fact injured, or the particular kind of injury produced." 1 *Shearm. & Redf. Neg.* 4th ed. § 21. It is quite sufficient to satisfy the principle and to bring any case within its operation that the party complained of should be able, in the exercise of the care of a man of ordinary prudence, to foresee that harm or injury will result, without reference to the particular kind. If he had or should have had this foresight, he is in no better case than the man who intends to do and actually does harm, so far as liability for the natural and probable consequence of his act or conduct is concerned. We believe this to be the doctrine to be gathered from the teachings of the text writers and the decided cases, and the principle that

the punishment is admissible, although the pupil makes no resistance, and the chastisement is so severe as to draw blood in a number of places. *Kinnard v. State*, 35 Tex. Crim. Rep. 276, 60 Am. St. Rep. 47, 33 S. W. 234.

Therefore, although there are cases favoring a strict construction, the weight of authority of the Texas cases seems to be in favor of construing the statute so as to place in the teacher a discretionary power, and to exonerate him from liability unless the punishment is clearly excessive under all the circumstances, or malicious.

It is also provided by the Texas Penal Code that, though lawful for a schoolmaster to chastise his scholar, yet, if this is done with an instrument likely to produce death, or if, with a proper instrument, the chastisement be cruelly inflicted, and death result, it is murder. *White's Anno. Texas Penal Code*, title XV. chap. 12, art. 682.

In one state, New Jersey, a statute has been passed entirely prohibiting the infliction of corporal punishment. 3 N. J. Gen. Stat. p. 3049, § 202.

M. M. M.

a man is liable for those consequences only which an ordinarily prudent man can foresee as likely to flow from his acts is, when thus restricted and understood, undoubtedly the correct one. It seems to be in consonance with a just appreciation of the causal connection which should exist between the act and the consequence of it in order to create civil liability. There is no sound or valid reason, so far as we are able to see, why the very injury that was inflicted by the wrongful or negligent act should have been foreseen; for, if the person complained of actually intended any harm to him who was injured by his act, it is conceded that he is liable, without regard to the particular nature of the injury, and there is no way of distinguishing such a case from one in which an act is negligently done, which the party doing it could well see at the time would cause harm, or injury, in its general sense, to another. There may be a difference in degree but not in principle. In the one case there is an actual intention, while in the other there is an implied intention, which the law will not ordinarily permit to be contradicted, because it is a just and reasonable rule, as it is a maxim of the law, that a person is presumed to intend that which is the natural consequence of his act. When, therefore, a wilful wrong is committed, or a negligent act which produces injury, the wrongdoer is liable, provided, in the latter case, he could have foreseen that harm might follow as a natural and probable result of his act; for, if he can presume that harm might naturally and probably follow, he must necessarily intend that it should follow, or he must have acted without caring whether it would or not, which, in effect, is the same thing. It may be stated as a general rule that, when one does an illegal or mischievous act, which is likely to prove injurious to another, or when he does a legal act in such a careless or improper manner that he should foresee, in the light of attending circumstances, that injury to a third person may naturally and probably ensue, he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. It is not necessary that he should actually intend to do the particular injury which follows, or, indeed, any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case, and in the other he will be presumed to intend that which, in the exercise of the care of a prudent man, he should see will be followed by injurious consequences. In the case of conduct merely negligent the question of negligence itself will depend upon the further question whether injurious results should be

expected to flow from the particular act. The act, in other words, becomes negligent, in a legal sense, by reason of the ability of a prudent man, in the exercise of ordinary care, to foresee that harmful results will follow its commission. The doctrine is thus expressed, and many authorities cited to support it, in 21 Am. & Eng. Enc. Law, 2d ed. p. 487: "In order, however, that a party may be liable in negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." It is not essential, therefore, in a case like this one, in order that the negligence of a party which causes an injury should become actionable, that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough if it now appears to have been a natural and probable consequence of the negligent act, and the party sought to be charged with liability for the negligence should have foreseen, by the exercise of ordinary care, that some mischief would be done. 1 Thomp. Neg. § 59. In determining whether due care has been exercised in any given situation of the party alleged to have been negligent, reference must be had to the facts and circumstances of the case and to the surroundings of the party at the time, and he must be judged by the influence which those facts and circumstances and his surroundings would have had upon a man of ordinary prudence in shaping his conduct if he had been similarly situated. *Hill v. Winsor*, 118 Mass. 251.

Applying these general principles to the case in hand, we find that the defendant occupied that relation toward the plaintiff, who was his pupil, which entitled him to use such means for the purpose of correction and discipline as, in his judgment, were required under the circumstances, provided that he neither acted from malice nor inflicted permanent injury. *State v. Pendergrass*, 19 N. C. (2 Dev. & B. L.) 365, 31 Am. Dec. 416; *State v. Long*, 117 N. C. 791, 23 S. E. 431. The law on this subject is thus well stated: "It is the duty of the teacher to enforce the rules and regulations adopted by the school directors for the government of a school, and to maintain discipline in the school; and in order to maintain discipline and compel obedience to any lawful regulation the teacher may inflict corporal punishment upon a pupil, since the teacher for the time being stands, to some extent at least, *in loco parentis*, and has such a portion of the

powers of the parent delegated to him, namely, that of restraint and correction, as may be deemed necessary to answer the purposes for which he is employed." 25 Am. & Eng. Enc. Law, 2d ed. p. 24. And by another writer it is thus stated: "The teacher has the power to enforce obedience to the rules and to his commands. One of the means recognized by the law is corporal chastisement. He may thereby inflict temporary pain, but not 'seriously endanger life, limbs, or health, or disfigure the child, or cause any other permanent injury.' He cannot lawfully beat the child, even moderately, to gratify his own evil passions. The chastisement must be honestly inflicted in punishment for some dereliction which the pupil understands. Plainly, if the teacher keeps himself within these limits and his lawful jurisdiction, he must decide the question of the expediency or necessity of the punishment and its degree. It is impossible he should ever inflict it without." Bishop, Noncontract Law, § 596, p. 269. If, when the case is again tried, the jury find that the defendant acted maliciously, he will, of course, be liable to the plaintiff for the consequent injury and damage, as was fully and clearly explained in the charge of the judge at the last trial; but, if he inflicted a permanent injury in attempting to enforce the discipline of his school, and in so doing failed to exercise ordinary care, he will still be liable to the plaintiff if the jury further find that the injury was the natural and probable result of his negligence, and that the defendant, in the light of the attending circumstances, and in the exercise of ordinary care, ought reasonably to have foreseen that a permanent injury would be the natural and probable consequence of his act.

The court had charged the jury correctly, in accordance with the foregoing principles, until it gave the instruction contained in the defendant's third prayer. By that instruction the jury, before they could return a verdict for the plaintiff, were required to find that the defendant was, at the time, able to foresee, by the exercise of ordinary care, not only that the injury would result, but that the particular injury which was received by the plaintiff would be the natural and probable consequence of his act. It is very likely that this instruction had great weight with the jury in deciding the case against the plaintiff; and we can well see how he might have been, and no doubt was, seriously prejudiced thereby. The language of Gaston, J., in *State v. Pendergrass*, 19 N. C. (2 Dev. & B. L.) at page 367, 31 Am. Dec. 416, will be appropriate in this connection, as he states the rule of responsibility in such cases with his usual clearness: "We think that the instruction on this point should 65 L. R. A.

have been that, unless the jury could clearly infer from the evidence that the correction inflicted had produced, or was in its nature calculated to produce, lasting injury to the child, it did not exceed the limits of the power which had been granted to the defendant. We think, also, that the jury should have been further instructed that, however severe the pain inflicted, and however, in their judgment, it might seem disproportionate to the alleged negligence or offense of so young and tender a child, yet, if it did not produce nor threaten lasting mischief, it was their duty to acquit the defendant, unless the facts testified induced a conviction in their minds that the defendant did not act honestly in the performance of duty, according to her sense of right, but, under the pretext of duty, was gratifying malice." There the liability was made to depend upon the question whether the act charged to have been negligent threatened lasting injury. We can add nothing to what is so well said by that wise and learned judge.

There was error in giving the defendant's third prayer for instruction, which entitles the plaintiff to another trial. We cannot consider this error as cured by the other parts of the charge though in themselves correct. *Edwards v. Atlantic Coast Line R. Co.* 129 N. C. 78, 39 S. E. 730, 132 N. C. 101, 43 S. E. 585; *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217; *Tillett v. Lynchburg & D. R. Co.* 115 N. C. 662, 20 S. E. 480. The rule in this respect is well settled in those cases.

Douglas, J., concurs in result, *arguendo*.

Smith PAUL, *Appl.*

r.

City of WASHINGTON.

(134 N. C. 363.)

1. Equity has no jurisdiction of a suit

NOTE.—For other cases in this series as to injunction to restrain enforcement of ordinance, see *Rushville v. Rushville Natural Gas Co.* 15 L. R. A. 321; *Georgia Packing Co. v. Macon*, 22 L. R. A. 775; *Augusta v. Burum*, 26 L. R. A. 340; *Deems v. Baltimore*, 26 L. R. A. 341; *Cicero Lumber Co. v. Cicero*, 42 L. R. A. 696; *Chicago v. Collins*, 40 L. R. A. 408; and *Americus v. Perry*, 57 L. R. A. 230.

As to municipal power to prohibit screens in barrooms, see also, in this series, *Champer v. Greencastle*, 24 L. R. A. 768, and note.

As to ordinance forbidding stalls, booths, or other inclosures in saloon, see *State v. Barge*, 53 L. R. A. 428.

As to ordinance requiring curtains to front doors and windows of saloon to be raised, and saloon to be closed between 10 p. m. and 4 a. m., and on Sunday, see *Bennett v. Pulaski*, 47 L. R. A. 278.

to enjoin the enforcement of a municipal ordinance for the alleged reason that it is unreasonable and void, since there is an adequate remedy at law.

2. That officers charged with the execution of a void penal ordinance are insolvent, so that a judgment against them will be unavailing, is not sufficient to require equity to take jurisdiction of a suit to restrain the attempted enforcement of the ordinance.
3. One who obtains a license to sell liquor has no standing in court to restrain the enforcement of existing ordinances regulating the manner of sale.
4. That a municipal corporation has power to prohibit the sale of intoxicating liquor within its limits does not, in case it attempts to regulate such sale, empower it to make unreasonable provisions for such regulation.
5. A municipal ordinance forbidding the use of any screen, of any nature which shall shut off the view from the street of the interior of a place where liquor is sold is not unreasonable.
6. A municipal ordinance may require all liquor sold in saloons to be served and drunk at the counter.
7. Forbidding the use of side, rear, or trap doors connected with a saloon for the sale or delivery of liquors, or the entrance or exit of customers, is not an unreasonable restraint upon the use of property.
8. Requiring liquor saloons to be closed between 8 o'clock in the evening and 6 o'clock in the morning, and forbidding the doors to be open between those hours, are not unreasonable.
9. Places where liquor is sold may be required to be kept lighted throughout the night, even during the hours when they are not open for the transaction of business.
10. Forbidding owners of, or employees in, places where liquor is sold to be in such places between the hour of closing on Saturday night and the hour for opening on Monday morning is not so clearly unreasonable as to require the court to set aside an ordinance making such provision.
11. The keeping of games and devices for amusements in places where liquor is sold may be forbidden by a municipal corporation having power to regulate or prohibit the sale of such liquor, although the state may have imposed a tax upon such things when used in connection with such places.
12. Forbidding the maintenance of restaurants or eating rooms in connection with barrooms is not unreasonable.
13. A provision in an ordinance regulating the liquor traffic authorizing the aldermen to investigate alleged violations of the ordinance, and revoke licenses if violations are found, is not void as against one who consented to it.
14. The invalidity of a provision in an ordinance regulating the liquor traffic, permitting the revocation of licenses, does not render void the provisions of the ordinance prescribing the manner in which

the business shall be conducted, for violation of which a penalty is prescribed.

(*Montgomery, J., dissents from proposition 1. Douglas, J., dissents from propositions 5-14.*)

(March 8, 1904.)

APPEAL by plaintiff from a judgment of the Superior Court for Beaufort County in favor of defendant in a suit to enjoin the enforcement of certain municipal ordinances for the regulation of the liquor traffic. *Affirmed.*

Statement by **Montgomery, J.:**

This is an appeal of the plaintiff from an order made by Judge Hoke in which he dissolved a restraining order theretofore made in the case. The plaintiff was, before the 1st day of January, 1904, and at the time this action was commenced (January 18, 1904), engaged in retailing liquor in the city of Washington, North Carolina, in a large two-story brick building situated at the corner of Main street and Whitecar alley. There is a front door upon Main street and a side door upon Whitecar alley, and also a door from the rear of the building opening into the lot upon which the building stands; and there has been, and still is, a cellar beneath the building, with a trapdoor leading to the cellar, and the cellar has been used and could be used for storage purposes. Prior to the 1st day of January, 1904, the plaintiff rented out the second story of the building as a general restaurant, and a part of the time conducted the same on his own account. On the 4th of November, 1903, the board of aldermen of the city of Washington enacted and adopted (to go into effect on the 1st day of January, 1904) the following ordinances:

"(1) That it shall be unlawful for any person, firm, or corporation, carrying on the business of selling spirituous, vinous, or malt liquors in Washington, or for any agent, servant, or employee of such person, firm, or corporation, to have, use, permit, or allow in their saloons, sales room, or place of business, any storm doors, partitions, screens, blinds, stained glass, or any contrivance which shall in any manner obstruct the view of the interior of his or their saloon, sales room, or place of business or any part thereof, or which shall in any manner conceal or cut off any view of any person or persons in such saloon, sales room, or place of business from and through the front door and windows thereof. All front doors shall be glass paneled, one glass to the shutter; the bottom of said panel shall not be more than 4 feet in height from the level of the sidewalk; the bottom of glass in all front windows shall not be more than 4 feet in height

from the level of the sidewalk; all glass in front windows and front doors shall be kept clean of dirt, specks, or anything that will dim or obstruct the view of the interior of such saloon, sales room, or place of business. No counters shall extend more than 50 feet from the front door or doors of said saloon or saloons. All liquor shall be served at the counter, and all liquors drunk in said saloon or saloons shall be drunk at the said counter or counters; and any person violating this ordinance shall, upon conviction thereof, be fined \$50. Each and every day upon which a violation of this section shall be committed or continued shall constitute a separate offense.

"(2) That it shall be unlawful for any person, firm, or corporation, carrying on the business of selling spirituous, vinous, or malt liquors in Washington, or for any agent, servant, or employee of such person, firm, or corporation to use, permit, or allow any side door or rear door, trapdoors, elevators, or stairways for entrance to or exit from his or their saloon, sales room, or place of business by side or rear door or place of entrance or exit; nor shall any spirituous, vinous, or malt liquors be sold or delivered through any window or other opening, and any person violating this ordinance shall, upon conviction thereof, be fined \$50. Each and every day upon which a violation of this section shall be committed or continued shall constitute a separate offense; provided nothing herein contained shall prevent the use of such back or side doors by the person or persons carrying on said business, his or their agents, servants, or employees for purposes other than the sale or delivery of liquors.

"(3) That it shall be unlawful for any person, firm, or corporation to whom shall be granted a license to sell spirituous, vinous, or malt liquors by the board of aldermen of Washington, or for any agent, servant, or employee of such person, firm, or corporation to sell, give away, or in any manner part with, directly or indirectly, any liquor or drinks in his or their saloon, sales room, or place of business between the hours of 8 o'clock in the evening and 6 o'clock in the morning, or permit or allow the doors of his or their saloon, sales room, or place of business to be opened or remain open between said hours; and every person violating this ordinance shall, upon conviction thereof, be fined \$50. Each and every day upon which a violation of this section shall be committed or continued shall constitute a separate offense.

"(4) That in every saloon or room where the business of selling spirituous, vinous, or malt liquors shall be carried on under a license from the board of aldermen of Washington, the person, firm, or corporation, holding such license shall keep burning through-

out the period of darkness, each and every night, a gas or electric light of such brightness that objects in the rear of said room may be plainly seen; and no such room shall be entered, opened, kept open, or occupied by any person whomsoever between the hours of closing on Saturday night at 8 o'clock and the hours for opening on the next Monday morning at 6 o'clock. Any person, firm, or corporation, or his or their servant, agent, or employee who shall violate this ordinance shall, upon conviction thereof, be fined \$50.

"(5) That it shall be unlawful for any person, firm, or corporation carrying on the business of selling spirituous, vinous, or malt liquors in Washington, or for any agent, servant, or employee of such person, firm, or corporation to have, use, permit, or allow in his or their saloons, sales room, or place of business, or in any room connected therewith, any billiard table or pool table, tenpin alleys, gaming tables, or any games or gaming devices whatsoever, whether the same be played, or used or played, for amusement and exercise, or for anything of value, and shall also be unlawful to have, use, permit, or allow in his or their saloon, sales room, or place of business, or in any room connected therewith, any restaurant, eating house, room, or table, or any means or contrivance whatever for providing, supplying, or furnishing food, whether the same is to be provided, supplied, or furnished for giving away or for selling to customers, and it shall be unlawful to permit or allow in his or their saloon, sales room, or place of business, obscene pictures, the printing to be exposed to view on the walls thereof or elsewhere in the room. Any person, firm, or corporation, his or their agents, servants, or employees, who shall violate this section, shall upon conviction be fined \$50.

"(6) No saloon shall be conducted, or shall any spirituous, vinous, or malt liquors be sold or disposed of in any building in which there is a restaurant, eating house, room, table, or any means or contrivance whatever for providing, supplying, or furnishing food, whether the same be provided, supplied, or furnished free or for pay: Provided this shall not apply where the saloon or place wherein liquor is disposed of, and the room or place where food is furnished or supplied, shall be separated by one or more solid, upright, perpendicular walls, with no doors, nor openings of any kind therein. Any person, firm, or corporation, his or their agents, servants, or employees, who shall violate this section, shall upon conviction be fined \$50.

"(7) That any and all licenses hereafter granted by the board of aldermen of Washington for the sale of liquors shall be issued by the said board and be accepted by the ap-

plicant therefor upon the express condition that a violation of any of the foregoing ordinances, of any statute or ordinance regulating the sale of liquors in or at the saloon, sales room, or place of business for which the license has been granted, shall work a forfeiture of said license, and that the board of aldermen, upon satisfactory evidence of such violation, shall have the power of declaring such license revoked, and such condition shall be incorporated in the license when granted. Upon complaint made to the mayor or that any person, company, or firm has violated any of the said ordinances or statutes, he shall forthwith summon such person, company, or firm to appear before the board of aldermen at a given time, not less than three days' notice being given, to show cause why such license should not be revoked."

On January 2, 1904, the ordinances being in full force, a license to retail liquor was granted to the plaintiff by the board of aldermen upon a condition inserted in the license that a violation of any of the ordinances should work a forfeiture of the license.

Mr. Charles F. Warren, for appellant: Void city ordinances may be enjoined.

Georgia Packing Co. v. Macon, 22 L. R. A. 775, 4 Inters. Com. Rep. 508, 60 Fed. 774; *Bennett v. Pulaski* (Tenn. Ch. App.) 47 L. R. A. 278, 52 S. W. 913; *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; *Page v. Baltimore*, 34 Md. 558; *Holland v. Baltimore*, 11 Md. 187, 69 Am. Dec. 195; *Black, Intoxicating Liquors*, § 73.

No power is given to adopt specifically any one of the ordinances in question. They are all subject to the inquiry whether they are authorized by the charter or the general law, and, if authorized, whether they are reasonable.

1 Dill. Mun. Corp. 2d ed. § 262.

The power to adopt the ordinance requiring screens cannot be fairly inferred from the language of the charter.

Champer v. Greencastle, 138 Ind. 339, 24 L. R. A. 768, 46 Am. St. Rep. 390, 35 N. E. 14.

Not only is the ordinance without authority, but it is unreasonable.

Bennett v. Pulaski (Tenn. Ch. App.) 47 L. R. A. 278, 52 S. W. 913; *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 46 Am. St. Rep. 390, 35 N. E. 14.

The board of aldermen had no power to adopt the ordinance requiring saloons to be closed from 8 P. M. until 6 A. M., and the same is also unreasonable and void.

State v. Ray, 131 N. C. 814, 60 L. R. A. 634, 92 Am. St. Rep. 795, 42 S. E. 960; *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535; 17 Am. & Eng. Enc. Law, p. 288; *Ward v. 65 L. R. A.*

Greeneville, 8 Baxt. 228, 35 Am. Rep. 700; *Black, Intoxicating Liquors*, § 236.

The ordinance requires that the saloon must be kept lighted every night and all day Sunday. This entails an unnecessary tax and expense upon the proprietor, and no necessity exists for the passage of such an ordinance.

State v. Thomas, 118 N. C. 1221, 24 S. E. 535.

An ordinance making it a misdemeanor to let a person in or out of a saloon during the hours in which it is required to be closed is unreasonable and void.

Bennett v. Pulaski (Tenn. Ch. App.) 47 L. R. A. 278, 52 S. W. 913; *Newbern v. McCann*, 105 Tenn. 159, 50 L. R. A. 476, 58 S. W. 114.

By statute it is legal to conduct either a billiard or pool table or a bowling alley in connection with a liquor saloon upon the payment of a license tax of \$50.

Laws 1903, chap. 247, § 50.

No authority has been given the board of aldermen to forbid it.

State v. Gerhardt, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *Washington v. Hammond*, 76 N. C. 33.

If it be within the power of the legislature to prevent the keeping of a restaurant in connection with a saloon, it has not granted that power to the aldermen of the city of Washington.

Chicago v. Netcher, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469.

It would not be a reasonable regulation for a city to provide that no liquor should be used or kept in any refreshment saloon or restaurant.

Black, Intoxicating Liquors, § 234.

The aldermen had no power to adopt the ordinance.

State v. Gerhardt, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707.

Mr. Stephen C. Bragaw, for appellee:

An injunction will not be granted to prevent the enforcement of an alleged unlawful municipal ordinance; nor can an action be maintained which only seeks to have such ordinance adjudged void.

St. Peter's Episcopal Church v. Washington, 109 N. C. 21, 13 S. E. 700; *Scott v. Smith*, 121 N. C. 94, 28 S. E. 64; *Cohen v. Goldsboro*, 77 N. C. 2; *Busbee v. Lewis*, 85 N. C. 332; *Busbee v. Macy*, 85 N. C. 329; *Pearson v. Boyden*, 86 N. C. 585; *Vickers v. Durham*, 132 N. C. 880, 44 S. E. 686; *Paulk v. Sycamore*, 104 Ga. 24, 41 L. R. A. 772, 69

Am. St. Rep. 128, 30 S. E. 417; *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115; *West v. New York*, 10 Paige, 539; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *State, Raffetto, Prosecutor, v. Mott*, 60 N. J. L. 413, 38 Atl. 857; *Crighton v. Dahmer*, 70 Miss. 602, 21 L. R. A. 84, 35 Am. St. Rep. 666, 13 So. 237; *Phillips v. Stone Mountain*, 61 Ga. 386; *Ewing v. Webster City*, 103 Iowa, 226, 72 N. W. 511; *Chisholm v. Adams*, 71 Tex. 678, 10 S. W. 336; *Wallack v. Society for Reformation of Juvenile Delinquents*, 67 N. Y. 23; *Levy v. Shreveport*, 27 La. Ann. 620; *Devron v. First Municipality*, 4 La. Ann. 11; *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 So. 575; *Poyer v. Des Plaines*, 123 Ill. 111, 5 Am. St. Rep. 494, 13 N. E. 819; *New Home Sewing Mach. Co. v. Fletcher*, 44 Ark. 139; *Schwab v. Madison*, 49 Ind. 329; *Pope v. Savannah*, 74 Ga. 365; *Moses v. Mobile*, 52 Ala. 198; *Waters Peirce Oil Co. v. Little Rock*, 39 Ark. 412; *Rogers v. Cincinnati*, 5 McLean, 337, Fed. Cas. No. 12,008; *State ex rel. George v. Aiken*, 42 S. C. 222, 26 L. R. A. 345, 20 S. E. 221.

If they are valid their enforcement should not be restrained, even temporarily.

Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; 2 High, Inj. § 1246; *Chicago v. Evans*, 24 Ill. 52; *Smith v. McCarthy*, 56 Pa. 359; *Montgomery Gas-light Co. v. Montgomery*, 87 Ala. 245, 4 L. R. A. 616, 6 So. 113.

The legislature may prohibit sales of liquor in the whole state or any part of its territory.

Bailey v. Raleigh, 130 N. C. 213, 58 L. R. A. 178, 41 S. E. 281; *State v. Austin*, 114 N. C. 855, 25 L. R. A. 283, 41 Am. St. Rep. 817, 19 S. E. 919; *Dill. Mun. Corp.* 3d ed. § 144; *Tragesor v. Gray*, 73 Md. 250, 9 L. R. A. 780; *State ex rel. George v. Aiken*, 42 S. C. 222, 26 L. R. A. 345, 20 S. E. 221; *State v. Barringer*, 110 N. C. 529, 14 S. E. 781; *State v. Yopp*, 97 N. C. 482, 2 Am. St. Rep. 305, 2 S. E. 458; *Hill v. Charlotte*, 72 N. C. 56, 21 Am. Rep. 451; *Potwell v. Pennsylvania*, 127 U. S. 683, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas*, 123 U. S. 660, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *License Cases*, 5 How. 583, 12 L. ed. 291; *Crowley v. Christensen*, 137 U. S. 91, 34 L. ed. 623, 11 Sup. Ct. Rep. 13; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *People v. Budd*, 117 N. Y. 15, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; *Com. v. Alger*, 7 Cush. 84; *Health Department v. Trinity Church*, 145 N. Y. 42, 27 L. R. A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Schulherr v. Bordeaux*, 64 Miss. 59, 8 So. 201; *State ex rel. Duensing v. Roby*, 142 Ind. 168, 33 L. R. A. 213, 51 Am. St. Rep. 174, 41 N. E. 145; *Ex parte Bell*, 24 Tex. App. 428, 6 S. W. 197.
65 L. R. A.

One who accepts a license or permission, the power to withhold which lies in a board, is bound by the conditions contained therein.

Metropolitan Bd. of Excise v. Barrie, 34 N. Y. 657; *Columbus City v. Cutcomb*, 61 Iowa, 672, 17 N. W. 47; *Calder v. Kurby*, 5 Gray, 597; *Com. v. Brennan*, 103 Mass. 70.

The manufacture and sale of spirituous liquors is subject to police regulation by the legislature, and the advisability or propriety of any particular regulation is a matter for legislative discretion.

State v. Barringer, 110 N. C. 529, 14 S. E. 781; *Potwell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *State v. Yopp*, 97 N. C. 482, 2 Am. St. Rep. 305, 2 S. E. 458; *Hill v. Charlotte*, 72 N. C. 56, 21 Am. Rep. 451; *State v. Austin*, 114 N. C. 860, 25 L. R. A. 283, 41 Am. St. Rep. 817, 19 S. E. 919; *State v. Potwell*, 100 N. C. 525, 6 S. E. 424; *Rosenbaum v. Newbern*, 118 N. C. 83, 32 L. R. A. 123, 24 S. E. 1; *State v. Ray*, 131 N. C. 820, 60 L. R. A. 634, 92 Am. St. Rep. 795, 42 S. E. 960; *Tiedeman, Pol. Power*, pp. 5-13; *Cooley, Const. Lim.* 203; *Sharpless v. Philadelphia*, 21 Pa. 161, 59 Am. Dec. 759; *State v. Berlin*, 21 S. C. 292, 53 Am. Rep. 677; *Bishop, Statutory Crimes*, § 985; *Mugler v. Kansas*, 123 U. S. 660, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Potwell v. Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257.

Where the grant of power is plain and unequivocal, or the legislature has expressly conferred upon municipal authorities the power to pass an ordinance, in the exercise of the police power of the state, any inquiry into its reasonableness by the courts is improper, unless it be in violation of the Constitution.

A Coal-Float v. Jeffersonville, 112 Ind. 15, 13 N. E. 115; *People v. Armstrong*, 2 L. R. A. 723, note, 73 Mich. 288, 16 Am. St. Rep. 578, 41 N. W. 275; *Haynes v. Cape May*, 50 N. J. L. 55, 13 Atl. 231; *Champer v. Greencastle*, 138 Ind. 330, 24 L. R. A. 768, 46 Am. St. Rep. 390, 35 N. E. 14; *Tiedeman, Pol. Power*, 593; *State, Consolidated Traction Co., Prosecutor, v. Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170, 34 Atl. 146; *Bertholf v. O'Reilly*, 74 N. Y. 516, 30 Am. Rep. 323; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469.

Where the validity of an ordinance is attacked, the burden is upon the attacking party to satisfy the court that the municipal authorities have exceeded their power.

Columbia v. Beasley, 1 Humph. 232, 34 Am. Dec. 646; *St. Louis v. Weber*, 44 Mo. 547; *State, Trenton Horse R. Co., Prosecutor, v. Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. 1076; *Olympia v. Mann*, 1 Wash. 389, 12 L. R. A. 150, 25 Pac. 337; *Little-*

field v. State, 42 Neb. 223, 28 L. R. A. 588, 47 Am. St. Rep. 697, 60 N. W. 724; *State v. Barge*, 82 Minn. 256, 53 L. R. A. 428, 84 N. W. 911.

These ordinances do not impose undue restrictions.

State v. Moore, 113 N. C. 705, 22 L. R. A. 472, 18 S. E. 342; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *State v. Joyner*, 81 N. C. 534; *Bailey v. Raleigh*, 130 N. C. 214, 58 L. R. A. 178, 41 S. E. 281; *State v. Ray*, 131 N. C. 817, 60 L. R. A. 634, 92 Am. St. Rep. 795, 42 S. E. 960; *State ex rel. George v. Aiken*, 42 S. C. 222, 26 L. R. A. 345, 20 S. E. 221; *Cooley*, Const. Lim. 718, note 2; *Black*, Intoxicating Liquors, § 31; *Crowley v. Christensen*, 137 U. S. 90, 34 L. ed. 623, 11 Sup. Ct. Rep. 13; *State v. Moore*, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; 1 Dill. Mun. Corp. 4th ed. § 309.

The power to regulate and control necessarily implies the freedom to adopt the means of regulation.

Barbier v. Connolly, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Tragesor v. Gray*, 73 Md. 250, 9 L. R. A. 780, 20 Am. St. Rep. 587, 20 Atl. 905; *State v. Berlin*, 21 S. C. 292, 53 Am. Rep. 677; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128.

Similar ordinances have been upheld.

Ex parte Hayes, 98 Cal. 555, 20 L. R. A. 701, 33 Pac. 337; *Lawrence v. Monroe*, 44 Kan. 607, 10 L. R. A. 520, 24 Pac. 1113; *State v. Freeman*, 38 N. H. 428; *Sanders v. Elberton*, 50 Ga. 178; *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611; *Re Neilly*, 37 U. C. Q. B. 289; *Horr & B. Mun. Pol. Ord.* pp. 96, 102; *Tiedeman*, Pol. Power, p. 310; *Com. v. Costello*, 133 Mass. 192; *Com. v. Casey*, 134 Mass. 194; *Shultz v. Cambridge*, 38 Ohio St. 659; *Com. v. Gibbons*, 134 Mass. 197; *Robinson v. Haug*, 71 Mich. 38, 38 N. W. 668; *Com. v. Ferden*, 141 Mass. 28, 6 N. E. 239; *Stockwell v. State*, 85 Ind. 522; *State, Staates, Prosecutor, v. Washington*, 44 N. J. L. 605, 43 Am. Rep. 402; 1 Dill. Mun. Corp. § 400; *State v. Welch*, 36 Conn. 215; *Morris v. Rome*, 10 Ga. 532; *State v. Freeman*, 38 N. H. 426; *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611; *Hudson v. Geary*, 4 R. I. 485; *Platteville v. Bell*, 43 Wis. 488; *Smith v. Knoxville*, 3 Head, 245; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660; *State v. Thomas*, 118 N. C. 1226, 24 S. E. 535; *State v. Ray*, 131 N. C. 814, 60 L. R. A. 634, 92 Am. St. Rep. 795, 42 S. E. 960; *State v. Austin*, 114 N. C. 855, 25 L. R. A. 283, 41 Am. St. Rep. 817, 19 S. E. 919; *Decker v. Sargeant*, 125 Ind. 404, 25 N. E. 458; *Davis v. Fasig*, 128 Ind. 272, 27 N. E. 726; *State v. Doyle*, 15 R. I. 325, 4 Atl. 764; *Black*, Intoxicating Liquors, § 153, p. 103; *Bennett v. Pulaski* (Tenn. Ch. App.) 47 L. R. A. 278, 52 S. W. 65 L. R. A.

913; *Ward v. Greenerille*, 8 Baxt. 228, 35 Am. Rep. 700; *Tarkio v. Cook*, 120 Mo. 1, 42 Am. St. Rep. 678, 25 S. W. 202; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 46 Am. St. Rep. 390, 35 N. E. 14; *State v. Barge*, 82 Minn. 256, 53 L. R. A. 428, 84 N. W. 911.

Montgomery, J., delivered the opinion of the court:

The plaintiff commenced this action for relief by injunction, his object being to avail himself of the benefits of his license and at the same time to restrain and enjoin the defendant from enforcing the ordinances on the ground that they were oppressive, vexatious, and unreasonable. He is met *in limine* by the contention on the part of the defendant that he cannot try the validity of an ordinance of a municipal corporation by injunction, and that he can have no relief in equity because he can have full relief in a court of law if the ordinance be unlawful. The cases of *Cohen v. Goldsboro*, 77 N. C. 2; *St. Peter's Episcopal Church v. Washington*, 109 N. C. 21, 13 S. E. 700; and *Scott v. Smith*, 121 N. C. 94, 28 S. E. 64, were cited in the argument of the defendant's counsel here in support of the contention.

In answer to that position, the counsel of the appellant, while questioning the correctness of the law of those cases, yet insists that the facts there can be distinguished from those in the present case; that the reason assigned in those cases by the court for denying redress in equity is that the plaintiff could have complete redress in an action at law for damages; that the court certainly could not have meant that damages could be recovered against the municipal corporations, for the reason that municipal corporations are not liable for torts in the nature of trespass committed by their officers—police-men—when they undertake to enforce unconstitutional and void ordinances enacted in the attempted exercise of police powers or public or governmental functions; nor could it have intended to say that damages could be recovered against the members of the board of aldermen of cities and towns individually or personally, for municipal officers who enact ordinances under a claim of power from the legislative branch of the government are vested with the immunities and privileges of government, and consequently are exempt from liability if they have made a mistaken use of their powers; and that the court must have meant, therefore, that the policemen who actually made the arrests under an unconstitutional municipal ordinance are liable in damages to the person aggrieved. And the counsel of the appellant further insisted that, as in the present case

the policemen are and were insolvent, and on that account a recovery against them would be worthless, and afford no redress to the appellant for injuries he may have sustained if the ordinances are void, the case was easily to be distinguished from *Cohen v. Goldsboro*, 77 N. C. 2. and the other similar cases mentioned, where it did not appear that the officers making the arrests were insolvent. The counsel further contended that the suggestion made in *St. Peter's Episcopal Church v. Washington*, 109 N. C. 21, 13 S. E. 700, that one who doubts the validity of a municipal ordinance might raise the question by a defense of himself when he might be arraigned upon a criminal charge for an alleged violation of a town ordinance, places the complainant at a disadvantage; that it would be a hard law to compel a citizen who has no redress in the way of damages against the municipal corporation or its aldermen personally, or from the constable or policeman (on account of his insolvency) who makes the arrest under an unlawful ordinance, to compel him to violate the law—the ordinance—at his peril, in order to test its validity.

The writer of this opinion is in sympathy with the argument of the counsel of the appellant, but the majority of the court are of the opinion that the law as laid down in the cases above cited is correct in principle, and applies to the facts of this case, and to all others in which the attempt may be made to test the validity of a municipal ordinance by injunction. That view of the case by the court would relieve us of the consideration of the question of the alleged unlawfulness of the ordinance, but, as a decision upon that branch of the case will be of so much importance to the public, we will now take up that question for discussion and decision.

No question can be raised in this case as to the power of the board of aldermen to pass reasonable ordinances to restrict and regulate the liquor traffic in Washington, and even to prohibit it if they see fit to do so. In § 18 of chapter 170, p. 362, Priv. Laws 1903, entitled "An Act to Incorporate the City of Washington," it is enacted "that among the powers conferred on the board of aldermen are these: They may . . . regulate, control, tax, license, or prevent the establishment of junk and pawn shops, their keepers or brokers, and the sale of spirituous, vinous, or malt liquors; . . . provide for the proper observance of the Sabbath, and the preservation of the peace, order, and tranquillity of the city." It was argued in this court for the defendant that, as the board of aldermen were given the power to prevent the sale of intoxicating liquors within the city limits, therefore, under the maxim that "the greater includes the less," ordinances 65 L. R. A.

regulating and restricting the traffic, if the aldermen should see fit not to prevent, but to license, whether reasonable or unreasonable, were matters in their discretion, and not reviewable by the courts. We think that that is not a proper view of the powers of the aldermen, or of the rights of those who may be licensed to sell liquor by the board. They, as we have said, had the right to prevent or prohibit entirely the sale of liquor. They had also the power to license the traffic, and to regulate it, and, having adopted as a choice the plan of licensing and then regulating, it must follow that the regulations and restrictions must be such as are reasonable, and their reasonableness must be, in case of contest, finally decided by the courts. *State v. Taft*, 118 N. C. 1190, 32 L. R. A. 122, 54 Am. St. Rep. 768, 23 S. E. 970; *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458.

In the consideration of the reasonableness of these ordinances, it must be understood that they are to be discussed from the point of view of our state legislation on the subject of the liquor traffic, and the decisions of our court upon that legislation. The restrictions and limitations with which the legislative branch of our government for many years past, at the demand of a strong and aggressive sentiment, individual and public, against the evils of intemperance, have environed this traffic, and the firm support of this legislation by the courts, afford unmistakable evidence that the traffic is dangerous to society in its moral effects, and injurious to the material welfare of the commonwealth. The police power, directly through the legislature and indirectly through municipal corporations, is being more and more exercised in the regulation and suppression of the sale of liquor, on the theory that it is evil in its nature, until such legislation has grown into a system of temperance legislation. Each encroachment, however, has been stubbornly resisted by those engaged in the trade. This court has in no uncertain language approved of the legislation on this subject. In *Bailey v. Raleigh*, 130 N. C. 209, 58 L. R. A. 178, 41 S. E. 281, the court said, referring to the restrictions in the prohibition act for Raleigh: "This is done under the exercise of the police power, owing to the evil tendency of the business;" and in *State v. Ray*, 131 N. C. 817, 60 L. R. A. 634, 92 Am. St. Rep. 795, 42 S. E. 960: "Liquor itself is regarded as an evil, an enemy of civilization and good government." From the standpoint of the statute law on the subject and the decisions of the court, the rule with reference to what the law would regard as undue restrictions upon a useful business cannot be the same as that applicable to the liquor traffic. What

would be a deprivation of the use of property without due process of law, or an infringement of personal liberty against one engaged in a useful trade, would not be such when considered in connection with the property or person with one engaged in the sale of intoxicating liquors, as is pointed out in *State v. Ray*, 131 N. C. 817, 60 L. R. A. 634, 92 Am. St. Rep. 795, 42 S. E. 960, where the court said: "It must be understood that they [saloons] stand on a very different footing to the sale of dry goods and family groceries. Liquor itself is regarded as an evil, an enemy of civilization and of good government. . . . Its sale without a license is condemned and prohibited by law, and the regulations closing [at certain hours] such shops might well be put upon the implied power as being for the public good." In looking at the ordinances as a whole, it is readily seen that the aldermen, in enacting them, had in view the purpose to cause the licensee to give publicness to whatever might go on inside of the place in which liquors might be sold, instead of allowing secrecy about the matter; to break up, as far as possible, loafing and loitering in saloons; to prohibit the young, or those who might not be permitted to enter the front doors, to come in by means of side and rear doors in a clandestine manner, or to get liquor from rear and side doors, or to do indirectly the same thing by means of having eating houses connected with the drinking places; to take from the saloons enticements and allurements which have a tendency to attract the senses, and to develop and foster the susceptibility of vice and immorality; to close the saloon at hours when general work is over for the day, to the end that the inexperienced, the young, and impressionable, and the unfortunate of those who have been at work in useful occupations may not be induced to spend their evenings and their money in the barroom; and to have lights kept burning and doors closed during prohibited hours that the officials may more easily preserve the public peace and order, and that the public may know that the laws in respect to the retailing of intoxicating liquors are being obeyed.

In respect to the first ordinance, it is insisted for the plaintiff that that part forbidding the use of partitions was not only enacted without authority, and is unreasonable, but that it is positively mischievous, in that it prevents the separation of the white and negro races while they are drinking in the saloon. The law has no requirement for race separation in barrooms, and, if their keepers think it necessary to make the separation, there is really nothing in the ordinance that prevents them from so doing. The partition can be run from the front

toward the counter, and one side can be allotted to one race and the other to the other, and the ordinance will not be violated; for it only provides that the partitions or screens shall not "conceal or cut off any view of any person or persons in such saloon, sales room, or place of business from and through the front doors and windows thereof." We have no decisions of this court on the subject of the power of municipal corporations, or even of the general assembly, to prohibit the use in saloons of storm doors, screens, stained glass, or any contrivances which obstruct the view of the interior of saloons, or as to what kind of doors and windows, whether of glass or of other material, shall be used; but the decisions from other states fully sustain the requirements of the first ordinance in all these respects, and we are of the opinion that the ordinance is a reasonable one.

We think further that that part of that ordinance which requires that all liquors shall be served at the counter, and shall be drunk at the counter, is also a reasonable requirement, being calculated to prevent loafing and loitering, and also to diminish the quantity that might be drunk. Drinking to excess would certainly be more apt to take place where guests could be seated around tables or lounges with other attractions that might be offered.

In regard to the second ordinance, the contention of the plaintiff is that it is "arbitrary, oppressive, vexatious, unreasonable, and void" in that it deprives the plaintiff of the use and convenience of his property without due process of law. By that ordinance saloon keepers and their servants and employees are not permitted to use any side or rear doors, or trapdoors, elevators, or stairways, for the purpose of selling or delivering liquor through such communications; but the ordinance does not prohibit the use of such entrances and exits for any other purposes than the sale and delivery of liquors. That certainly is a restriction upon the plaintiff's property, but, in our opinion, it is not an unreasonable restriction; certainly not one so unreasonable as to warrant us to declare it void. As was said in the case of *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458: "Such statutes [police regulations] are valid, unless the purpose or necessary effect is not to regulate the use of property, but to destroy it. As we have said, it is the province of the legislature to decide upon the wisdom and expediency of such regulations and restraints; and the courts cannot declare them void, or interfere with their operation, unless they are so manifestly unjust and unreasonable as to destroy the lawful use of property, and hence are not within the proper exercise of the police power of the government. Courts cannot regu-

late the exercise of this power; they can only declare the invalidity of statutes that transcend its limits. The exercise of this power does not extend to the destruction of property under the form of regulating the use of it, unless in cases where the property or the use of it constitutes a nuisance." The plaintiff's property is not destroyed by this ordinance. It is true the regulations concerning its use by the aldermen are stringent, but we cannot say they are too much so, when the purposes for which the building is being used are taken into consideration. The board of aldermen have said that that part of the plaintiff's building which he uses for the sale of liquor is a suitable place, and sufficient for that purpose, and that the use of the forbidden parts of that building in connection with the sale of liquor are not necessary, and would prevent, if so used, the proper regulation of the sale of spirituous liquors. We have no doubt that the defendant, under the power given in the charter, had a right to confine the sale of liquor to a particular room in that building, and to prohibit the use of side and rear doors, trapdoors, elevators, and stairways leading to or out of that room for the purpose of selling or delivering liquors.

It is contended that the third ordinance is unlawful for the reason that it prohibits the selling or giving away liquors between the hours of 8 o'clock in the evening and 6 o'clock in the morning, and also for that it prohibits the saloon keeper or his employees to open the doors, or allow them to remain open between said hours. In *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535, the hours prescribed by the ordinance were 10 o'clock P. M. and 4 o'clock A. M., and there was no question made in that case on the reasonableness of such hours. It seems to us that the hours of closing and opening in the case before us are not unreasonable. For a few months in the year there might be, in the mornings, a couple of hours of daylight in which the retailing of liquor might not be carried on, but it does seem that those hours—hours in which the greater number in each community is engaged in preparing for the day's duties and living—might be spent in some useful way without injury to the saloon keeper. He would then have nearly fourteen hours in which to supply the demand for his wares. That ought to be ample time for all legitimate needs and necessities.

So far as the requirement in the fourth ordinance that places for the retailing of liquor shall be kept reasonably lighted, it seems to us there can be no just objection, for on its face it seems a very fair and proper police regulation. But in respect to that requirement which makes it unlawful for the owners

of saloons to enter their buildings between the hours of closing on Saturday night at 8 o'clock P. M. and the hour for opening next Monday morning at 6 o'clock we have some doubt. In the case of *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535, the charge was that the defendant remained in his barroom after the hour prescribed for closing. In that case the ordinance made "it unlawful for any barkeeper, clerk, or agent, or any person whatsoever, to keep open, or be or remain in, a barroom or other place where spirituous or intoxicating liquors are sold between 10 o'clock P. M. and 4 o'clock A. M." The court there held that the charter of Marion did not empower the town to pass the ordinance, and that under the general law (Code, § 3800) the power did not exist to pass the ordinance. Under the charter of the city of Washington the board of aldermen, as we have seen, had the power either to prohibit the sale of liquor or to regulate and control its sale, and the only question is whether this part of the fourth ordinance, preventing the owners of saloons from entering their saloons during Sundays, is reasonable. As we have said, we have our doubts about this matter; but, as that part of the ordinance is not clearly unreasonable, and remembering that the board of aldermen have full opportunity to judge of such a necessity, we do not feel called upon to set aside their judgment by declaring the ordinance invalid on the ground that it is unreasonable. We cannot see that the objections to the fifth ordinance are reasonable objections. Billiard tables, pool tables, gambling tables, tenpin alleys, and other gaming devices, whether played for amusement and exercise or for anything of value, are such attractions as ought not to be used in saloons where liquor is sold. They entice and allure men into the temptation to drink, and encourage loafing and lounging. It is true that in the Revenue Laws of 1903 a tax is levied on billiard and pool tables and bowling alleys connected with any place where liquor is sold or allowed to be drunk, whether kept under the same roof or not; but it does not follow from this that it is not in the power of a municipal government that is authorized by its charter to prohibit the sale of liquor, or to license its sale, and then regulate it, and declare that billiard and pool tables shall not be used in connection with barrooms. It is only where they are not prohibited from being used by the lawful authority that they can be taxed. Under the fifth ordinance there is no prohibition against the use of restaurants or eating houses, rooms, or tables for providing or furnishing food, being kept in the same building in which liquor is sold; but the prohibition is against having such restaurants or eating rooms connected

with the barroom. We cannot say that that prohibition is unreasonable.

The sixth ordinance enacts that no place where spirituous, malt, or vinous liquors are sold or disposed of shall be in any building in which there is a restaurant, eating house, room, or any means or contrivance for providing or furnishing food, unless the two places shall be separated by one or more solid, upright, perpendicular walls, with no doors nor openings of any kind therein. That seems to us a very proper regulation. Such a condition of affairs, we can see, would be most conducive to the bringing together of elements of society whose conduct in many instances would tend to produce disorder. We may take judicial notice of a fact so well known that these joint eating houses and drinking saloons afford opportunities for carousals and lawlessness, and are sore spots in many communities.

It is provided in the seventh ordinance that in case of a violation of any of the ordinances of the town regulating the sale of liquor by one licensed to sell liquor the board of aldermen may have the power to investigate the matter, and to revoke the license in case it should be found that the ordinance had been violated. We see no objection to the ordinance as applicable to this case,—especially as the plaintiff in this case had agreed to that method of trial. But, if that ordinance was invalid, yet the others would not be affected, and the plaintiff or any licensee of the board of aldermen of Washington might be made to pay the fines mentioned in the ordinances by the proper tribunal, upon its being made to appear that the ordinance had been violated.

Chapter 233, p. 288, of the Acts of 1903, has no application to the city of Washington, for, as we have seen, the charter of that city confers on the aldermen the power to regulate or to prevent the sale of intoxicating liquors, and § 19 of chapter 233, p. 293, of the Laws of 1903, particularly declares the purpose of the act to be not to interfere with such municipalities or territories as are given the power to regulate or to prohibit the sale of intoxicating liquors.

No error.

Walker, J., concurring:

This action was brought to enjoin the defendant from enforcing certain ordinances regulating the liquor traffic within its corporate limits, and from revoking and canceling the plaintiff's license to sell liquor, and to declare the said ordinances null and void upon the ground that they impose unreasonable, vexatious, and oppressive restrictions upon the business of selling liquors by those who are licensed to do so by the town authorities. The motion for the injunction was denied, 65 L. R. A.

and the plaintiff appealed. It is sufficient, I think, for the purpose of deciding the case, in the view I take of it, to state that it is provided by the several ordinances in question that the business of retailing liquors shall be conducted under certain rules and regulations specified in the ordinances, and that a failure to comply with the said rules and regulations, or the violation of any of the ordinances, subjects the offender, upon conviction, to a fine of \$50 for each day on which a violation occurs. It is not necessary to set forth the terms of the several ordinances more particularly than I have done, as the court, in my opinion, is not at liberty to consider the general question of their validity, because of an objection of the defendant *in limine*, which is fatal to the plaintiff's action, namely, that if we concede, for the sake of the argument, the ordinances are invalid, the plaintiff is not, upon the facts stated in his affidavit, entitled to any relief by injunction. The plaintiff, upon affidavit, obtained a restraining order and an order to show cause why an injunction to the hearing should not be issued, and on the return day of the order the motion for a continuance of the injunction was heard upon the affidavits, as is stated in the order, no complaint having been filed, though it is recited in the original restraining order that it was granted upon the complaint and affidavits. Regularly, the motion to continue the injunction should not have been heard until the complaint was filed; and it may be that the law contemplates in a case like this one that the complaint shall be filed in the beginning, so that the court may see clearly and distinctly that the plaintiff is entitled to the relief demanded, "where it consists in restraining the commission or continuance of an act" (Code, § 338); but, however this may be, it would seem to be good practice to require the complaint to be filed when the motion to continue is heard, for it is the allegations of the complaint, and not of affidavits merely, that ascertain and determine what is the cause of action out of which arises the right or equity that requires protection pending the litigation. But I will consider the case without reference to the question of pleading and practice, as I desire to state my views upon the legal merits involved.

There are two objections to the plaintiff's right to maintain this action: First, the courts cannot enjoin the enforcement of the criminal law, or of municipal ordinances imposing fines or penalties; and, second, the defendant, under its charter, had the power "to prevent, control, tax, license, or regulate the sale of spirituous, vinous, or malt liquors," and the plaintiff, having applied for and accepted his license with full knowl-

edge of the terms of the ordinances, is not in a position to question their validity, but must exercise the right and privilege of selling conferred by that license in strict compliance with the conditions and restrictions imposed.

In regard to the first objection, we must bear in mind that, if the court should issue an injunction against the institution of a criminal prosecution, it would not only interfere with the due administration of the criminal law, which is of the first importance in any well-ordered system of government, but it would have to restrain action by the state, in whose sovereign name and capacity all criminal cases are commenced and prosecuted; and the state is not even a party to this action, and her rights cannot be prejudiced without notice and a hearing, even if we could entertain for a moment with any seriousness the proposition that a court of equity can interfere by injunction with the administration of the criminal law. The violation of a town ordinance is made by statute a misdemeanor. Code, § 3820. If it is contended that the ordinance imposes a penalty for each violation of it, and that a court of equity will interfere on behalf of the plaintiff to prevent vexatious litigation and a multiplicity of suits, one answer, and a conclusive one, is that a court of equity will never assume jurisdiction in such a case until the right of the complaining party, or, in this particular case, the validity of the ordinance, has been first determined in an action at law. The true principle governing such a case is well stated in *Wallack v. Society for Reformation of Juvenile Delinquents*, 67 N. Y. 28: "The general rule is that the court will not restrain a prosecution at law when the question is the same at law and in equity. . . . An exception exists where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the court acts in such cases by granting an injunction only after the controverted right has been determined in favor of the defendant in a previous action. On this ground the chancellor in *West v. New York*, 10 Paige, 539, dissolved a temporary injunction restraining the defendant from prosecuting suits against the complainant for violation of a corporation ordinance claimed to be invalid. The unconstitutionality of the act of 1872 would be a perfect defense to a prosecution for the penalties given by it; and the question as to the constitutionality of the act has not been determined. It would doubtless be convenient for the plaintiff to have the judgment of the court upon the constitutionality of the act before subjecting himself to liability for accumulated penalties. But this is not a ground for equitable interference, and to 65 L. R. A.

make it a ground of jurisdiction in such cases would, in the general result, encourage, rather than restrain, litigation." Further, the court thus states the law: "The question as to the validity of the corporation ordinances does not properly belong to this court for decision, where the complainants, as in this case, have a perfect defense at law if the ordinances are invalid, or if they do not render the complainants, or those in their employ, liable for the penalty. And it would be a usurpation of jurisdiction by this court if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court. . . . This court would not grant an injunction to protect him against the multiplicity of suits until his right to such protection had been established by a successful defense at law in some of the suits." In 16 Am. & Eng. Enc. Law, 2d ed. p. 370, we find the following succinct statement of the principle: "It is a well-settled rule, both in England and America, that a court of equity has no jurisdiction to interfere by injunction to restrain a criminal prosecution, whether the prosecution be for violations of statutes or for an infraction of municipal ordinances. The rule applies whether the prosecution is by indictment or by summary process, and to prosecutions which are merely threatened or anticipated as well as to those which have already been commenced. So it is not within the power of the parties to waive the question relating to the jurisdiction of the court, and to compel it to try the cause. If the prosecution is under an ordinance, no ground for enjoining it is constituted by the fact that the ordinance is void, or that the party seeking the injunction has not committed a violation of the ordinance, or that the complaint in the prosecution under the ordinance states no cause of action." In *Burnett v. Craig*, 30 Ala. 138, 68 Am. Dec. 115, the plaintiff sought to enjoin the enforcement of an ordinance against the sale of liquor, and the court said: "We have found no case, however, where chancery has restrained a simple trespass or succession of trespasses on either the person or personal goods. The utmost extension of the principle which has come under our observation embraces only trespasses to realty, where this remedial agency is shown to be necessary to prevent multiplicity of suits, or to avert irreparable mischief. . . . The judgments and sentences of the town council, of which the appellant complains, were quasi criminal proceedings. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of novel impression. . . . We have not been able to find any principle or adjudged case which justifies an injunction to

stay a prosecution, either criminal or quasi criminal, or to restrain a trespass to the person or personal property. We think such a precedent would be an alarming stretch of equity jurisdiction. In considering this case simply on the equity of the bill, we have necessarily regarded its averments as true. It is not intended by this to intimate an opinion on the validity or invalidity of the ordinance or of the fines imposed on the appellant. They will be considered when properly presented." In *Moses v. Mobile*, 52 Ala. 198, it is said: "Courts of equity will not interfere to stay proceedings in criminal matters, or in any cases not strictly of a civil nature. They will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition. . . . The courts of law have complete jurisdiction to punish the commission of crimes, and can interpose to prevent their commission by imprisoning the offender or binding him to keep the peace. But courts of equity have no jurisdiction over such matters; at least a court of equity cannot entertain a bill on this ground alone. . . . A bill in chancery to restrain a malicious or unfounded prosecution is certainly of novel impression, and . . . there was neither principle nor authority to support it. . . . Municipal authorities would be paralyzed in discharging the public duties intrusted to them if every offender against the ordinances they have proclaimed could by injunction arrest them, or could by multiplying his offenses invoke the interference of a court of equity. . . . The counsel for the appellants have sought to withdraw the case presented by the bills from the operation of this general principle and the authorities by which it is supported, upon the ground that the interference of a court of equity is necessary in this case for the prevention of vexatious litigation and of a multiplicity of suits. It could well be said in answer, the litigation and multiplicity of suits apprehended are criminal in their character and without the jurisdiction of the court." And to the same effect are the following authorities: *Devron v. First Municipality*, 4 La. Ann. 11; *Beach*, Inj. § 520; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Field v. Western Springs*, 181 Ill. 186, 54 N. E. 929; 1 *Spelling*, Inj. & Extr. Rem. § 694. In *Burch v. Cavanaugh*, 12 Abb. Pr. N. S. 410, it was held that an injunction will not lie to restrain an illegal arrest, and that several persons who were threatened with arrest could not unite in the same action to prevent it; and, further, that the insolvency of a person who threatens to make the arrest cannot be ground for an injunction to restrain him. The case of *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 So. 575, in its essential facts, is very much

like the case at bar. The plaintiff alleged that the defendant, by the attempted enforcement of an illegal and void municipal ordinance, was interfering with her dairy business, and by its unauthorized acts was injuring her property and impairing the value thereof. The court, after stating that as a court of equity it had no power by injunction to prevent a municipal corporation from enforcing penal ordinance in the interest of public order and health, said: "The ordinance was enacted in pursuance of the police power vested in the city,—whether rightfully or wrongfully is not to be determined in this suit. It was a police regulation, in the interest of public health, with a penalty for its violation. The pecuniary loss in the enforcement of the ordinance cannot, therefore, be considered in determining the question of jurisdiction. The enforcement of the ordinance vested by the Constitution and law of the state upon the recorder's court of the city of New Orleans. If the ordinance is unconstitutional, as alleged, the plaintiff can suffer no injury, as she has her remedy, and can urge her defense in the recorder's court. Failing there, she has her remedy by appeal to this court." In *Cohen v. Goldsboro*, 77 N. C. 3, this court said: "If the defendants have an unlawful ordinance, and have arrested and fined the plaintiffs, as they allege, the plaintiffs have complete redress in an action for damages. And as often as the arrest may be repeated they have the like redress; but we are aware of no principle or precedent for the interposition of a court of equity in such cases." The principle has been expressly affirmed in *St. Peter's Episcopal Church v. Washington*, 109 N. C. 21, 13 S. E. 700; *Scott v. Smith*, 121 N. C. 94, 28 S. E. 64, and recognized and applied in *Vickers v. Durham*, 132 N. C. 880, 44 S. E. 685; *Busbee v. Lewis*, 85 N. C. 332; *Busbee v. Macy*, 85 N. C. 329; and *Pearson v. Boyden*, 86 N. C. 585. While, as we have said, the fact that the police officers of the town are insolvent does not take this case out of the general rule, it may be added that process can be issued by the mayor, who is made by statute a magistrate and custodian of the peace with the jurisdiction of a justice of the peace to any lawful officer, such as a sheriff, town constable, etc. (Code, §§ 2079, 3808, 3811, 3818; *State v. Cainan*, 94 N. C. 880); and the execution of such process is not confined to the policemen of the town. But, if an injunction is the proper remedy, the plaintiff must fail in this suit, as his case presents no equity to be protected by the restraining process of the court. The ordinances in question were adopted by the defendant before the plaintiff applied for and obtained his license to retail liquor, and he knew of their existence and accepted the li-

cense subject to the conditions and the regulations imposed by them. Under these circumstances, what moral or legal right has he to question their validity? The legislature may prohibit or restrict the sale of liquor in any manner its wisdom and discretion may dictate, and no one has any natural or absolute right to sell liquor. If he sells at all, it must be on such terms as the law may impose. The law in this respect is thus stated in *Crowley v. Christensen*, 137 U. S. 91, 34 L. ed. 623, 11 Sup. Ct. Rep. 13: "The police power of the state is fully competent to regulate the business,—to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authorities." The same doctrine is stated by this court in *Bailey v. Raleigh*, 130 N. C. 214, 58 L. R. A. 178, 41 S. E. 281, as follows: "It [the legislature] had the right to have absolutely prohibited the interstate or anyone else from selling liquor within 1 mile of the corporate limits of the city of Raleigh. This it did unless the party selling obtained a license—permission to do so—from the city authorities. And instead of this right to do so with the permission of the city authorities being a restriction, its effect was to relax the prohibitory rule, and to grant him a right he did not otherwise have. The law allowing him to get a license from the city took nothing from him,—imposed no duty upon him. It only gave him an option,—a right to take the license and pay the tax, or not. How he was damaged by having this privilege, this option, which he chose to accept, we are unable to see." When, therefore, the law conferred upon the defendant the power to "prevent, regulate, control, tax, or license the sale of spirituous, vinous, and malt liquors," as they had the power to prevent, or, what is the same thing, to prohibit, the sale, this necessarily implied that they could grant license upon any terms or conditions they saw fit, in the exercise of their judgment or discretion, to impose or to annex to the grant. "A grant of entire control, or of power to suppress and restrain, would enable the corporation to adopt any mode of regulation within the limit of those powers, license included." *Horr & B. Mun. Pol. Ord.* p. 250. "Regulating a thing is the prohibition of it, except in accordance with certain rules. This act prohibits the sale and manufacture of intoxicating liquors except under certain regulations therein provided." 65 L. R. A.

provided." *Cantini v. Tillman*, 54 Fed. 975. I confess my inability to understand how a person, who, upon his own application, has received a license in which is stated that it was issued "subject to all ordinances of the city of Washington now in force and hereafter enacted, and upon the condition that a violation of any ordinance of the city shall work a forfeiture of said license," can continue to enjoy the right and privilege conferred by the license, and repudiate the conditions upon which it was granted. He must take the burden with the benefit or privilege he has sought and accepted. If the plaintiff is about to suffer any injury to his property, it is one which he has voluntarily and deliberately brought upon himself by accepting a license so worded, and he has no good reason to complain. He is the author of his own misfortunes, if any are about to overtake him; and I am not aware of any principle of law or morals upon which he can justly appeal to a court of equity for relief.

Having concluded that the court has no jurisdiction to grant the relief demanded, it is unnecessary to consider the question argued by counsel as to the reasonableness and validity of the ordinances. That matter is not before the court, and anything I might say would be the expression of my individual opinion upon an abstract and hypothetical question. I agree with the majority of the court that the ruling below, by which the injunction was dissolved, was right.

Clark, Ch. J., and Connor, J., concur with **Walker, J.,** that an injunction does not lie against the enforcement of a municipal ordinance, the violation of which is a misdemeanor, for the reason that the state cannot be enjoined from the execution of its criminal laws, and concur with **Montgomery, J.,** that the ordinances are not void.

Douglas, J., dissenting in part:

With the utmost respect I am constrained to express the difficulty I have had in arriving at the real opinion of the court. Having held that the action would not lie, it seems to me that there the opinion of the court ended, and that all that is said in the numerous opinions as to what might have been the law if there were any question of law before us is *obiter dictum*. Still, as it is in the opinion of the court, and as the judgment of the court is that there is "no error," I must take things as I find them, regardless of their legal relation. I am inclined to think that the weight of authority is against the right of the plaintiff to injunctive relief. This, in my opinion, ends the case, and my only excuse for proceeding further is that I am following the court. We are now in the last hours of the

term, and it is impossible to write this opinion, which has been delayed for various reasons, with the fullness and care that I would desire. Many of the ordinances are reasonable, while others are utterly indefensible. No ordinances should go beyond a reasonable regulation of the traffic, remembering always its dangerous character. But we must also remember that it is not an unlawful business as long as the state sees fit to license it, and that when the people vote for license they are entitled to have their will carried out in good faith by their public servants. When a man accepts a public office, he should give to all classes of men the equal protection of the law, no matter what may be his personal convictions, or resign the office. Under the pretense of regulating a business he should not seek to destroy it. Time will permit me to cite but one of the several ordinances I deem unreasonable. It is made unlawful for the owner of a saloon to enter his own building between 8 o'clock on Saturday night and 6 o'clock on Monday morning, a period of two nights and a day, and yet he is required to have a bright light burning in his saloon during the entire night. Should the light go out during that thirty-four hours, he is liable to heavy penalties if he fails to relight it, and also liable to a heavy penalty if he goes into his building for the purpose of lighting it. Is this reasonable? It certainly is not law. *State v. Thomas*, 118 N. C. 1221, 24 S. E. 536.

Much is said in the opinion of the court as to the moral features of the case that may justify a personal allusion on my part. All my life I have voted consistently and persistently for temperance in whatever form it was presented, and in the sunset of life I see no reason to change my course; but others are entitled to the same freedom of suffrage and opinion. I am constrained to say that I have sometimes had occasion to doubt the wisdom of my vote, and I am sure that the cause has frequently been injured by the intemperate language of some of the most zealous and brilliant of temperance advocates. My experience convinces me that extremists on either side are the evangelists of opposition.

Walter K. DEBNAM

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, *App't*.

(126 N. C. 831.)

1. A denial of the right of a corpora-

NOTE.—The above case seems to follow the trend of prior decisions (see note to *Stephens v. St. Louis & S. F. R. Co.* 14 L. R. A. 184), 65 L. R. A.

tion incorporated in another state to remove a cause into a Federal court, on the ground of diverse citizenship, from a court of North Carolina in which it has been sued by a citizen of the latter state, on the ground that the corporation has become a domestic corporation under Pub. Laws 1899, chap. 62, as it was compelled to do in order to obtain the privilege of doing business in that state, does not deprive the corporation of any rights under the Federal Constitution as a citizen of the United States, or deny it due process of law or the equal protection of the laws.

2. The mere filing of a petition for the removal of a cause from a state court to a Federal court does not oust the state court of jurisdiction, where the petition does not show a prima facie case for the removal.

3. A foreign corporation which complies with Pub. Laws 1899, chap. 62, which compels it, as a condition of the privilege of doing business in the state, to "become a domestic corporation" by filing its charter, etc., whereupon it is entitled to the rights and privileges, and subject to the liabilities, of corporations of the state as if it had been originally incorporated in that state, thereby becomes, not a mere licensee, but a domestic corporation, which cannot remove a cause against it by a citizen of that state into a Federal court on the ground of diverse citizenship.

(*Faircloth, Ch. J., and Furches, J., dissent.*)

(June 7, 1900.)

APPEAL by defendant from a judgment of the Superior Court for Durham County denying its petition to remove the case into the Circuit Court of the United States. *Affirmed.*

The facts are stated in the opinion.

Mr. Robert C. Strong, for appellant:

Corporations, for all purposes of Federal jurisdiction, are conclusively considered citizens of the state which created them.

Desty, Fed. Proc. § 97, p. 464; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935.

Citizenship can only be in the state of its creation.

Shattuck v. North British & M. Ins. Co. 7 C. C. A. 386, 19 U. S. App. 215, 58 Fed. 610; *Wilcox & G. Guano Co. v. Phœnix Ins. Co.* 60 Fed. 932; *Baughman v. National Waterworks Co.* 46 Fed. 4.

The record must be examined, as well as the petition, on the ground of diversity of citizenship.

National S. S. Co. v. Tugman, 106 U. S. 119, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; *Foster*, Fed. Pr. 2d ed. p. 818, § 385a; *Bondurant v. Watson*, 103 U. S. 281, 26 L. ed. 447; *Amory v. Amory*, 95 U. S. 186, 24 L. ed. 428; *Jackson v. Allen*, 132 U. S. 27, 33 L. ed.

but is in conflict with the later case of *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 28 Sup. Ct. Rep. 713.

249, 10 Sup. Ct. Rep. 9; *Blackwell v. Lynchburg & D. R. Co.* 107 N. C. 219, 12 S. E. 133.

Defendant was first created a corporation of the state of New York, and, even if it was afterwards created a corporation of North Carolina also, it was, and remained, for the purposes of the jurisdiction of the Federal courts, a citizen of New York, the state by which it was originally created.

Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 563, 43 L. ed. 1087, 19 Sup. Ct. Rep. 817.

The filing of the charter did not make it a North Carolina corporation.

Ibid.

A corporation has such powers, and such powers only, as are conferred upon it by its charter.

Clark, Corp. p. 120.

Messrs. Boone, Bryant, & Biggs, for appellee:

Foreign corporations have no right *per se* to do business in North Carolina.

Clark, Corp. pp. 617-619; *Doyle v. Continental Ins. Co.* 94 U. S. 542, 24 L. ed. 152; *Paul v. Virginia*, 8 Wall. 181, 19 L. ed. 360; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972.

It is true that the state cannot permit a foreign corporation to do business within the state as a foreign corporation, and by statute deprive it of the right to remove suits to the Federal court, when sued by citizens of the state.

Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931.

But the state can say to all foreign corporations: "You cannot do business in North Carolina. I will permit only domestic corporations to do business within my borders; and I will prescribe an easy method by which all foreign corporations can become domestic corporations. I can and do say you must become a North Carolina corporation, as to all acts done within my territory, or you must not do business here." The state, having this power, exercised it by enacting chapter 62 of the Public Laws of 1899.

When one state makes a corporation of another state a corporation of itself the corporation, in so far as transactions and suits in that state are concerned, becomes a citizen thereof.

Clark, Corp. pp. 74-80.

The manner of forming corporations is exclusively within the province of state legislation.

Clark, Corp. pp. 36, 37.

Whether the effect of an act is to create a corporation of the state or not is a question of legislative intent, to be determined 65 L. R. A.

from the wording of the act, its caption, etc.

Clark, Corp. p. 49; *Goodlett v. Louisville & N. R. Co.* 122 U. S. 407, 30 L. ed. 1233, 7 Sup. Ct. Rep. 1254.

When the defendant accepted the provision of this act, and complied with it, it became a North Carolina corporation.

Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 30 L. ed. 196, 6 Sup. Ct. Rep. 1009; *Martin v. Baltimore & O. R. Co.* 151 U. S. 674, 38 L. ed. 312, 14 Sup. Ct. Rep. 533; *Bradley v. Ohio River & C. R. Co.* 119 N. C. 918, Appx., 78 Fed. 387.

This is true notwithstanding the fact that it had been previously, or originally, incorporated in another state.

Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. ed. 571; *Bradley v. Ohio River & C. R. Co.* 119 N. C. 916, Appx., 78 Fed. 387; *Horne v. Boston & M. R. Co.* 18 Fed. 50; *Martin v. Baltimore & O. R. Co.* 151 U. S. 674, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Thomp. Corp.* § 7472; *Morawetz, Priv. Corp.* 999-1001; 1 *Desty, Fed. Proc.* 8th ed. p. 321; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 562, 40 L. ed. 808, 16 Sup. Ct. Rep. 621.

This act does not violate § 1 of article 14 of the Federal Constitution.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 211, 32 L. ed. 110, 8 Sup. Ct. Rep. 1176; *St. Louis & S. F. R. Co. v. Matheus*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Broadfoot v. Fayetteville*, 121 N. C. 420, 39 L. R. A. 245, 61 Am. St. Rep. 668, 28 S. E. 515; *Hancock v. Norfolk & W. R. Co.* 124 N. C. 226, 32 S. E. 679.

It is true that the petition states that the defendant "is a citizen of the state of New York, and not a citizen or resident of North Carolina." But this is insufficient, because it must appear that the diversity of citizenship existed at the beginning of the action, as well as at the time of filing the petition. Nothing can be substituted for, or take the place of, this.

Overman Wheel Co. v. Pope Mfg. Co. 46 Fed. 577; *Bradley v. Ohio River & C. R. Co.* 119 N. C. 918, Appx., 78 Fed. 387; *Adams v. May*, 27 Fed. 907; *Kelly v. Houghton*, 9 Sawy. 19, 23 Fed. 417; *Pacific R. Co. v. Missouri P. R. Co.* 5 McCrary, 373, 23 Fed. 565; *Hirschl v. J. I. Case Threshing*

Mach. Co. 42 Fed. 803; *Dillon, Removal of Causes*, p. 144.

Douglas, J., delivered the opinion of the court:

This is an action brought to recover damages sustained by the plaintiff through the alleged negligence of the defendant. In apt time, and without filing an answer, the defendant filed its petition for removal to the circuit court of the United States. The complaint alleges "that the defendant is a corporation duly organized and is doing business in North Carolina, and has become and is a domestic corporation under the laws of said state." There is no other allusion, express or implied, in the complaint as to its having ever been incorporated in any other state.

The affidavit upon which the petition is based is as follows:

O. A. Dozier, first being duly sworn by me, maketh oath that the Southern Bell Telephone & Telegraph Company is a corporation under and by virtue of the laws of the state of New York, and that none of its incorporators, stockholders, or directors are residents or resident of the state of North Carolina, or citizens or citizen of said state of North Carolina; nor are any citizen or citizens of the state of North Carolina interested in said company. Further, that none of said incorporators, or their successors or stockholders or directors, have ever been citizens or citizen or residents or resident of said state of North Carolina; nor have any citizen or citizens of North Carolina ever had an interest in said corporation. (2) That having very valuable property in North Carolina at the present time, and at and before and after the meeting of the general assembly of North Carolina, during the year A. D. 1899, it was forced, for the protection of its said property, which it had built and constructed in said North Carolina under authority of its laws, to file its charter under the direction of "An Act to Provide a Manner in Which Foreign Corporations may Become Domestic Corporations," ratified by said general assembly on the 10th day of February, A. D. 1899; further, that it submits that the filing of its said charter, as aforesaid, did not operate to make it a citizen of the said state of North Carolina. O. A. Dozier, Manager.

The act referred to is chapter 62, Pub. Laws 1899, ratified on the 10th day of February, 1899. The essential features of said act are as follows:

Section 1 provides that every telegraph, telephone, express, insurance, steamboat, and railroad company organized under the

laws of any other state or government, desiring to carry on any business in this state, shall become a domestic corporation by filing in the office of the secretary of state copies of its charter and by-laws, duly authenticated.

Section 2, that all parts of charter or by-laws in contravention of the laws of this state shall be null and void in this state.

"Sec. 3. That when any such corporation shall have complied with the provisions of this act above set out, it shall thereupon immediately become a corporation of this state, and shall enjoy the rights and privileges, and be subject to the liability, of corporations of this state, the same as if such corporation had been originally created by the laws of this state. It may sue and be sued in all courts of this state, and shall be subject to the jurisdiction of the courts of this state as fully as if such corporation were originally created under the laws of the state of North Carolina.

"Sec. 4. That on and after the 1st day of June, 1899, it shall be unlawful for any such corporation to do business, or to attempt to do business, in this state without having fully complied with the requirements of this act."

Section 5 provides the penalty for violating any provision of this act and the method of its collection.

"Sec. 6. No such foreign corporation is allowed to sue in the courts of this state unless domesticated.

"Sec. 7. No such foreign corporation mentioned in the preceding section of this act shall be allowed to enter into a contract in the state of North Carolina on or after the 1st day of June, 1899, nor shall any such contract heretofore or hereafter made, or attempted to be made, and entered into by such corporation in the state of North Carolina be enforced by such corporation, unless such corporation shall, on or before the 1st day of June, 1899, become a domestic corporation under and by virtue of the laws of North Carolina."

Section 8 prescribes the penalty for any foreign corporation doing business in this state without domestication.

The court below denied the defendant's motion to remove on the grounds "(1) that the petition is defective on its face; (2) that, considering the affidavit aforesaid filed by defendant along with its petition, the defendant is a corporation of the state of North Carolina."

The defendant excepted, and appealed, assigning, among other errors, including that of citizenship, the following: That the "opinions, conclusions, and adjudication of the court below were erroneous, (a) the same being repugnant to article 1, § 8, of

the Constitution of the United States," as well as various statutes enumerated; "(b) also repugnant to article 14, § 1, of the Constitution of the United States, in that the state of North Carolina, in enforcing the said 'An Act to Provide a Manner in Which Foreign Corporations may Become Domestic Corporations,' abridges the privileges and immunities of this defendant, a citizen of the United States, and deprives this defendant of its property without due process of law, and deprives it of the equal protection of the laws; wherein was drawn in question the validity of the said statutes and authority exercised thereunder, and the validity of a statute of said North Carolina, on the ground of repugnancy to the Constitution of the United States; and also the construction of above-named clauses especially, and other clauses of said United States Constitution and said United States statutes."

The question of diverse citizenship is the only one presented by the record; but we will briefly notice the remaining contentions.

Article 1, § 8, U. S. Const., is a very comprehensive section, and, as the particular repugnancy was not pointed out to us on the argument, we are at a loss how to answer it further than to say we see no merit in the defendant's contention. We cannot understand how a refusal to permit a domestic corporation to remove an action for personal injury "abridges the privileges and immunities of this defendant" as "a citizen of the United States." We are equally unable to admit that a trial in the courts of this state *ipso facto* "deprives this defendant of its property without due process of law, and deprives it of the equal protection of the laws." We presume that these assignments of error are intended to be taken in connection with those that follow, and are supposed legal inferences from the alleged right of removal. The questions argued were those arising from alleged diverse citizenship, and the supposed existence of such a Federal question as would prevent our passing upon the legality of removal.

It is but just to say that they were ably argued, both orally and by brief. The defendant contends that, while the cause of action does not raise a Federal question in any view, the petition for removal does raise a Federal question, to wit, the right of removal, which, of itself, ousts the jurisdiction of the state courts. In other words, that, no matter what may be the nature of the action, a defendant can absolutely stop all further proceedings in the state courts by a mere petition for removal, and that the state courts cannot pass, even in the first instance, upon their own jurisdiction, provided only that the petition is regular in form, no matter how apparent may be its essential want of validity.

lar in form, no matter how apparent may be its essential want of validity.

We cannot think that this is the law. No court has a right to abandon its own lawful jurisdiction when properly invoked, any more than it has to infringe upon the exclusive or paramount jurisdiction of another tribunal. The state court clearly has original jurisdiction of the action at bar, subject to be defeated by the defendant's right of removal, if such right exists. Such existing right of removal may be waived by the defendant, or, rather, it is lost if not claimed in apt time and in strict accordance with the terms of the statute. The petition, taken in connection with the complaint, must show a *prima facie* right of removal; in which event it is the duty of the state court to grant the order of removal, and stay all further proceedings. If the defendant does not show a *prima facie* right, it is the duty of the state court to retain the cause for such further proceedings as may be proper. It is not a question of discretion for either tribunal, but one of absolute right, involving the vital fact of jurisdiction; and the relinquishment of jurisdiction by one, or its assumption by the other, would not confer the right of removal if it did not already exist. It would seem that, for the purposes of the motion, disputed facts are properly determinable by the Federal courts; but the principle is fully recognized by the Supreme Court of the United States that "the state court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right." *Removal Cases*, 100 U. S. 457, 474, 25 L. ed. 593, 599; *Amory v. Amory*, 95 U. S. 180, 24 L. ed. 428; *Yulee v. Vose*, 99 U. S. 539, 545, 25 L. ed. 355, 356; *Stone v. South Carolina*, 117 U. S. 430, 432, 29 L. ed. 962, 963, 6 Sup. Ct. Rep. 799; *Howard v. Southern R. Co.* 122 N. C. 944, 953, 954, 29 S. E. 778; *Bradley v. Ohio River & C. R. Co.* 119 N. C. 744, 26 S. E. 169, and 918, Appx., 78 Fed. 387. It has also been held that "the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim." *Tennessee v. Bank of Commerce*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654. In this case occur the following significant words, on page 462, 152 U. S., page 514, 38 L. ed., and page 657, 14 Sup. Ct. Rep.: "The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the ju-

isdiction of the circuit courts of the United States."

If the state court wrongfully denies the petition, the defendant can remain and defend himself in the state court without losing his right of removal. He can appeal from such denial, and can eventually take his writ of error to the Supreme Court of the United States, where the question will be finally determined. Until such determination we cannot be required to surrender what appears to us to be our rightful jurisdiction. What, under such circumstances, may be the rights and duties of the parties in the Federal courts it is not for us to determine.

In the case at bar there are really no disputed facts, the only question being the construction of the said act of February 10, 1899. We must therefore determine (1) whether said statute has the effect of making the defendant a domestic corporation as distinguished from a mere licensee; and (2) what is its further effect under the United States statutes of removal. It is well settled that a corporation, being a mere creature of the law, has no legal existence outside of the sovereignty that created it, except in so far as it may be recognized by the so-called "law of comity." The rule of comity—for it is nothing more than a rule—is of such general acceptance as to carry with it the presumption of its existence; but this is a mere presumption, which may be rebutted by any act of the legislative power which may amount to its express or implied repudiation. Foreign corporations may be entirely excluded by any state, or may be admitted upon any terms and conditions that are not repugnant to the Constitution and laws of the United States.

The nature and status of a foreign corporation are so well stated in *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, that our own views can best be expressed by an extended quotation. The court says on page 180, 8 Wall., and page 360, 19 L. ed.: "But the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their Constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation, except by the permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given. Now, a grant

of corporate existence is a grant of special privileges to the corporators, enabling them to act, for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence, even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion. If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each state in other states the peculiar privileges conferred by their laws, an extraterritorial operation would be given to local legislation utterly destructive of the independence and the harmony of the states. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that with the advantages thus possessed the most important business of those states would soon pass into their hands. The principal business of every state would, in fact, be controlled by corporations created by other states."

This able opinion, coming, without dissent from the court of last resort, clearly lays down the underlying principles originating and governing the statute now under consideration. The dangers therein pointed out have become too fully realized to be

longer ignored, and are greatly aggravated by the open policy adopted by certain states of chartering corporations with almost unlimited powers for the sole purpose of transacting business in other states. So far has this gone that we have merchants in this state who, having failed as a partnership, subsequently incorporated under the laws of another state, and immediately resumed their same old business, at the same old stand, in the state of their life-long residence, with all the privileges and immunities of a foreign corporation.

It seems to be well settled that while a state can, in its discretion, absolutely prohibit a foreign corporation from transacting any business within its borders, it cannot impose conditions that are repugnant to the Constitution and laws of the United States. Such would be any provision requiring a foreign corporation to surrender or agree to waive its right of removal to the Federal courts as a condition precedent to obtaining license. Nor can a state forbid a foreign corporation, as such, from removing its causes when otherwise entitled to do so. *Home Ins. Co. v. Morse*, 20 Wall. 445, 456, 22 L. ed. 365, 369; *Southern P. Co. v. Denton*, 146 U. S. 202, 207, 36 L. ed. 943, 945, 13 Sup. Ct. Rep. 44; *Barron v. Burnside*, 121 U. S. 186, 200, 30 L. ed. 915, 919, 7 Sup. Ct. Rep. 931, and cases therein cited.

Construing the act of February 10, 1890, now under consideration, as a North Carolina statute, it is clear to us that the legislative intent was not to grant a mere license under which foreign corporations might do business in this state, but to require all such corporations to become domestic corporations, either by reincorporation or adoption. Whatever the process may be called, the intent of the act, as well as its legal effect, was to make all corporations complying with its conditions domestic corporations of the state of North Carolina. Its effect was to charter, and not to license.

But it is argued that the act has attempted to create a domestic corporation, not out of natural persons, but out of a foreign corporation, that has no natural or legal existence in this state. This is only partially correct. Whatever may be the wording of the act, its effect, as well as legal intent, is to create a domestic corporation out of the stockholders of the foreign corporation. Perhaps it would be better to say that it enables the stockholders of a foreign corporation to become a domestic corporation, with the same capital stock and identical powers, privileges, and obligations.

Again, it is said that the act requires a foreign corporation to file its foreign charter and by-laws; but this is done, not as 65 L. R. A.

recognizing the legal validity of such charter, but to definitely ascertain the powers to be conferred, which can never exceed those permitted by the Constitution and laws of this state. In fact, as a foreign corporation, having no legal existence in this state, can never be anything more than a licensee, express or implied, it would seem that it could become a domestic corporation only by some form of creation. Because, in building a house, a man may use some timbers hewn by someone else, he is none the less the builder of the house; and the defendant is none the less a North Carolina corporation because our laws permit it to use its New York charter and by-laws simply for the purpose of indicating the extent of its powers acquired by virtue of our incorporation.

It may be said that this is an artificial construction, but so is the entire existence of a corporation. In *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 297, 17 L. ed. 130, 133, Chief Justice Taney, speaking for the court, says: "It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state. And neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers."

In *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 373, 34 L. ed. 363, 367, 10 Sup. Ct. Rep. 1004, the court said: "Identity of name, powers, and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute, and to the corporation created by it, there can be but one legislative paternity."

Of course, all such chartered rights are held at the will of the legislature, and under article 8, § 1, Const., "may be altered from time to time or repealed." A mere license is admittedly revocable at any time, not reaching the dignity of a charter.

Having thus decided that the act in question does not license, or pretend to license,

but in legal intention and effect creates, a domestic corporation, we come to the final question, whether a corporation so domesticated can remove an action into the Federal courts solely by virtue of its prior incorporation by some other state. In the case at bar the defendant voluntarily took advantage of the act, and became a domestic corporation, certainly as far as that act could make it so. It held itself out to the people of North Carolina as a domestic corporation, in order to obtain their business, and at the same time evade the penalties attaching to the transaction of any business by a foreign corporation after all comity had been withdrawn by legislative authority. The plaintiff has sued the defendant as a domestic corporation of this state, and in that capacity only, and states a cause of action that presents no element whatsoever of a Federal question. He simply seeks to recover damages for personal injuries inflicted upon him by the defendant's servants, who dropped an iron bar upon his head while he was walking the public streets of an incorporated city. Admitting that the defendant exists in a dual capacity as a corporation under the laws of New York as well as of North Carolina, the plaintiff elected to sue it in the latter capacity. In fact, we do not see how he could well have sued it in any other capacity. Forbidden by law to do any business as a foreign corporation, and holding itself out as a domestic corporation, was not the plaintiff forced to presume that he was injured by the defendant in the transaction of its business as a domestic corporation? Is it not a legal presumption that the defendant was acting in that capacity in which alone it could lawfully transact any business? It seems that if the defendant had, as plaintiff, been seeking to enforce a lawful cause of action, it might have brought suit in the Federal courts by electing to sue as a New York corporation. We do not see how it could have sued in the Federal courts as a domestic corporation; nor could it have brought suit in the state courts as a foreign corporation, because, as a purely foreign corporation, it has now no legal existence in the state of North Carolina.

Recognizing the fact that this is a question whose ultimate determination rests with the Supreme Court of the United States, we have carefully examined its reports, and have endeavored to reconcile our decision with its opinions. We think they are entirely consistent. The facts in the case at bar seem identical with those in *Memphis & O. R. Co. v. Alabama*, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432. The headnote of that case, written by Mr. Justice Gray, who also wrote the opinion, is 65 L. R. A.

as follows: "The Memphis & Charleston Railroad Company is made, by the statutes of Alabama, an Alabama corporation; and, although previously incorporated in Tennessee also, cannot remove into the circuit court of the United States a suit brought against it in Alabama by a citizen of Alabama." The opinion says, on page 585, 107 U. S., page 520, 27 L. ed., page 436, 2 Sup. Ct. Rep.: "The defendant, being a corporation of the state of Alabama, has no existence in this state as a legal entity or person, except under and by force of its incorporation by this state; and, although also incorporated in the state of Tennessee, must, as to all its doings within the state of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States;" citing *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 283, 20 L. ed. 571, 575.

If this be the law, then, we are compelled to hold in the case at bar that the defendant, being a corporation of the state of North Carolina, has no existence in this state as a legal entity or person, except under and by force of its incorporation by this state; and, although also incorporated in the state of New York, must, as to all its doings within the state of North Carolina, be considered a citizen of North Carolina, which cannot, when sued by another citizen of North Carolina, remove the cause into the courts of the United States. It is rare that a precedent so exactly fits that the case under consideration can be decided by the adoption of a single sentence from the opinion of the cited case with a mere change of names. Has that case been overruled or modified? Not so far as we can see; certainly not in express terms, nor by necessary implication, in any case that has been cited to us or that we have been able to find. On the contrary, it has been expressly cited with approval in numerous cases, including *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 559, 40 L. ed. 802, 807, 16 Sup. Ct. Rep. 621, and *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 561, 43 L. ed. 1081, 1086, 19 Sup. Ct. Rep. 817, so strongly relied on by the defendant. The last case, which is the latest utterance of the Supreme Court upon the subject, was written by Mr. Justice Gray, who also wrote the opinion in *Memphis & O. R. Co. v. Alabama*, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432. This learned judge surely would not have expressly cited his own opinion with approval if he had intended to overrule it by implication. On page 562, 174 U. S., page 1087, 43 L. ed., and page 821, 19 Sup. Ct. Rep. he says: "This court

has often recognized that a corporation of one state may be made a corporation of another state by the legislature of that state, in regard to property and acts within its territorial jurisdiction;" citing *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 297, 17 L. ed. 130, 133; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 82, 20 L. ed. 354, 358; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 283, 20 L. ed. 571, 576; *Indianapolis & St. L. R. Co. v. Vance*, 96 U. S. 450, 457, 24 L. ed. 752, 756; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432; *Clark v. Barnard*, 108 U. S. 436, 451, 452, 27 L. ed. 780, 786, 2 Sup. Ct. Rep. 878; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 334, 29 L. ed. 636, 645, 6 Sup. Ct. Rep. 334, 388, 1191; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 169, 30 L. ed. 196, 201, 6 Sup. Ct. Rep. 1009; *Martin v. Baltimore & O. R. Co.* 151 U. S. 673, 677, 38 L. ed. 311, 313, 14 Sup. Ct. Rep. 533. And again, on the same page: "But this court has repeatedly said that, in order to make a corporation already in existence under the laws of one state a corporation of another state, 'the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creator.' The mere grant of privileges or powers to it as an existing corporation, without more, does not do this."

This clear and concise statement of the law would meet our unqualified approval, even if it had come from a different source. Applying this rule in its strictest form, we are clearly of opinion that the act now under consideration does not pretend to be a "mere grant of privileges or powers," but is, in legal intent and effect, "a creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creator." The act says, in express terms, "that every telephone . . . company incorporated, created, and organized under and by virtue of the laws of any state or government other than that of North Carolina, desiring to own property or to carry on business or to exercise any corporate franchise whatsoever in this state, shall become a domestic corporation of the state of North Carolina by filing," etc.; "that when any such corporation shall have complied with the provisions of this act above set out, it shall thereupon immediately become a corporation of this state, and shall enjoy the rights and privileges, and be subject to the liability, of corporations of this state, the same as if such corporation had 65 L. R. A.

been originally created by the laws of this state." Acts 1899, chap. 62, §§ 1, 3.

The distinction between the case at bar, following the opinion in *Memphis & C. R. Co. v. Alabama*, and the case of *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* seems to be that in the last case the complainant, being a corporation of the state of Indiana by original creation, even if also a corporation of Kentucky by adoption, elected to sue in its former character. If it had elected to sue as a Kentucky corporation, or someone had elected to sue it in such capacity, the suit could not have been brought in the Federal courts within the state of Kentucky. This seems to appear from the opinion of the court on page 563, 174 U. S., page 1087, 43 L. ed., and page 821, 19 Sup. Ct. Rep., where the following language is used: "But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created. It could neither have brought suit as a corporation of both states against a corporation or other citizen of either state, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States."

The case of *Memphis & C. R. Co. v. Alabama* is so completely "on all fours" with the case at bar, and has been so often and so recently approved, that further citations seem unnecessary; but the same principle is clearly enunciated in *Martin v. Baltimore & O. R. Co.* 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533. There the court says on page 677, 151 U. S., page 313, 38 L. ed., and page 535, 14 Sup. Ct. Rep., that "a railroad corporation created by the laws of one state may carry on business in another, either by virtue of being created a corporation by the laws of the latter state also, as [citing cases], or by virtue of a license, permission, or authority granted by the laws of the latter state to act in that state under its charter from the former state [citing cases]. In the first alternative, it cannot remove into the circuit court of the United States a suit brought against it in a court of the latter state by a citizen of that state, because it is a citizen of the same state with him (*Memphis & O. R. Co. v. Alabama*); in the second alternative, it can remove such a suit, because it is a

citizen of a different state from the plaintiff."

The leading text writers take the same view of the question. Thompson, in his elaborate work on Corporations (vol. 6, § 7472), says: "We have several times had occasion to examine into the constitution of this species of corporation, with the conclusion that it is a domestic corporation in each of the states by whose legislation, in concurrence with that of other states, it has been created. This being so, when it is sued in a court of any one of such states by a citizen thereof, it is not entitled to remove the cause to a court of the United States on the ground of diverse state citizenship." To the same effect are Clark, Corp. §§ 36-38; Morawetz, Priv. Corp. §§ 999, 1001; Desty, Fed. Proc. p. 321; Black's Dillon, Removal of Causes, § 101.

There are many other cases sustaining the position we have taken, but those above cited are so carefully considered and ably written, with such full citation of authority, that further elaboration by us seems useless. We are of the opinion that, as the defendant has become a domestic corporation of the state of North Carolina, and, in contemplation of law, a citizen thereof, and as the plaintiff has sued the defendant as a North Carolina corporation upon a cause of action which discloses no Federal question whatever,—the case cannot be removed into the circuit court of the United States.

Therefore the judgment of the court below is affirmed.

Furches, J., dissenting:

It is with hesitation that I dissent from the well-considered opinion of the court, especially so when, personally, I have no objection to the conclusion arrived at. And it may appear strange that I dissent for the reason that I have an entirely different conception of the case from that of the court. If I agreed with the court as to who the defendant is, I would agree with the court in its conclusion.

I do not propose to enter into a discussion of the case, but simply to state my position, and some of the reasons for my not agreeing with the court; and it is to be regretted that a case of so much importance as this should be presented in such a way as to leave any doubt as to the very question upon which I think the appeal depends.

Is the New York corporation or the North Carolina corporation the defendant? The summons does not say which is the defendant. The complaint does not say in direct terms whether it is the New York corporation or the North Carolina corporation. But it seems to me that by direct implication 65 L. R. A.

it does say that it is the New York corporation. It says "that the defendant is a corporation duly organized and is doing business in North Carolina, and has become and is a domestic corporation under the laws of said state." It is plainly stated that the defendant is a corporation, and that it (the defendant) has become a domestic corporation under the laws of North Carolina. So the thing sued existed before it became domesticated. It is not the thing created by domestication that is sued, but the thing that existed before, and has become domesticated. But, if there was any doubt as to this, it seems to me to be made plain and certain by the affidavit of O. A. Dozier, which was received and considered by the court in passing upon the motion to remove. He says "that at the time said suit was begun, and at the present time, the defendant was and still is a corporation chartered by, and existing under and by virtue of, the laws of the state of New York." And the court in passing upon the motion to remove says "that considering the affidavit aforesaid (Dozier's) filed by the defendant, along with its petition, the defendant is a corporation of the state of North Carolina." These facts stated in the affidavit were not denied, were considered by the court, and must be taken as true. These facts being true it seems to me settles the question, and shows that it was the New York corporation which was sued. In other words, there was a latent ambiguity (two John Smiths), and the affidavit showed it was the New York John which was sued. But, as it has become domesticated under the act of 1899, the judge held, as a matter of law, that the New York corporation was not entitled to have the case removed, because it had become a domestic corporation. In this I think he was in error.

It is stated in the opinion of the court that it must have been the North Carolina corporation which was sued, as it is admitted that the defendant was doing business in North Carolina at the time of the injury, and that the New York corporation had no right to do business in North Carolina after the act of 1899 went into effect. I submit that this must be an error. It is true that this act did take from the defendant and all other foreign corporations their comity,—their right to engage in business in this state,—unless they complied with that act by becoming domesticated. But when they did this their right of comity was restored, and the conclusion of the court is incorrect.

I agree that a foreign corporation may become a North Carolina corporation by complying with the act of 1899. Indeed, there must be a foreign corporation before this

act can operate. It is then made a North Carolina corporation, not by creation, but by adoption. But this new corporation has a new and distinct entity from the New York corporation. It does not bring the New York corporation into North Carolina; it cannot do this, because a corporation can have no legal existence or authority outside of the state that gives it corporate life, except by the law of comity. My opinion is that, had the plaintiff sued the North Carolina corporation, it would not have been entitled to removal, based on diverse citizenship. But, as the plaintiff chose to sue the New York corporation, the defendant was entitled, as I think, to an order of removal.

Faircloth, Ch. J., also dissents.

B. M. ALLRED et al., Appts.,

v.

H. D. SMITH et al.

(185 N. C. 443.)

1. **Heirs at law are not entitled to the benefit of a judgment in an action by a coheir to set aside a deed of the ancestor, where they were not made parties to the suit, and it was not brought for their benefit.**
2. **A proceeding to set aside a deed for want of capacity of the grantor is not *in rem*.**
3. **Judgments in actions quasi in rem are binding only on the parties.**
4. **One not a party to the action cannot take any advantage of an erroneous judgment.**
5. **One claiming property rights under a judgment in an action to which he was not a party should set up the entire record, to the end that the court may see what was in litigation and what was adjudicated.**

(*Clark, Ch. J., dissents.*)

(May 17, 1904.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Randolph County in favor of defendants in a proceeding to partition certain real estate. *Affirmed.*

Statement by **Connor, J.:**

Nancy Allred was the owner of the land in controversy, all parties to the land claiming title under her. She died leaving the plaintiffs and defendants her heirs at law.

NOTE.—As to effect of judgment on rights of persons who are not parties thereto, see *Hughes v. Jones*, 5 L. R. A. 632; *Leslie v. Bonte*, 6 L. R. A. 62; *Barnes v. Boardman*, 9 L. R. A. 571; *Wilson v. Brookshire*, 9 L. R. A. 792; *Hornthall v. Burwell*, 13 L. R. A. 740; *Re Rochester*, 19 L. R. A. 161; *Denny v. State*, 31 L. R. A. 726; *Lowe v. Turple*, 37 L. R. A. 233; *Ward v.* 65 L. R. A.

Prior to her death she executed a deed for the land in controversy to the defendant G. D. Allred. The plaintiff Willie Allred, after the death of her mother, instituted an action in the superior court against the defendant G. D. Allred, alleging that at the time of the execution of said deed the said Nancy Allred did not have sufficient mental capacity to execute the same; that she did not assume to sue for or in behalf of any children heirs at law of said Nancy Allred. At July term, 1903, the cause came to trial, and upon an issue submitted to the jury it was found that the said Nancy Allred did not have the sufficient mental capacity to execute the said deed, and it was "ordered, adjudged, and decreed that the deed described in the complaint, and which is recorded in Book 99, p. 310, in the office of the register of deeds of Randolph county, and which purports to convey the land described therein from Nancy Allred to the defendant G. D. Allred, is void, and of no effect; and it is further ordered, adjudged, and decreed that the said deed be delivered up and canceled of record; and it is further ordered that the clerk of this court certify a copy of this judgment to the register of deeds of Randolph county to the end that the same may be registered at the office of the register of deeds for said county." From this judgment no appeal was taken. The plaintiffs instituted this proceeding for partition, and alleged that they and the defendants are each entitled to one-ninth undivided interest of said land as heirs at law of Nancy Allred. The defendant G. D. Allred says that he is entitled to eight-ninths undivided interest in said land by virtue of the deed from Nancy Allred to himself. He admits that by virtue of the judgment in the case of Willie Allred against himself she is entitled to one-ninth interest therein. The facts in regard to the execution of the deeds and a copy of the judgment are fully set out in the answer. The plaintiffs demurred to the answer for that it appeared upon the face of the complaint that the said deed under which the defendant G. D. Allred claimed had been declared void and canceled. The clerk sustained the demurrer, and directed a sale of the land for partition, to which judgment the defendant excepted, and appealed to the judge. Upon the said appeal the judge of the district reversed the judgment of the clerk and overruled the demurrer, adjudg-

Boyce, 36 L. R. A. 549; *State ex rel. National Subway Co. v. St. Louis*, 42 L. R. A. 113; *Probate Judge v. Sulloway*, 49 L. R. A. 347; *Farm Invest. Co. v. Carpenter*, 50 L. R. A. 747; *Rodini v. Lytle*, 52 L. R. A. 165; *McConnell v. Poor*, 52 L. R. A. 312; *Long v. Willson*, 60 L. R. A. 720; and *Lincoln v. First Nat. Bank*, 60 L. R. A. 923.

ing: "Upon the record now before the court, the court adjudges that Willie Allred and G. Dallas Allred are tenants in common in the lands described in the petition, the said Willie entitled to one ninth and G. Dallas to eight-ninths, and the judgment of the clerk to this extent is reversed and modified." From this judgment the plaintiffs other than Willie Allred appealed.

Mr. Oscar L. Sapp, for appellants:

It does not appear that the demurrer was not interposed in good faith; therefore the plaintiffs were entitled to an order allowing them to plead over.

Clark's Code Civ. Proc. § 272; *Moore v. Hobbs*, 77 N. C. 65; *Bronson v. Wilmington N. C. L. Ins. Co.* 85 N. C. 411.

Defendant is claiming title in this action by virtue of a deed which has been declared by a court of competent jurisdiction of both subject-matter and parties to be void.

"Void" means without legal efficacy, ineffectual to bind parties, or to convey or support a right.

28 Am. & Eng. Enc. Law, p. 473.

An invalid deed vests no title in the purchaser.

Shev v. Call, 119 N. C. 451; 56 Am. St. Rep. 678, 26 S. E. 33.

If the deed is void as to one, it is void as to all.

If the judgment is erroneous or irregular in saying that the whole deed is void, and in not saying that it is void as to one eighth interest and valid as to the other, then the defendant should have it corrected; and he cannot do that in this action.

Simmons v. Dowd, 77 N. C. 155; *McKee v. Angel*, 90 N. C. 60; *Spivey v. Harrell*, 101 N. C. 48, 7 S. E. 693; *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Everett v. Reynolds*, 114 N. C. 366, 19 S. E. 233; *Weeks v. McPhail*, 128 N. C. 130, 38 S. E. 472.

When there is jurisdiction of the person and subject-matter, and the judgment is not the result of fraud and collusion between the parties to it, and the record is material only to establish the fact of such judgment and those legal consequences which result from that fact, the record must be regarded as conclusive, even as to strangers.

11 Am. & Eng. Enc. Law, 2d ed. p. 391, note; Black, Judgm. § 604.

The plaintiffs are not estopped by virtue of the deed.

11 Am. & Eng. Enc. Law, 2d ed. p. 393, note; *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 285, 38 Am. Dec. 722.

The judgment in the action between Willie Allred and the defendant comes within the legal definition of a judgment *in rem*, and it is a judgment *in rem*.
65 L. R. A.

2 Smith, Lead. Cas. *585; Black, Judgm. § 792.

Messrs. Robbins & Robbins and Hammer & Spence, for appellees:

G. Dallas Allred is not estopped, by the judgment in the action of Willie Allred against him to set up the deed from Nancy Allred to him, against such of the parties to this action as were not parties to the action in which said judgment was rendered.

Sweepson v. Harvey, 69 N. C. 387.

A privy to an action is one who has acquired an interest in its subject-matter by inheritance, succession, or purchase from a party to the action subsequent to its institution. A privy antedating the action does not work an estoppel.

Bryan v. Malloy, 90 N. C. 511; Bigelow, Estoppel, 5th ed. 142.

Cotenants are not privies.

Black, Judgm. § 553.

One not a party or privy is not bound by a judgment.

Parks v. Adams, 113 N. C. 473, 18 S. E. 665; *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295; *Dickens v. Long*, 109 N. C. 165, 13 S. E. 841; *Finch v. Finch*, 131 N. C. 271, 42 S. E. 615; *Temple v. Williams*, 91 N. C. 82; *Moore v. Ingram*, 91 N. C. 376.

This is true although originally he was a party.

Owens v. Alexander, 78 N. C. 1.

An estoppel must be mutual, and one not bound by an estoppel cannot take advantage of it.

Griffin v. Richardson, 33 N. C. (11 Ired. L.) 439; *Peebles v. Pate*, 90 N. C. 348; *Ray v. Gardner*, 82 N. C. 146.

Actions *in rem*, strictly considered, are proceedings against property alone treated as responsible for the claims asserted by the libellants or plaintiffs.

Freeman v. Alderson, 119 U. S. 187, 30 L. ed. 373, 7 Sup. Ct. Rep. 165; Bigelow, Estoppel, p. 14.

The object and purpose of a proceeding purely *in rem* are to ascertain the right of every possible claimant; and notice is given to the whole world to appear and make claim.

Duchess of Kingston's Case, 2 Smith, Lead. Cas. Hare & W.'s notes, 694.

Notice is indispensable.

Windsor v. McVeigh, 93 U. S. 279, 23 L. ed. 916; *Woodruff v. Taylor*, 20 Vt. 65.

Judgments denominated quasi *in rem* are not conclusive against those not parties thereto.

Freeman v. Alderson, 119 U. S. 187, 30 L. ed. 373, 7 Sup. Ct. Rep. 165; Black, Judgm. § 794; *Falls v. Gamble*, 66 N. C. 455; *Starkie*, Ev. 379; *Kearney v. Denn*, 15 Wall. 51, 21 L. ed. 41; *Shober v. Robinson*, 6 N. C. (2 Murph.) 33; *Davis v. Wood*, 1

Wheat, 6, 4 L. ed. 22; *Arthur v. Broadway*, 127 N. C. 410, 37 S. E. 503; *Bigelow, Estoppel*, 47.

The deed of a *non compos mentis* is not void, but only voidable,—and this deed of Nancy Allred is valid until avoided by Nancy Allred or her heirs,—not an heir.

Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; *Ellington v. Ellington*, 103 N. C. 54, 9 S. E. 208; *Odom v. Riddick*, 104 N. C. 520, 7 L. R. A. 118, 17 Am. St. Rep. 686, 10 S. E. 609; *Creekmore v. Baxter*, 121 N. C. 32, 27 S. E. 994.

And until such avoidance no estate vests in the heirs.

Ellington v. Ellington, 103 N. C. 58, 9 S. E. 208; *Sinclair v. Huntley*, 131 N. C. 243, 42 S. E. 605.

Where one of several tenants in common brings an action claiming the whole of a tract, he is entitled to judgment for his proportionate part, upon the necessary proof.

Overcash v. Kitchie, 89 N. C. 391.

Connor, J., delivered the opinion of the court:

The deed from Nancy Allred to the defendant G. D. Allred conveyed to him the title to the land in controversy. If she was *non compos* at the time of its execution, the deed was voidable, not void. "The deed of a person of unsound mind, not under guardianship, conveys the seisin." *Odom v. Riddick*, 104 N. C. 515, 7 L. R. A. 118, 17 Am. St. Rep. 686, 10 S. E. 609. At her death no estate passed to her heirs at law. They had a right of action, and were entitled, either jointly or severally, to attack the deed in so far as it affected their rights. Only one of them did so. It is alleged, and the demurrer admits, that she "did not assume to sue for or in behalf of any of the other children." As the basis of her right to sue she alleged that she was an heir of Nancy Allred. This was admitted. The only issue submitted to the jury was directed to the mental capacity of the grantor. The facts appearing upon the pleadings before us are that Nancy executed the deed; that Willie brought the action to set it aside so that she might inherit her share of the land conveyed; that she prosecuted her action successfully, and has the fruits of her victory,—one-ninth undivided interest in the land. The brothers and sisters seek to avail themselves of the verdict and judgment in that case to vest title in themselves, and to estop the defendant G. D. Allred from claiming any right to or title in the land under the deed. They are not parties to the action. The defendant does not seek to use the judgment as an estoppel, or to attack it. He concedes that, as against the plaintiff Willie,

in respect to her one ninth, he is estopped. She claims no more. The parties to the action are content to abide its result. When the other plaintiffs, strangers to the action, and, as we shall see, not privies, seek to take title under the judgment, or to estop him from denying that they have title, he simply relies upon the well-established principle that "estoppels must be mutual, and bind only parties and privies. One who is not bound by an estoppel cannot take advantage of it." For this position he relies upon the numerous decisions of this court and the uniform current of authority from the time of Coke to this day. Pearson, Ch. J., in *Griffin v. Richardson*, 33 N. C. (11 Ired. L.) 439, so declares the law. Also in *Falls v. Gamble*, 66 N. C. 455; *Ray v. Gardner*, 82 N. C. 146; *Bryan v. Malloy*, 90 N. C. 508. In *Peebles v. Pate*, 90 N. C. 348, it is said: "Every estoppel must be reciprocal. It must bind both parties. A stranger can neither take advantage of it nor be bound by it." *Temple v. Williams*, 91 N. C. 82. Mr. Starkie says: "Where the parties are not the same, one who would not have been prejudiced by the verdict cannot afterwards make use of it, for between him and a party to such verdict the matter is *res nova*, although his title turn upon the same point." Starkie, Ev. 332. "Judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation. And in the case of a former adjudication set up in defense it is no bar unless the parties to the first judgment are the same as those to the second proceeding. On the principle that estoppels must be mutual, no person is entitled to take advantage of a former judgment or decree as decisive in his favor of a matter in controversy, unless, being a party or privy thereto, he would have been prejudiced by it had the decision been the other way." Black, Judgm. § 534. We cannot more accurately state the principles underlying the doctrine of estoppel of record than by using the language of Pearson, J., in *Armfield v. Moore*, 44 N. C. (Busbee, L.) 157: "According to my Lord Coke, an estoppel is that which . . . 'shuts a man's mouth from speaking the truth.' With this forbidding introduction a principle is announced which lies at the foundation of all fair dealing between man and man, and without which it would be impossible to administer law as a system. The harsh words which the very learned commentator upon Littleton uses in giving a definition of this principle are to be attributed to the fact that before his day 'the scholastic learning and subtle disquisition of the Norman lawyers' (in the language of Blackstone) had tortured this principle so as to make it the means of great injustice; and the object of

my Lord Coke was to denounce the abuse which he says had got to be 'a very cunning and curious learning,' and 'was odious;' and thereby restore the principle and make it subserve its true purpose as a plain, practical, fair, and necessary rule of law. . . . Estoppels must be mutual; that is, if one side is bound, the other must be. It only includes parties and privies, and does not extend to a stranger." Co. Litt. 252d.

It is well settled that tenants in common are not privies. They do not claim under each other. They may claim their several titles and interests upon entirely different sources. In this respect they differ from joint tenants and coparceners. "Tenants in common are they which have lands or tenements in fee simple, fee taile, or for terms of life, etc., and they have such lands or tenements by several titles, and not by a joint title; and none of them know of this his several, but they ought by the law to occupy these lands or tenements in common." Co. Litt. § 292, p. 188b. It is therefore sufficient description of tenants in common that they are persons who hold by unity of possession. 4 Kent, Com. 367. They may claim by deed, devise, or descent. In either case they are deemed to have several and distinct freeholds; that being a leading characteristic of tenancy in common. "Each tenant is considered solely or severally seised of his land." 4 Kent, Com. 368. They can in no proper or legal sense be called privies, because it is said: "In the law of estoppel 'privy' signifies merely succession of rights; that is, the devolution in whole or in part of the rights and duties of one person upon another; . . . and derivation of rights by one person from the holding in subordination to those of another as in the case of a tenant. No one can be bound by, or take advantage of, the estoppel of another, who does not succeed or hold subordinately to his position." Bigelow, Estoppel, 347; Black, Judgm. 549. That tenants in common are not privies, and are therefore not bound by judgments rendered in actions brought by one of their cotenants respecting the common property, is illustrated by the cases in which it is held that they are competent witnesses for their cotenant. *Bennett v. Hethington*, 16 Serg. & R. 193, was an action of ejectment for the recovery of possession of the land held by the plaintiff and the witness. The demise was made by the plaintiff alone. Gibson, Ch. J., after stating the principle that the interest which excluded a witness was not in the subject-matter of the action, but in the result or event of it, and that it was not necessary that all of tenants should join in the devise, said: Here the plaintiff has elected to sue alone, and what would the witness get

by his recovery? The possession of his freehold would not be restored; but for that he would have to bring a second action, in which the record in this would not be competent evidence. The same doctrine is held in *Hammett v. Blount*, 1 Swan, 385. It is held by this court that a tenant in common may sue alone. *Carson v. Smart*, 34 N. C. (12 Ired. L.) 369. And in the action of ejectment he would recover to the extent of his right. *Holdfast v. Shepard*, 28 N. C. (6 Ired. L.) 361. It was held in England and in many of the states of the Union that tenants in common could not make a joint demise; that to do so would be calculated to perplex the jury with the trial of a number of titles in one issue. *White v. Pickering*, 12 Serg. & R. 435, Appx. In this case the court said: "There is no privity between the plaintiffs. The estate of each is distinct from the other, and they cannot join in a demise." For a discussion of this question, see Sedgw. & W. Trial of Title to Land, 300, and cases cited. It was held by this court in *Nixon v. Potts*, 8 N. C. (1 Hawks, N. C.) 469, that they could join; the case being cited in *Doe ex dem. Hoyle v. Stowe*, 13 N. C. (2 Dev. L.) 318. Ruffin, Ch. J., said that it was held "contrary to the rule in England, which is that, as their title is several, their demise must also be several. . . . Their demise may be joint, because, although they cannot jointly convey the land, they may jointly demise for years, since a demise for years is but a contract for possession, and their possession is joint." No question of estoppel arose, because "the judgment was not conclusive upon the title or right of property even between the parties. The action could be repeated, and the same questions retried indefinitely, because there was no privity between the successive fictitious plaintiffs. . . . Each successive ejectment was founded upon a new lease, entry, and ouster." Sedgw. & W. Trial of Title to Land, § 42. The learning upon the subject is of interest since the abolition of the action of ejectment, with its fictions, only as showing the reason upon which the doctrine of this and some other courts permitting a joint demise was founded. The changes made by the Code system, by which the jury may, upon appropriate issues, ascertain and declare the interest or estate of each party, either plaintiff or defendant, cannot be extended to work a change in the law of estoppel by record, by which one tenant in common may be estopped in respect to his title by a judgment in an action to which he was not a party. Merrimon, J., says: "One tenant in common may sue in many cases without joining his cotenant. Each has a separate and distinct freehold, and he may sue to recover possession when he has been dis-

seised." *Overcash v. Kitchie*, 89 N. C. 384. It is true that, as against a trespasser having no title, a tenant in common suing alone will recover possession of the whole land. If the land belongs to the plaintiff and others in common, he has an undoubted right to expel an intruding trespasser and secure possession, his right being full and complete, although others have the same right. *Yancey v. Greenlee*, 90 N. C. 317; *Brittain v. Daniels*, 94 N. C. 781; *Gilchrist v. Middleton*, 107 N. C. 663, 12 S. E. 85. Because of this principle it does not follow that, if one tenant in common takes it upon himself to bring an action for the recovery of the common property, alleging title in himself or in himself and his cotenants, and fails in his action, his cotenants are thereby estopped. If this be the law, may we not think, with my Lord Coke, that by reason of "a curious and cunning learning" estoppels will become "odious?" This court has never so held. In *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692, the court permitted the plaintiff to sue for the recovery of a tract of land "in behalf of himself and all other persons interested herein as plaintiffs." Davis, J., said: "As to how far the judgment may affect persons made parties under this order we express no opinion. But, independent of this, any one or more of several tenants in common may sue for the recovery of the possession of land." In *Gilchrist v. Middleton*, 107 N. C., at page 684, 12 S. E. 92, Avery, J., said: "One tenant in common may sue alone, and recover the entire interest [italics ours] in the common property against another claiming adversely to his cotenants as well as to himself, though he actually prove title to only an undivided interest. This he is allowed to do in order to protect the rights of his cotenants against trespassers and disseisors." We think the learned justice inadvertently used the word "interest" instead of "possession." A careful examination of the authorities fails to disclose a single case in which this court has said that the plaintiff can put in issue his cotenant's interest in the common tenement. The reason assigned by the learned justice shows that the "entire interest" was not in issue. When the plaintiff shows any interest in himself as against one having no interest, he recovers possession of the entire tenement, because he is entitled, as against a stranger, "to the possession of every part and parcel of the subject-matter of the tenancy." Freeman, Cotenancy & Partition, § 87. When he secures such possession, it inures to the benefit of his cotenants. The same justice had occasion to review the authorities in *Foster v. Hackett*, 112 N. C. 546, 17 S. E. 426. He says: "It is obvious, therefore, that one of several cotenants, when he brings an

action against a trespasser on the common property, and proves the title of the other tenants in establishing his own, may, under the common-law practice in ejectment applied to actions for the possession of land, recover the whole, though he claim sole seisin in his complaint in himself, just as he can do under the procedure prescribed in the Code [§ 185] by alleging that the action is brought in behalf of himself and others having a common interest; though it has never been determined in this state how far, if at all, in the action under the provisions of the statute the cotenants not actual parties would be concluded by the judgment." *Allen v. Salinger*, 103 N. C. 14, 8 S. E. 913; *Lenoir v. Valley River Min. Co.* 113 N. C. 513, 18 S. E. 73. In *Winborne v. Elizabeth City Lumber Co.* 130 N. C. 32, 40 S. E. 825, Clark, J., says: "One tenant in common can recover the entire tract against a third party, for each tenant is entitled to possession of the whole except against a cotenant." The correct principle is that in respect to the one unity—the possession—the acts of one tenant in common inure to the benefit of his cotenant, as if an entry be made by one tenant. "As both have an equal right to the possession, the law presumes that if one only enters and takes the rents and the profits he does this act as well for his companion as for himself." Freeman, Cotenancy, § 166; *Day v. Howard*, 73 N. C. 1; *Caldwell v. Neely*, 81 N. C. 114; and many other cases in our Reports. So the possession, or the bringing an action for possession, by one repels the bar of the statute as to all. *Locklear v. Bullard*, 133 N. C. 260, 45 S. E. 580. In respect to title, interest, or estate to or in the common tenement, they are strangers, and no act done by one can affect, inure to the benefit of, or injure the other. Each tenant has a right by reason of the unity, or the fealty which each owes the other to rely upon his protection of the common possession. In respect to the title no act by one can affect the other; as, if one make a deed for the whole land, and the grantee go in possession, his possession is that of the cotenant, and not adverse until the expiration of twenty years, when the law will presume an ouster. *Cloud v. Webb*, 14 N. C. (3 Dev. L.) 317; *Page v. Branch*, 97 N. C. 97, 2 Am. St. Rep. 281, 1 S. E. 625; *Breden v. McLaurin*, 98 N. C. 307, 4 S. E. 136; *Ferguson v. Wright*, 113 N. C. 537, 18 S. E. 691. It would be an anomaly in the law if one tenant in common could, by matter in pais, deed, or record, estop his cotenant in respect to his title, in regard to which they are absolute strangers. Our researches, with the aid of the excellent briefs of counsel, do not disclose any authority or reported case

in which a party has been permitted to rely upon a judgment as an estoppel to which he was not a party or a privy, or which makes any exception to the well-settled rule that estoppels must be mutual. Applying these principles to the record before use, we can have no doubt that His Honor was correct in overruling the demurrer. If the action of Willie Allred against the defendant had resulted otherwise, we would not for a moment suppose that the plaintiffs other than Willie would be affected by it. Why they did not join her in the action is not suggested, nor are we to conjecture. For the purpose of testing the question, however, suppose that they had released their right of action to attack the deed, or that they were barred by the statute of limitations, or that they were of service to the plaintiff as witnesses,—either of which reasons is consistent with the record,—can it be that, by absenting themselves from the action, they can acquire title to property by an estoppel which they could not have acquired as parties to the action? If their contention be sound, the defendant is estopped as to them in the same manner and to the same extent as to Willie, the plaintiff. There is no suggestion that the judgment is competent as evidence. If of any efficacy, it is a complete bar, and “shuts the defendant’s mouth to speak the truth.” He has by estoppel lost the title to seven ninths of a tract of land without having had an opportunity to defend it as against them. This would be to violate first principles, and introduce new and dangerous exceptions to the fundamental limitations of the law of estoppels. It would no longer be entitled to the indorsement of judges, and surely it would surprise the great chief justice who so ably defended it in *Armfield v. Moore*, 44 N. C. (Busbee, L.) 157.

The plaintiffs say that, conceding the law to be as we find it, the effect of the judgment is to cancel, avoid, and utterly destroy the deed; that it is “without legal efficacy, ineffectual to bind parties, or to convey or support a right.” 28 Am. & Eng. Enc. Law, p. 473. The argument is ingenious, but will not bear inspection. It assumes the very question in issue. As to whom is it void? The parties to the action? Let us reverse the proposition: If the verdict and judgment had been that the deed was valid and effectual, could it be said that it was conclusively so as to the plaintiffs? The answer is obvious. The rule of the law is plain, fair, and necessary, and it is just. But they say the judgment is *in rem*, and settles the status of the deed. It is not the paper upon which the language of the law is written which vests the title. The court deals with the deed only as it affects title.

65 L. R. A.

This court has said that the record of a suit between A and B in which the validity of the assignment of a note was adjudged is no evidence of the validity of such assignment in an action between A and B, the latter not being a party to the former suit. *Svepson v. Harvey*, 69 N. C. 387. The action clearly was not a proceeding *in rem*. If quasi *in rem*, the plaintiff is met with the difficulty that in such actions judgments are only binding between the parties. Black, Judgm. § 793. To the suggestion that plaintiff is attacking the judgment as being erroneous, it is sufficient to say that one not a party cannot take any advantage of an erroneous judgment. If Willie Allred was claiming the entire land because of the form of the judgment, the suggestion would have some apparent force.

There is another view of this case not adverted to. If the plaintiffs claim that they acquired certain rights of property under the judgment, they should have set up the entire record, to the end that the court could see what was in litigation and what was adjudged.

After a careful examination of the authorities and arguments, we think that *the judgment of His Honor should be affirmed*. It is a mistake to say that His Honor rendered final judgment. The case was not before the judge for judgment, but only to pass upon the appeal from the ruling of the clerk on the demurrer. Code, §§ 254, 255. His Honor’s ruling remanded the case, in so far as it was before him, to the clerk. As the case is in the court for further orders, the plaintiffs may, if so advised, ask for permission to reply to the answer. Let this be certified.

Clark, Ch. J., dissenting:

In a proceeding duly constituted in a court of competent jurisdiction, and in which the defendant G. Dallas Allred was defendant, the jury found that Nancy Allred was without sufficient mental capacity to execute the deed to G. Dallas Allred covering the land in question, and the court adjudged that said deed “from Nancy Allred to G. Dallas Allred is void and of no effect; and it is further ordered, adjudged, and decreed that the said deed be delivered up and canceled of record,” with further judgment that the decree should be certified to the register of deeds to be recorded in his office. The deed being adjudged “void and of no effect,” the title of the grantee thereunder absolutely ceased (Code, §§ 426–428), as fully as if a reconveyance had been executed and recorded. The proceeding was in the nature of an action to remove a cloud from the title, and the judgment acting upon title to property adjudging the conveyance to the defend-

ant to the action to be null and void, and directing its cancelation and the registration of the decree in the register's office, where the conveyance to the defendant had been recorded, such proceeding has been held, "though not strictly proceedings *in rem*, . . . yet they are regarded as proceedings *in rem sub modo*." Hence the judgment canceling the defendant's title rendered it invalid as to all the world, as is the case with all judgments *in rem*. The matter stands, therefore, as if the conveyance to G. Dallas Allred had never been made. He certainly is bound by the judgment. The decree renders the deed void *ab initio*; and, if void, it is void as to everyone, especially as to the plaintiffs, who claim under Nancy Allred. The decree having directed the cancelation of the deed and the registration of the decree in the register's office, there is in contemplation of law no such conveyance in existence. The registration of the decree of cancelation was directed that purchasers from G. D. Allred should have notice that he could convey no title. He cannot now set up a title when a purchaser from him could not acquire title from him.

It matters not at whose instance, as plaintiff, such decree was rendered, or that it was at the instance of only one of several cotenants. It was rendered against the defendant. It binds him. Its effect was to declare that the title has never proceeded out of Nancy Allred, and to cancel the conveyance, and to strike the registration thereof off the register's books. It is not open, therefore, to the grantee in such deed to set it up as valid in this proceeding to partition the land, especially against the plaintiffs, who have acquired by descent all of Nancy Allred's title save the share which has descended to him. He holds that share by descent,—the same title by which the plaintiffs hold theirs,—and not under the void deed.

If in the proceeding to declare the deed void it had been held valid, this would have been a judgment *in personam* against Willie Allred, the plaintiff therein, and would not bind the other plaintiffs herein, because they do not claim under Willie Allred. But the judgment declaring the deed void and directing its cancelation acts quasi *in rem sub modo* upon the title which it sets aside, and is binding upon G. D. Allred, who is the same defendant, and who in this action attempts to set up the same title which, as against him, has been declared void. Further, being a decree quasi *in rem sub modo*, it is binding upon all who might claim under G. D. Allred. The decree of cancelation, registered as decreed, is notice to all the world. Code, §§ 426-428.

Closely analogous is the case where, in an application of a railroad company to ac-

quire the right to use the track of another company for purposes of its business, the applicant was held concluded by a former adjudication against its corporate existence, rendered in a former proceeding by the same plaintiff for the same purpose against another railroad company (*Re Brooklyn, W. & N. R. Co.* 19 Hun, 314), and a determination that a creditor is entitled to share in a fund (*Eppright v. Kauffman*, 90 Mo. 25, 1 S. W. 736). The adjudication here that the deed is void is a judgment upon the *rem*, upon the status of the title, denying G. D. Allred's interest thereunder, and is conclusive upon him whenever and wherever thereafter he sets up title in himself under the deed which has been adjudged void and directed to be canceled. The principle is *res judicata*, and not strictly matter in estoppel. 24 Am. & Eng. Enc. Law, 2d ed. p. 712. The judgment setting aside the deed to G. D. Allred as void inured to the benefit of the other plaintiffs, as cotenants, who became thereupon beneficiaries under and privies to the decree which canceled the deed. The legal consequence of the judgment declaring the deed void as to G. D. Allred can be availed of by strangers to the action. 11 Am. & Eng. Enc. Law, 2d ed. p. 391. The judgment is also admissible, even if between strangers, as a link in the plaintiff's title, since it cancels the cloud cast upon it by the deed from Nancy Allred to G. D. Allred (24 Am. & Eng. Enc. Law, p. 757); especially when, as here, the decree is a decree in chancery (Id. p. 758, and cases cited in note 2).

It was error certainly to render final judgment upon overruling the demurrer, unless it was found that the demurrer had not been "interposed in good faith." Code, § 272; *Moore v. Hobbs*, 77 N. C. 65; *Bronson v. Wilmington N. C. L. Ins. Co.* 85 N. C. 411.

The deed was voidable; i. e., valid till declared void by the court. *Odom v. Riddick*, 104 N. C. 515, 7 L. R. A. 118, 17 Am. St. Rep. 686, 10 S. E. 609. But when adjudged void, and directed to be canceled, it ceased to be voidable, and became absolutely void. No conveyance had been made to third parties by G. D. Allred prior to such decree. A conveyance by him thereafter would be void, and certainly no title remained in him when he could convey none.

John E. REYBURN, *Appt.*,

v.

D. C. SAWYER.

(135 N. C. 328.)

1. The setting of making acts in a perma-

NOTE.—As to right to private remedy for public nuisance or injury, see *South Carolina S. B. Co. v. South Carolina R. Co.* 4 L. R. A.

ment manner by means of stakes driven into the soil in a navigable sound so as to interfere with navigation is a public nuisance.

2. The owner of an island, across a channel constituting the approach to which a fishing net is placed in such a manner as to constitute a public nuisance by interfering with navigation, may maintain an action to redress the private injury inflicted upon him by interference with his access to and from his property.
3. Injunction may issue, at the suit of the owner of an island, to compel the removal of nets set in the adjoining waters in such a manner as to constitute a public nuisance, where they interfere with the access to and from the island, and the one responsible for them is insolvent, so that an action for damages would not afford adequate relief.
4. To entitle the owner of an island to an injunction against the maintenance of nets across the channel by which he gains access to his property, it is sufficient that his agent, visiting the island on business, is delayed by the presence of the nets.

(May 3, 1904.)

A PPEAL by complainant from a decree of the Superior Court for Dare County in favor of defendant in a suit to enjoin the maintenance of a fishing net across a channel constituting an approach to plaintiff's property. *Reversed.*

The facts as found by the referee were as follows:

(1) Durant's island is a body of land lying in Dare county, surrounded by the waters of Albemarle sound, Alligator river, East lake, and the Haulover, and is well known by the name of Durant's island. All of said waters and land lie wholly within the state of North Carolina.

(2) Durant's island is swamp or marsh land, except a little around the shore,—sand ridge.

(3) That on the southern side of the island is a creek or bay making into said island from Albemarle sound, which creek or bay is known as "Tom Mann's creek."

(4) On the 18th day of April, 1890, the state board of education made and executed a deed unto John E. Reyburn, the plaintiff, which deed was recorded in Dare county. Said deed describes, and the boundaries include, Durant's island.

(5) Near the shore of Tom Mann's creek the plaintiff has erected several houses, which are now, and have been continuously

since April 18, 1890, occupied by plaintiff and his servants or agents.

(6) The plaintiff has a house known as an icehouse, which is situated over the waters of Tom Mann's creek, which house is connected with the land by a wharf or pier.

(7) The plaintiff has cut a canal about 10 feet wide and 30 inches deep, which canal connects the waters of Tom Mann's creek with the waters of Frying Pan, and has built some roads on the island. The said canal was cut prior to the erection of the nets hereinafter referred to.

(8) Since 1890 the plaintiff has continuously kept on said island at least two men, who have lived in the houses which were built by plaintiff, and has also kept thereon a stock of cattle and some poultry.

(9) In 1890, after the execution of the deed by the state board of education, the plaintiff posted notice on Durant's island forbidding others from trespassing thereon, and has kept others from trespassing upon said island.

(10) There is a channel leading from Tom Mann's creek into Albemarle sound, which channel, after leaving the creek, turns eastwardly and westwardly nearly parallel with the general curvature of the shore of the island, and running eastwardly until it gets near the northeastern end of the island abreast of the Haulover, where it connects with the deep water of Albemarle sound, which lies to the northward.

(11) From near the mouth of Tom Mann's creek going eastwardly to where it connects with the deep waters of Albemarle sound this channel is from 5 to 6 feet in depth, and varies from 175 to 600 feet in width. There are shoals in this channel upon which the water is only 4 feet deep.

(12) On the northern or sound side of this channel is a reef or shoal running nearly parallel with the shore or island, which reef or shoal terminates nearly opposite the Haulover. This reef or shoal varies in width from 30 to 150 feet. The water on this shoal or reef is from 3 to 4 feet deep, and deeper abreast of Tom Mann's creek than at other parts, except where the shoal terminates nearly abreast the Haulover.

(13) The channel above mentioned extends to the west of the mouth of Tom Mann's creek.

(14) On the southern or shore side of this channel the water gradually shoals until it

209, and *note*; *Swanson v. Mississippi & R. River Boom Co.* 7 L. R. A. 673, and *note*; *Wylie v. Elwood*, 9 L. R. A. 726; *Kuehn v. Milwaukee*, 18 L. R. A. 553; *Jacksonville, T. & K. W. R. Co. v. Thompson*, 26 L. R. A. 410; *Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co.* 29 L. R. A. 700; *South Carolina S. B. Co. v. Wilmington, C. & A. R. Co.* 33 L. R. A. 541; 65 L. R. A.

Mahler v. Brumder, 31 L. R. A. 695; *Miller v. Hare*, 39 L. R. A. 491; *Blagen v. Smith*, 44 L. R. A. 522; and *Griffith v. Holman*, 54 L. R. A. 178.

As to right to fish, see *State v. Shaw*, 60 L. R. A. 481, and *note*.

As to right to obstruct rights of navigation, see *Hutton v. Webb*, 59 L. R. A. 33, and *note*.

approaches the shore, but in some places it is as deep as in the channel.

(15) The waters on the southern or shore side of the above-mentioned reef are navigable for boats drawing from 3 to 4 feet of water. That part of Albemarle sound on the inside or shore side of the above-mentioned reef or shoal is usually and almost entirely navigated and used by boats called "shad boats" or "sprit-sail boats," which boats, when loaded, draw about 30 inches of water. Boats of smaller size are also used inside of the said reef or shoal, and occasionally boats of larger size, drawing from 3 to 4 feet, come inside this reef or shoal. Boats drawing as much or more than 7 feet of water can navigate the waters of the Albemarle sound on the outside of the said reef or shoal, and can pass from Albemarle sound through connecting waters to the Atlantic ocean.

(16) When it is calm, or in moderate weather, boats drawing 30 inches can cross the reef or shoal. In rough weather, and especially when the wind is from the north, northeast, or northwest, boats drawing as much as 2 feet of water cannot cross the reef or shoal with safety, and in such weather boats of smaller size are not safe in Albemarle sound. When the wind is from the north, northeast, or northwest, this reef has the effect to break the force of the waves beating upon the lee shore, and it is smoother on the inside of the reef than on the outside, and safer for such boats as usually go on the inside, than it would be on the outside of the reef.

(17) The defendant, prior to the institution of this suit, placed a line of stakes in the waters of Albemarle sound, which stakes are from $2\frac{1}{2}$ to 4 inches in diameter at the water's edge, and larger at the bottom, and extend 4 or more feet above the water, and are firmly set or driven in the soil under the water. These stakes are nearly abreast of the Haulover, and run across the mouth of the above-mentioned channel, and are 140 feet from its mouth and 140 feet from the eastern end of the reef, and run parallel with the channel as it empties into the sound, and runs nearly at right angles to the reef. The first pocket or pond is from 100 to 150 yards from the reef on the sound side.

(18) These stakes for the nets originally began about 100 yards from the shore, and from that point extended out into the sound a distance of from 1,000 to 1,200 yards. There were two stakes between the shore end of said net stakes and the shore, which two stakes have been removed since this suit began. The stakes starting from the net stake nearest the shore are placed about 60 feet apart, running out a distance of 200 to 300 yards. These stakes are called "lead

stakes." At about a distance of 200 to 300 yards from the shore end of the line of stakes a square 36 feet each way is formed by stakes of similar size, the stakes forming this square are about 36 feet apart, and have smaller stakes from 12 to 18 feet apart between them. This forms the pocket of the net. From the outer side of this pocket another line of lead stakes starts and runs out about 250 yards, when another pocket is formed, and this continues until four pockets have been formed. The whole row of stakes extend into the sound about 1,200 yards from the stake nearest the shore.

(19) At certain times during the year a net is attached to these lead stakes running from the stakes nearest the shore to the pound stakes. This net is made of net twine, and is hung upon 9-thread manilla rope, which is about $\frac{3}{4}$ inches in diameter, which manilla rope is tied to the lead stakes at about the level of the water with marlin. The net drops down in the water. These lead lines sag so as to drop about 12 to 18 inches below the top of the water in the center between the stakes. This is the usual method of setting Dutch nets.

(20) There is attached to the pocket or pound stakes a pocket or pound net made of similar twine, with smaller meshes, tied to similar ropes, which ropes are tied to the pocket or pound stakes with marlin. This pocket or pound of the net is about 28 feet square, and is level with the water, and is tied to the stakes so as to be kept level with the water and to prevent sagging. About 2 feet above the pocket another line of rope is tied to the pocket stakes. This line of rope, which is tied to the pocket stakes, is called a "hand line," and is about 2 feet above the level of the water line. The mouth of the pocket is on the side next to the lead. This is the usual method of setting Dutch nets.

(21) When these stakes are broken off and left in the water so that they do not show above it, a boat might run on one of them, and they become more or less dangerous, as they are liable to or might knock a hole in the bottom or side of the boat.

(22) The nets are usually set, in that section, about seven months in the year. The referee is unable to find from evidence when the nets in question were hung upon the stakes, or how long they remained, or when taken up. The referee finds that the nets in question were hung to the stakes, or set, and have been taken up at least once, and have been put down again. The stakes have not been taken up since set.

(23) Boats such as are commonly used, and such as can be used, in navigating the waters of Albemarle sound when the nets are not set can with ease and safety pass between the stakes in the lead of the nets, and,

should one of such boats strike one of the stakes, it would not necessarily injure or delay the boat. If the stake was rotten, or broken off at or below the water's edge, it would be more apt to injure the boat than if it were sound, and as originally set.

(24) Shad or sprit-sail boats, and such other boats as usually navigate the waters of that part of Albemarle sound lying inside of the reef or shoal, can, when the nets are not set, pass between the stakes of the pocket or pound, but not with ease; and these stakes are more apt to injure or delay a boat than the stakes in the lead.

(25) When the nets are set, shad or sprit-sail boats or smaller boats, and boats as large as any that usually or can navigate the waters of that part of Albemarle sound lying south of the reef, can, and generally with safety and without delay or hindrance, pass over the nets of the defendant by going over the lead.

(26) When the nets are set, boats can pass through the pocket or pound, but are liable to be delayed, obstructed, and hindered in their passage.

(27) There are times when the tide is low, the water rough, and the wind blowing hard, that boats such as are commonly used in that part of Albemarle sound cannot cross these nets with ease and safety, and might be hindered or delayed by them.

(28) There are times when there is but little wind, when, in order to pass over the nets, one would have to push down nets so as to let a boat go over. This can be done with safety, and with but little inconvenience, and without any practical delay.

(29) Plaintiff cannot anchor his yacht where nets or stakes are placed, or so near thereto as will permit her to swing on the nets or stakes. There are no special advantages had by anchoring at the place where the nets are situated, or so near thereto as to permit the yacht to swing on the stakes. The usual, customary, and best anchorage is in or near the Frying Pan. Occasionally the plaintiff anchors his yacht on the outside of the reef or shoal, which he can still do.

(30) The postoffice from which plaintiff gets his mail while on the island, and from which the servants of plaintiff get their mail, is Mashoes, 4 miles to the eastward. In going to this postoffice, or going to Manteo from the island, you will have to cross the nets of the defendant or go around them.

(31) In October, 1900, or 1901, Mr. B. G. Crisp, who is the attorney and representative of plaintiff in Dare county, went from Manteo to Durant's island to see the plaintiff about a matter of business, expecting to return the next day. During the night the wind came on to blow very hard from the

northwardly, and continued to blow very hard for two days. The waves were breaking over the reef to such an extent that the boatman who carried Mr. Crisp to the island would not cross the reef. Owing to the rough water on the reef and difficulty in crossing the reef with the breakers on it and the stakes in the channel, the boatmen were afraid to venture out, and Mr. Crisp did not leave for two days. No attempt was made to start.

(32) There are 11 stands of nets between Durant's island and Mashoes, and in going to Mashoes from Durant's island you cross 11 stands of nets besides the nets of the defendant.

(33) None of the boats of the plaintiff, his servant or agents, have been delayed or obstructed in any passage which they have undertaken, or have been compelled to change their course, or been damaged on account of the stakes or nets of this defendant; and the plaintiff and his servants or agents have not been prevented from taking any passage on the water on account of the nets of the defendant.

(34) The plaintiff has access to his island from the waters of Albemarle sound through the western end of the channel inside of the reef just to the west of Tom Mann's creek; also through the channel at the east end of the island. In coming from the postoffice or points east of Durant's island the plaintiff would have to go around or over the nets. In passing from Tom Mann's creek to the Haulover the plaintiff would have to cross the nets or go around them.

Upon the foregoing facts the referee finds the following conclusions of law:

(1) That the plaintiff is the owner of Durant's island. Code, § 2527; *Aycock v. Raleigh & A. Air Line R. Co.* 89 N. C. 321.

(2) That the nets and stakes are a public nuisance.

(3) That as to the plaintiff neither the nets nor the stakes are a private nuisance.

(4) That the plaintiff is not entitled to recover damages for the setting and maintaining said nets, or to have the same abated.

Messrs. Hinsdale & Hinsdale and B. G. Crisp, for appellant:

The right of fishing in navigable waters is subordinate to the right of navigation therein.

Lewis v. Keeling, 46 N. C. (1 Jones, L.) 306; *State v. Glen*, 52 N. C. (7 Jones, L.) 321; *Brounaw v. Baker*, 94 N. C. 675, 55 Am. Rep. 633; *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242; *State v. Narrows Island Club*, 100 N. C. 477, 6 Am. St. Rep. 618, 5 S. E. 411; *Burke County v. Catawba Lumber Co.* 116 N. C. 731, 47 Am. St. Rep. 829, 21 S. E. 941.

Such structure as defendant erected in this case is, as to any person who suffers special damage thereby, a private nuisance, for which damage he may sustain a civil action.

Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274; *Wesson v. Washburn Iron Co.* 13 Allen, 95, 90 Am. Dec. 181; *Georgetown v. Alexandria Canal Co.* 12 Pet. 97, 9 L. ed. 1015; *Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 554 note, 69 Miss. 299, 11 So. 26; *Orighton v. Dahmer*, 35 Am. St. Rep. 675, note, 70 Miss. 602, 21 L. R. A. 84, 13 So. 237; 1 High, Inj. § 761; *Beach, Inj.* pp. 1059, 1060; 14 Enc. Pl. & Pr. pp. 118, 1137; 16 Am. & Eng. Enc. Law, pp. 270, 959, 971; 1 Wood, Nuisances, p. 119; 2 Wood, Nuisances, pp. 1119, 1120, 1122, 1126, 1147-1149.

The plaintiff's ingress to and egress from his property are interfered with, and the facility with which he can go from one part of the island to the other by water is lessened. These are rights peculiar to himself, in which the general public does not share. His property has been rendered less valuable. The public suffers no such injury. The plaintiff's damage is, therefore, special, and differs in kind and degree from that of the public at large.

Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co. 117 N. C. 579, 29 L. R. A. 700, 53 Am. St. Rep. 606, 23 S. E. 43; *Blanc v. Klumpke*, 29 Cal. 156; *Yolo County v. Sacramento*, 36 Cal. 195; *Alden v. Pinney*, 12 Fla. 349; *Wilder v. De Cou*, 26 Minn. 10, 1 N. W. 48; *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41, 11 N. W. 124; *Brown v. Watson*, 47 Me. 161, 71 Am. Dec. 482; *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123; *Walker v. Shepardson*, 2 Wis. 384, 60 Am. Dec. 423; *King v. Dewsnap*, 16 East, 196; 2 Wood, Nuisances, pp. 817, 872, 886, 887; *Park v. Chicago & S. W. R. Co.* 43 Iowa, 636; 16 Am. & Eng. Enc. Law, p. 972; *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Corley v. Lancaster*, 81 Ky. 175; *Bell v. Edwards*, 37 La. Ann. 475; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Turner v. Holland*, 54 Mich. 300, 20 N. W. 51; *Page v. Mille Lacs Lumber Co.* 53 Minn. 492, 55 N. W. 608, 1119; *Blagen v. Smith*, 34 Or. 394, 44 L. R. A. 522, 56 Pac. 292; *Dudley v. Kennedy*, 63 Me. 465; *Callanan v. Gilman*, 67 How. Pr. 464; *Elias v. Sutherland*, 18 Abb. N. C. 126; *Penniman v. New-York Balance Co.* 13 How. Pr. 40; *Crooke v. Anderson*, 23 Hun, 266; 9 Am. & Eng. Enc. Law, p. 414; *Callanan v. Gilman*, 20 Jones & S. 112; *Sheedy v. Union Press Brick Works*, 25 Mo. App. 527; 14 Enc. Pl. & Pr. p. 1125; *Maine Wharf v.* 65 L. R. A.

Custom House Wharf, 85 Me. 175, 27 Atl. 93; 2 Wood, Nuisances, p. 1159.

A structure $\frac{3}{4}$ of a mile long, which consists of stakes from 2 $\frac{1}{4}$ to 4 $\frac{1}{4}$ inches in diameter, firmly driven in the bottom of the sound 60 feet distant from each other, attached to which is a $\frac{1}{2}$ -inch tarred manilla rope, from which is suspended a heavy net, stretching continuously from post to post, and reaching the bottom of the sound, said rope at each stake being 2 feet above the water, but sagging in the middle, having at intervals of 200 yards or so a pound or pocket in the form of a square, consisting of 14 stakes 18 feet apart, attached to which are similar ropes and nets, and, in addition thereto, hand lines of $\frac{1}{2}$ -inch tarred manilla rope,—is an obstruction to navigation (*State v. Narrows Island Club*, 100 N. C. 481, 6 Am. St. Rep. 618, 5 S. E. 411); and a public nuisance (*Ibid.*; 2 Wood, Nuisances, p. 1147).

It is, as to any person who suffers special damage thereby, a private nuisance as well, for which damage he may sustain a civil action.

Wilder v. De Cou, 26 Minn. 10, 1 N. W. 48; *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106; *Bell v. Edwards*, 37 La. Ann. 475; 9 Am. & Eng. Enc. Law, p. 414.

A riparian owner has the right of free egress from and ingress to his property located on navigable waters, and any damage which he may suffer from an obstruction which renders such access less secure, expeditious, or convenient is, as to him, different in kind and degree from that sustained by the public at large, makes the obstruction a private nuisance to him, and enables him to maintain a civil action for any damages he may sustain thereby, or to enjoin.

Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co. 117 N. C. 579, 29 L. R. A. 700, 53 Am. St. Rep. 606, 23 S. E. 43; *Venard v. Cross*, 8 Kan. 248; *Reynolds v. Clarke*, 1 Pittsb. 9; *Rose v. Miles*, 4 Maule & S. 101. 16 Revised Rep. 405; *Chichester v. Lethbridge*, Willes, 71; *Jackson v. Kiel*, 13 Colo. 378, 6 L. R. A. 254, 16 Am. St. Rep. 207, 22 Pac. 504; *South Carolina S. B. Co. v. Wilmington, C. & A. R. Co.* 46 S. C. 327, 33 L. R. A. 541, 57 Am. St. Rep. 693, 24 S. E. 337; *Knowles v. Pennsylvania R. Co.* 175 Pa. 623, 34 Atl. 974; *Sheedy v. Union Press Brick Works*, 25 Mo. App. 527; 2 Wood, Nuisances, p. 1158; *Works v. Junction R. Co.* 5 McLean, 425, Fed. Cas. No. 18,046; *Gould, Waters*, § 123; *Rose v. Groves*, 5 Mann. & G. 613, 6 Scott, N. R. 645, 1 Dowl. & L. 61. 12 L. J. C. P. N. S. 251, 7 Jur. 951; *Atty. Gen. v. Thames Conservators*, 1 Hem. & M. 1, 1 New Reports, 121, 8 Jur. N. S. 1203, 8 L. T. N. S. 9, 11 Week. Rep. 163; *Cole v. Sprowl*, 35 Me. 163, 56 Am. Dec. 699; *Van*

Brunt v. Ahearn, 13 Hun, 388; *Runyon v. Bordine*, 14 N. J. L. 472; *Brayton v. Fall River*, 113 Mass. 229, 18 Am. Rep. 470; *Penniman v. New-York Balance Co.* 13 How Pr. 40; *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89; *Burrows v. Pisley*, 1 Root, 362, 1 Am. Dec. 56; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255.

It is not necessary that the obstruction must have caused actual damage to such riparian owner by his coming in contact therewith, to enable him to maintain such action.

State v. Narrows Island Club, 100 N. C. 477, 6 Am. St. Rep. 618, 5 S. E. 411.

If the value of the property of the plaintiff has been to any extent depreciated by an obstruction, then he has shown such special damage as will enable him to maintain a civil action therefor.

Pierce v. Dart, 7 Cow. 609; *Bechtel v. Carslake*, 11 N. J. Eq. 244.

Any person who sustains actual damages from such obstruction can maintain a civil action to recover therefor.

2 Wood, Nuisances, p. 817; Angell, Water-courses, § 567; *Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co.* 117 N. C. 579, 29 L. R. A. 700, 53 Am. St. Rep. 606, 23 S. E. 43; *Downs v. High Point*, 115 N. C. 182, 20 S. E. 385; *Wilkes v. Hungerford Market Co.* 2 Bing. N. C. 281.

Messrs. E. F. Aydlott and G. W. Ward, for appellee:

The burden of proof was upon the plaintiff to prove to the satisfaction of the jury, here the referee, that the acts complained of by Reyburn as a public nuisance affected him injuriously in some manner peculiar to himself, and not in common with the general public; and that he has received extraordinary and particular damage.

Gordon v. Baxter, 74 N. C. 470.

A riparian owner has no rights in the water in front of his land any further than to deep-water line,—that is, to the point where the navigable waters begin; outside of that he has no more right than the people in common have.

Fishing with pound nets in Albemarle sound is recognized as a useful and lawful enterprise.

2 N. C. Code, §§ 3382-3385.

Albemarle sound, being navigable, is not subject to entry, and every citizen of the state has the liberty and privilege of fishing therein subject to such regulation of those rights as the legislature may establish.

McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; *Skinner v. Hettrick*, 73 N. C. 53; *Rea v. Hampton*, 101 N. C. 51, 9 Am. St. Rep. 21, 7 S. E. 649.
65 L. R. A.

Montgomery, J., delivered the opinion of the court:

The referee's conclusions of law upon the facts found by him that the action of the defendant in the placing of pound nets in the manner in which they were set constituted a public nuisance was a correct one. *State v. Narrows Island Club*, 100 N. C. 477, 6 Am. St. Rep. 618, 5 S. E. 411. To prevent a multiplicity of private actions, the law provides a remedy for public nuisances in the way of an indictment, by which the nuisance can be abated, or the offender punished by fine or imprisonment, or in both ways. The plaintiff in this action, however, alleges in his complaint that he has suffered, and, further, that he has shown by the proof that he has suffered, an unusual and special damage on account of the erection of the nuisance by the defendant, and that he therefore is entitled to redress by a civil action; that is, to have the nuisance abated at his own suit. The plaintiff's contention rests upon a sound principle of law, and where the facts go to show that a public nuisance has been the cause of unusual and special damage to an individual or a class of persons, as contradistinguished from a grievance common to the public, that person may bring a civil action for the redress of injury. In *Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co.* 117 N. C. 579, 29 L. R. A. 700, 53 Am. St. Rep. 606, 23 S. E. 43, the defendant, by erecting a bridge across a river so low as to obstruct the passage of boats plying up and down the stream, thereby prevented a steamboat from carrying a cargo of merchandise for a consignee up the river and beyond the bridge. The court held that the defendant was liable in damages for the injury done to the plaintiff on the ground that the damage was special, and unusual to the plaintiff. The court said there: "It is not material whether this particular boat was licensed, or whether other individuals owned boats that were engaged in navigating the river. If the plaintiff suffered damage common to a class whose business required the transportation of material for manufacturing purposes from a point below the obstruction to a plant located above it, but not common to the whole public, his right is not impaired by the fact that the boat was doing business as a common carrier, as well as for the manufacturers who owned it." The same principle was announced in *Downs v. High Point*, 115 N. C. 182, 20 S. E. 385. It is a principle of law found stated in all of the text writers on the subject of nuisance, and in the decisions of many of the courts of the states. If the facts be such as the plaintiff claims he has shown them to be in this action, his right to relief by a civil action appears to be clearer in principle, and more

necessary to the peace and order of society, than were the plaintiff's rights in the cases we have cited.

The plaintiff here is the owner of a tract of land (Durant's island) situated in the midst of navigable waters, and it is necessary to the full and free enjoyment of his property that his access over the waters to that property and his egress from it should not be obstructed by nuisances erected athwart the channels of approach. The claim of the plaintiff is that not only was the erection of the fish nets in the manner in which they were constructed by the defendant a public nuisance, but that it prevented the free use and enjoyment of his private property, which was a damage and an injury to himself, not in common with the public at large, but as extraordinary and special in its effects upon him. In *Blanco v. Klumpke*, 29 Cal. 156, the court said: "Undoubtedly, if the obstructions only affect the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action; but if he is thereby obstructed in the free use of his property, and its comfortable enjoyment by him is thereby interfered with and to some extent prevented, can it be said he suffers only in common with the public at large? Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is declared to be a nuisance, and the subject of an action; and it is further provided that such action may be brought by any person whose property is injuriously affected." In *Wilder v. De Cou*, 26 Minn. 10, 1 N. W. 48, the court decided that the owner of a town lot suffers a peculiar damage by the obstruction of a portion of a public street immediately in front of his lot, and that he might therefore maintain an action to prevent such obstruction, although the same may be a public nuisance. In *King v. Dewsnap*, 16 East, 196, Lord Ellenborough said: "I did not expect that it would have been disputed at this day, that, though a nuisance may be public, yet that there may be a special grievance arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influences of it. In the case of stopping a common highway which may affect all the subjects, yet if a particular person sustains a special injury from it he has an action. This must necessarily be a special grievance to those who live within the direct influence of the nuisance, and are therefore parties grieved within the statute" allowing such parties costs. In *Wood on Nuisances*, pp. 886, 887, it is said: Redress may be "had through the medium of a private

action in behalf of each person specially injured, although the same damage is inflicted upon many persons at one and the same time—as an obstruction of a highway leading to one's premises, or so as to obstruct access thereto, or otherwise producing special damage. The obstruction of a navigable stream so as to hinder or delay passage over the same, or producing actual damage to vessels, or by cutting off the approach to a private wharf or premises so as to injure one's premises, . . . is such a special injury as enables the person so injured to maintain an action." In *Park v. Chicago & S. W. R. Co.* 43 Iowa, 636, a correct syllabus of the decision may be stated as follows: "Injuries resulting from the obstruction of highways leading to the premises of the party complaining and interfering with access to them are proper grounds of recovery by the injured party, even though many others sustain like injuries from the same cause." And we are of the opinion that one who suffers damage, through the erection of a public nuisance, unusual and special to himself, is not confined in his remedy to an action merely for damages, especially where the damage arises from an injury and obstruction to the free use and enjoyment of one's property,—lands and tenements, as in this case. In 2 *Wood on Nuisances*, p. 1159, the author says: "Any person injuriously affected by a nuisance, who could maintain an action at law therefor, can maintain a bill in equity for an injunction," and *Barnes v. Hathorn*, 54 Me. 127; *Thebaut v. Canova*, 11 Fla. 143; *Peck v. Elder*, 3 Sandf. 126; *Dana v. Valentine*, 5 Met. 8,—are cited in support of the text. Indeed, in a case like the present, it would be impossible to fix with any degree of certainty the damages which the plaintiff ought to recover for the obstruction of his access to his property; and this court has said in *Jolly v. Brady*, 127 N. C. 142, 37 S. E. 153: "But when the damage cannot be reasonably compensated in a court of law, or the injury is irreparable, the court will stay the injury by injunctive order until the parties shall have the main facts determined by jury." In *Wood on Nuisances*, p. 119, it is said that, "when the injury is not susceptible of adequate compensation in damages, or where the injury is a constantly recurring grievance, a court of equity will interpose by injunction." In *Works v. Junction R. Co.* 5 McLean, 425, Fed. Cas. No. 18,046, the court said: "If such injury exists, no adequate remedy can be found by an action at law. From the nature of the injury its extent cannot be ascertained with precision. It is permanent; consequently the suits at law for redress must be endless. In such a case adequate relief can be given only by injunc-

tion. It prevents the wrong. To establish this wrong it need not be measured by dollars and cents. It must be shown to exist; it must be material; but the particular amount of damage cannot and need not be shown." But, besides, in this case it appears that, if damages could be made a sufficient compensation for the injury done to the plaintiff, a recovery would be of no avail on account of the insolvency of the defendant, and the injury would therefore be irreparable. In *1 Beach on Injunction*, § 34, it is said: "A court of equity, in the exercise of its discretion, may grant an injunction to prevent a breach or an injury for which there can be no other redress on account of the defendant's insolvency;" and in *Kerlin v. West*, 4 N. J. Eq. 449, it was declared that an injury may be irreparable either from its nature or the want of responsibility in the person committing it. 10 Enc. Pl. & Pr. p. 956.

So far we have considered this case on the theory that the referee had found the facts as the plaintiff insisted they should have been found from the evidence. The referee, however, found as a fact that "none of the boats of the plaintiff, his servants or agents, had been delayed or obstructed in any passage which they have undertaken, or had been compelled to change their course, or been damaged on account of the stakes or nets of this defendant, and the plaintiff and his servants or agents have not been prevented from taking any passage on the water on account of the nets of the defendant."

If there had been no other finding of fact by the referee on the subject of the obstruction of the plaintiff's access to his premises, the judgment of the court below upon the referee's report would have to be affirmed. But there was another finding of fact on that subject, and one totally inconsistent with the finding which we have quoted above, which will result in a reversal of the legal conclusion upon those findings. The inconsistent finding of fact referred to is in these words: "In October, 1900, or 1901, B. G. Crisp, who is the attorney and representative of the plaintiff in Dare county, went from Manteo to Durant's island to see the plaintiff about a matter of business, expecting to return the next day. During the night the wind came on to blow very hard from the northwardly, and continued to blow very hard for two days. The waves were breaking over the reef to such an extent that the boatmen who carried Crisp to the island would not cross the reef. Owing to the rough water on the reef and the difficulty in crossing the reef with the breakers on it and the stakes in the channel, the boatmen were afraid to venture out, and Crisp did not leave for two days. No attempt was made to start." We are of the opinion that upon that finding of fact the court should have given judgment that the plaintiff should have his injunction for the abatement of the nuisance.

Error.

Douglas, J., concurs in result only.

ARKANSAS SUPREME COURT.

John PATTON, *Appt.*,

v.

C. E. CRUCE.

(.....Ark.....)

1. The publication of a libel is not justified by the prior publication of an independent libel against accused by the one who is attacked in the later one.
2. That two persons had been engaged in the publication of a series of libelous articles against each other may be taken into consideration in assessing the damages in a suit by one, based on the publications of the other.
3. Accusing one of being a secret slanderer and scandal monger, with betraying his friends and telling lodge secrets, is libelous *per se*.

(May 7, 1904.)

NOTE.—For mutual vituperation or defamation as affecting remedy for libel or slander, see also, in this series, *Goldberg v. Dobbertine*, 28 L. R. A. 721, and *note*; also *Brewer v. Chase*, 46 L. R. A. 397.
65 L. R. A.

A PPEAL by plaintiff from a judgment of the Circuit Court for Conway County in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Reversed*.

Statement by **Riddick, J.**:

The plaintiff, John Patton, and the defendant, C. E. Cruce, live in the town of Morrilton. The defendant is the editor of a weekly newspaper, the Morrilton Democrat, published in that town. In the fall of 1899 there was published in this paper the following aphorism, to wit: "A person never makes anything by deserting his friends and lying down with his enemies." The plaintiff, Patton, on account of some disagreement he had with Cruce, understood this as having reference to him, and he had published in the Headlight, a paper published in the same town, an article which he intended as a reply to the remark of Cruce, and in which he said that "a man never makes anything by being a chronic kicker, ready to jump on

everything in sight that does not suit him, and has for his motto, 'What's in it for me?'" In this article the defendant was referred to as "a lying reprobate," though his name was not mentioned; but plaintiff afterwards, in a conversation with the defendant, disclaimed having written those last words, stating that they were probably inserted by the editor, but he made no public retraction of them. It is not shown that the defendant made any reply to this article, but in the following spring Patton was elected mayor of Morrilton. Shortly afterwards, hearing that the defendant had made some disparaging remarks about the firm of which he was a member, he withdrew his subscription to the paper of defendant, and told him to stop sending it. This action of Patton called forth the following, which Cruce published in his paper, to wit: "Now is the cup of our sorrow full, and our tears copious. The mayor of Morrilton has discontinued his subscription to the Democrat. It is tough, and we acknowledge it. If we do not survive the shock, we will go into bankruptcy. Meanwhile you might read up on the laws, as you might be appointed receiver to inherit the ill will a lot of soreheads of this city have for the Democrat." This is made the basis of the first count in the complaint, it being alleged that thereby defendant intended to charge that plaintiff was "a sorehead, a chronic grumbler, and disgruntled in politics," and that the intent and effect of the damage was to bring plaintiff into ridicule, to his damage in the sum of \$1,000. The second count charges that on the 10th of August, 1900, the defendant published of and about the plaintiff the following language: "John Patton, who is mayor, announces in last week's Headlight that he will in the near future launch a first-class weekly newspaper in this city to fill 'the long-felt want, and that it will have a larger circulation than "Weekly Bunghole Sucker."'" . . . He does not state whether or not he will backbite his friends and lie down with his enemies, or even whether he will tell secrets out of the lodge. There are many things he left off his prospectus that the public is intensely interested in, but then he is a rather peculiar individual, who can change friends and issues upon very short order." It was alleged that defendant intended by this language to falsely accuse plaintiff of being a secret slanderer and scandal monger, with betraying lodge secrets, and of betraying his friends, to the further damage of plaintiff in the sum of \$1,000. On the 31st of August, 1900, the plaintiff published in the Headlight the following article: "The mayor, who is John Patton, is in constant dread that some 'big' man will visit our city, and not give him an

opportunity to grow a beard and have a genuine dignified appearance. No doubt he is aware that nature was only lavish to him in one respect. She endowed him with brains, or at least enough to fill any position that he has held up to date with satisfaction to those who are his friends. However, we feel that, should the necessity arise, there is one individual in Morrilton who could be appointed a committee of one to entertain our long-looked-for visitors, and when the rotund and Falstaff-like form, accompanied by his dignified and classic appearance, is taken into consideration, the small matter of brains will be overlooked." The individual referred as having "the rotund and Falstaff-like form" was the defendant, Cruce, who, on the 7th of September following replied as follows: "September, 1900. The Headlight has made a wonderful discovery. It has discovered that John Patton, who is mayor, has brains. Now let the public watch developments." This publication by Cruce is made the basis of the third count in the complaint. There are other counts in the complaint, and the total amount of damages claimed was \$10,000, but some of these counts are lengthy, and it is not necessary to set out the complaint in full. The answer of the defendant alleged that the publications were made from time to time by him in response to publications by the plaintiff in which the defendant was assailed and his good name and character attacked, and that the publications of defendant were made in legitimate defense of his own name and character, and were without malice, and were therefore privileged. On the trial there was a verdict for the defendant, and the plaintiff appealed.

Mr. J. F. Sellers, for appellant:

The publications are libelous *per se*.

13 Am. & Eng. Enc. Law, p. 394; Townshend, Slander & Libel, 3d ed. § 172.

Mutual controversy is no defense in libel cases, even where the plaintiff was the aggressor.

Townshend, Slander & Libel, § 414; *Southwick v. Stevens*, 10 Johns. 443; *Beardsley v. Maynard*, 4 Wend. 336, 7 Wend. 561, 22 Am. Dec. 595; *Gould v. Weed*, 12 Wend. 12; *Child v. Homer*, 13 Pick. 503; *Brewer v. Chase*, 121 Mich. 526, 46 L. R. A. 400, 80 Am. St. Rep. 527, 80 N. W. 575; *Mouster v. Harding*, 33 Ind. 176, 5 Am. Rep. 195; *Walker v. Flynn*, 130 Mass. 151; *Mitchell v. Spradley*, 23 Tex. Civ. App. 43, 56 S. W. 134; *Newell, Slander & Libel*, 519; *Odgers, Libel & Slander*, 228; *Bourland v. Edison*, 8 Gratt. 27; *Porter v. Henderson*, 11 Mich. 20, 82 Am. Dec. 59; *Quinby v. Minnesota Tribune Co.* 38 Minn. 528, 8 Am. St. Rep. 693, 38 N. W. 623; *Frost v. Lawler*, 33

Mich. 348; *Miller v. Johnson*, 79 Ill. 58; *Battell v. Wallace*, 30 Fed. 229; *McClintock v. Crick*, 4 Iowa, 453; *Davis v. Griffith*, 4 Gill & J. 342; *Richardson v. Northrup*, 56 Barb. 105; *Sheffill v. Van Deusen*, 15 Gray, 485, 77 Am. Dec. 377; *Smurthwaite v. News Pub. Co.* 124 Mich. 377, 83 N. W. 116; *Moore v. Clay*, 24 Ala. 235, 60 Am. Dec. 461; *Steever v. Beehler*, 1 Miles (Pa.) 146.

Messrs. A. F. Vandeventer, F. N. Bruce, and Charles C. Reid, for appellee:

The newspaper controversy and the "similar publications" made by plaintiff were proved. This left the question of malice as the only one to be determined, and placed the burden of proving actual malice upon the plaintiff.

18 Am. & Eng. Enc. Law, 2d ed. pp. 909-1003, 1029; *Chaffin v. Lynch*, 83 Va. 117, 1 S. E. 803; *Union Mut. L. Ins. Co. v. Thomas*, 28 C. C. A. 96, 48 U. S. App. 575, 83 Fed. 803.

Express malice, or "malice in fact" is never presumed, but must be proved, and is necessary to rebut the inference arising from a qualified privilege.

The question of malice is one alone for the jury, and their verdict that none was proved could not be set aside by the court below; nor will their finding be disturbed here.

Stallings v. Whittaker, 55 Ark. 494, 18 S. W. 829; 18 Am. & Eng. Enc. Law, 2d ed. pp. 999-1003, 1012; *Wheeler v. Nesbitt*, 24 How. 544, 16 L. ed. 765; *Locke v. Bradstreet Co.* 22 Fed. 772; *Childers v. San José Mercury Printing & Pub. Co.* 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; *Atwater v. Morning News Co.* 67 Conn. 504, 34 Atl. 865; *Hupfer v. Rosenfeld*, 162 Mass. 131, 38 N. E. 197; *Warner v. Press Pub. Co.* 132 N. Y. 181, 30 N. E. 393; *Bunton v. Worley*, 4 Bibb, 38, 7 Am. Dec. 735; *Shadden v. McElwee*, 86 Tenn. 146, 6 Am. St. Rep. 821, 5 S. W. 602; *Fay v. Harrington*, 176 Mass. 270, 57 N. E. 369; *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173, 11 S. W. 699; *St. Louis, I. M. & S. R. Co. v. White*, 48 Ark. 495, 4 S. W. 52; *Little Rock & Ft. S. R. Co. v. Atkins*, 46 Ark. 430; *Gavin v. Armistead*, 57 Ark. 577, 38 Am. St. Rep. 262, 22 S. W. 431; *Fayetteville & L. R. Co. v. Combs*, 51 Ark. 324, 11 S. W. 418; *Jabine v. Midgett*, 25 Ark. 474; *Crump v. Starkc*, 23 Ark. 131.

The mutual controversy constituted a qualified privilege.

Goldberg v. Dobberton, 46 La. Ann. 1303, 28 L. R. A. 721, 16 So. 192; *Johnston v. Barrett*, 36 La. Ann. 320; *Bigney v. Van Benthuysen*, 36 La. Ann. 38; *Child v. Homer*, 13 Pick. 503; 18 Am. & Eng. Enc. Law, 2d ed. p. 1033; *Jacob v. Lawrence*, 14 Cox, C. C. 65 L. R. A.

321; *Dwyer v. Esmonde*, L. R. Ir. 2 C. L. 243; *Laughton v. Bishop of Sodor*, L. R. 4 P. C. 504, 9 Moore, P. C. C. N. S. 318, 42 L. J. P. C. N. S. 11, 28 L. T. N. S. 377, 21 Week. Rep. 204; *O'Donoghue v. Hussey*, Ir. Rep. 5 C. L. 124; *Chaffin v. Lynch*, 83 Va. 117, 1 S. E. 803; *York v. Pease*, 2 Gray, 282.

The mere fact that the jury find that the language used was in excess of the occasion of privilege will not take away the privilege, unless they at the same time find that there was express malice.

18 Am. & Eng. Enc. Law, 2d ed. p. 1049; *Fresh v. Cutter*, 73 Md. 93, 10 L. R. A. 67, 25 Am. St. Rep. 575, 20 Atl. 774; *Brow v. Hathaway*, 13 Allen, 239; *Atwill v. Mackintosh*, 120 Mass. 177; *Chaffin v. Lynch*, 83 Va. 117, 1 S. E. 811; *Odgers, Slander & Libel*, 228; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698; *Hamilton v. Eno*, 81 N. Y. 116.

Where criminations and recriminations are indulged in, the participants are held to be *in pari delicto*, and neither of them entitled to damages.

Mielly v. Soule, 49 La. Ann. 800, 21 So. 594; *Chaffin v. Lynch*, 83 Va. 117, 1 S. E. 811; *Odgers, Slander & Libel*, 228.

Free and open criticism upon the acts of a person which are of public concern is privileged.

Burt v. Advertiser Newspaper Co. 154 Mass. 238, 13 L. R. A. 97, 28 N. E. 1; *Brewer v. Chase*, 121 Mich. 526, 46 L. R. A. 397, 80 Am. St. Rep. 527, 80 N. W. 575.

The use of opprobrious epithets and mutual vituperations will justify a verdict for defendant.

Young v. Bridges, 34 La. Ann. 336; *Goldberg v. Dobberton*, 46 La. Ann. 1303, 28 L. R. A. 721, 16 So. 192; *Mielly v. Soule*, 49 La. Ann. 800, 21 So. 592; *Brewer v. Chase*, 121 Mich. 526, 46 L. R. A. 397, 80 Am. St. Rep. 527, 80 N. W. 575; *Chaffin v. Lynch*, 83 Va. 117, 1 S. E. 810; *Myers v. Kaichen*, 75 Mich. 272, 42 N. W. 820; *Fulda v. Caldwell*, 9 La. Ann. 358.

Riddick, J., delivered the opinion of the court:

This is an action for libel, brought by John Patton against C. E. Cruce to recover damages on account of certain publications made by defendant, and which the plaintiff alleges were libelous. The defense set up by defendant against this action of the plaintiff was that the publications complained of were made in response to publications against him made by plaintiff, that the publications by defendant were made necessary by the attacks of the plaintiff, and went no further than was required in order to make a full and fair reply to those publications. The presiding judge, in his charge

to the jury, gave a very satisfactory and clear statement of the law of the case to the jury, with the exception of one instruction which he gave at request of defendant. That instruction was as follows: "If the plaintiff and defendant voluntarily engaged in a newspaper controversy, and lavished slanderous imputations upon each other, and both were equally at fault, neither of them can claim damage from the other, and your verdict should be for the defendant." The evidence shows that these parties did engage in a newspaper controversy, and, taking all the evidence in reference to that controversy that we have before us, we do not see that the defendant was more culpable than plaintiff himself. If the law was as stated in the above instruction, it would therefore be our duty, as well as our pleasure, to affirm the judgment; for, if one libel could be set off against another, we do not think that plaintiff could be entitled to anything in this action. But one libel cannot be set off against another independent libel. Yet, under the instruction quoted, the jury may have found that each of these parties were guilty of separate and independent libels against each other, and that, being equally to blame, neither could maintain an action therefor against the other. We are therefore of the opinion that this instruction was incorrect and misleading. *Brewer v. Chase*, 121 Mich. 526, 46 L. R. A. 397, 80 Am. St. Rep. 527, 80 N. W. 575. If one's good name and character are assailed in a newspaper, he may, of course, reply, and defend himself, and, if his reply is made in good faith, without malice, and is not unnecessarily defamatory of his assailant, the reply will be privileged. 18 Am. & Eng. Enc. Law, p. 1033. And even if, in the heat of passion, he should go beyond what a full and fair reply required, and publish a separate and independent libel against his opponent, the jury, in estimating the damages, may take into consideration the previous libel committed against him, and the provocation under which he labored, and, if they find that plaintiff himself was greatly to blame, they may, if they deem proper, allow him only nominal damages. In other words, in determining the amount of damages to which the plaintiff is entitled

for a libel, it is proper to take into consideration the circumstances under which the libel was committed, and whether plaintiff was himself to blame for the controversy. *Kelly v. Sherlock*, L. R. 1 Q. B. 686, 6 Best & S. 480, 35 L. J. Q. B. N. S. 209, 12 Jur. N. S. 937. The plaintiff had, as before stated, six counts in his complaint, and he asked the court to instruct the jury that each of the counts, except the sixth, "describes and sets up a libel, and is libelous *per se*, and that the verdict should be for the plaintiff." Now, the words set out in some of the counts, we think, were libelous *per se*. For instance, the second count alleges that by the language therein set out the defendant intended and did accuse plaintiff of being a secret slanderer and scandal monger, with betraying his friends, and telling lodge secrets. This, if proved, was clearly libelous *per se*. But the instruction requested asked that each of the counts except the sixth sets up language that was libelous *per se*, and in this form, we think, was properly refused, for, while this may be true of some of the counts, it is not, we think, true of all. Again, most of these publications of which plaintiff complains seem to have been directly called forth by publications on his part in which he attempted to ridicule and make sport of the defendant. Some of these replies made by defendant were, it seems to us, very mild retorts when the provocation under which they were made is considered. Plaintiff must have known that his shots at the defendant would provoke a return fire. In fact, he stated on the stand that some of these articles were written for that purpose. "I meant," he said, "for Cruce to come back at me." This being so, we do not see that he has much right to complain because Cruce did come back at him. Honors in that respect were so nearly even between them that we see very little reason why either should recover damages from the other. While, therefore, we feel considerable doubt as to whether the plaintiff is entitled under the proof to any substantial damages, yet for the error referred to *the judgment must be reversed*, and the cause remanded for a new trial. It is so ordered.

CALIFORNIA SUPREME COURT.

CRESCENT CANAL COMPANY, *Appt.*,
v.

L. Y. MONTGOMERY *et al.*, *Respts.*

(143 Cal. 248.)

1. Stockholders in, and owners of, land

served by an irrigation ditch, who tacitly assent to, and are present without objection during the extension of, the canal over other land of theirs for the purpose of changing the point of intake, are estopped from objecting to the maintenance of the canal after its completion.

NOTE.—As to effect of passive acquiescence of owners of land in the expenditure of a considerable sum of money in the construction of an irrigation ditch over it to estop their grantees, 65 L. R. A.

considerable sum of money in the construction of an irrigation ditch over it to estop their grantees,

2. One over whose land an irrigation canal has been extended to supply the needs of a farming community has no right to destroy the canal, but must resort to an action to recover damages for the injury done to his property.

3. One who purchases land over which an irrigation ditch is in operation takes subject to the rights of the owner of the ditch.

(May 12, 1904.*)

A PPEAL by plaintiff from an order of the Superior Court for Fresno County denying a motion for a new trial after judgment in defendants' favor in an action brought to enjoin interference with an irrigation ditch. *Reversed.*

The facts are stated in the opinion.

Mr. Frank H. Short, for appellant:

The landowners and their successors in interest are forever estopped from any proceeding by ejectment or injunction to destroy the value of the property, or interrupt the public use inaugurated through their acquiescence.

Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310; *Godeffroy v. Caldwell*, 2 Cal. 489, 56 Am. Dec. 360; *Mitchell v. Reed*, 9 Cal. 204, 70 Am. Dec. 647; *Hostler v. Hays*, 3 Cal. 302; *Barber v. Babel*, 36 Cal. 23; *Flickinger v. Shaw*, 87 Cal. 126, 11 L. R. A. 134, 22 Am. St. Rep. 234, 25 Pac. 268; *Grimshaw v. Belcher*, 88 Cal. 217, 22 Am. St. Rep. 298, 26 Pac. 84; *Scott v. Jackson*, 89 Cal. 258, 26 Pac. 898; *Dolbeer v. Livingston*, 100 Cal. 617, 35 Pac. 328; *Churchill v. Baumann*, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; *Smith v. Green*, 109 Cal. 228, 41 Pac. 1022; *Curtis v. LaGrande Hydraulic Water Co.* 20 Or. 47, 10 L. R. A. 484, 23 Pac. 808, 25 Pac. 378; *Gehman v. Erdman*, 105 Pa. 371; *Lehi Irrig. Co. v. Moyle*, 4 Utah, 327, 9 Pac. 867; *Morrison v. Winn*, 18 Utah, 15, 54 Pac. 761.

The appropriation and distribution of water in this state are a public use.

Const. 1879, art. 1, § 14; *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264; *People v. Stephens*, 62 Cal. 209; *Fresno v. Fresno Canal & Irrig. Co.* 98 Cal. 179, 39 Pac. 943; Civil Code, §§ 1410 *et seq.*; Code Civ. Proc. § 552; *Price v. Riverside Land & Irrigating Co.* 56 Cal. 432; *Merrill v. South Side Irrig. Co.* 112 Cal. 426, 44 Pac. 720.

In public matters of this kind the public

*A decision was reached, and an opinion handed down, in this case on October 14, 1903, but a rehearing was granted, and the case withheld from publication, and the opinion published herewith was finally substituted for the one first handed down.

who purchased with knowledge of the ditch, from destroying it, see, in this series, *Ewing v. Rhea*, 52 L. R. A. 140.

As to revocability of license to maintain burden on land after the licensee has incurred expense in creating the burden, see note to *Pifer v. Brown*, 49 L. R. A. 497.

will be protected, even where an equitable estoppel otherwise would not arise.

Indiana, B. & W. R. Co. v. Allen, 113 Ind. 581, 15 N. E. 446; *St. Julien v. Morgan Louisiana & T. R. Co.* 35 La. Ann. 924; *Mitchell v. New Orleans & N. E. R. Co.* 41 La. Ann. 363, 6 So. 522; *Cairo & F. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *McAulay v. Western Vermont R. Co.* 33 Vt. 312, 78 Am. Dec. 62; *Knapp v. McAulay*, 39 Vt. 275; *Northern P. R. Co. v. Smith*, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794.

Messrs. E. D. Edwards and W. C. Graves, for respondents:

The representation, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference. Certainty is essential to all estoppel.

Bigelow, Estoppel, 5th ed. p. 578; *Wood v. Blaney*, 107 Cal. 295, 40 Pac. 428; 2 *Herman, Estoppel*, § 960.

In case of alleged dedication to a public use, the dedication and acceptance are to be proved or disproved by the acts of the owner, and the circumstances under which the land has been used. The owner's acts and declarations should be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention permanently to abandon his property to the specific public use.

Holdane v. Cold Spring, 21 N. Y. 474.

Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party.

1 *Greenl. Ev.* § 197.

Beatty, Ch. J., delivered the opinion of the court:

The plaintiff is a corporation organized and existing under the laws of the state of California for the purpose of diverting water from King's river by means of a canal, and conveying it to the owners of adjacent lands for irrigation, domestic uses, etc. The main canal, which is a large one, carrying 250 cubic feet of water per second, was constructed prior to the year 1887, and, as first laid out, headed in the river at a point on section 5 of a certain township. In 1887 Poyser and Johns were owners of about 480 acres in the adjoining section 4 of the same township, and were also owners of about 500 acres more on the line of the canal, and irrigable therefrom. They were at the same time stockholders of the plaintiff, and seem to have held a share of the stock fully

proportioned to the acreage of their lands; the evidence being to the effect that a share of stock represented the right to water for the irrigation of 320 acres. While they were the owners of said lands and shares of stock, the corporation decided to extend its canal through their 480-acre tract in section 4 to a higher point of diversion on the river; and this seems to have been done for the purpose of insuring a supply of water necessary for the uses of the company. Without obtaining any conveyance of a right of way for its canal, and, according to the evidence of Poyser and Johns, without even asking their oral consent, the work was pushed forward to completion by the company between September, 1887, and February, 1888, since which time the canal, except when broken by accident or design, has been operated by the plaintiff for the supply of the owners of a large body of agricultural land with water for irrigation and domestic purposes. The evidence shows without conflict that both Poyser and Johns were present on one or more occasions while the work of extending the canal through their land in section 4 was in progress, and before its completion, and that they never made any objection. They were at the time stockholders of the company, and as such interested in the improvement to the canal; and afterwards, when they sold their lands irrigable therefrom, they transferred to their vendees certain of their shares of the corporation stock as part of the same transaction. There is evidence to the effect that before the extension of the canal was undertaken the consent of Poyser was asked and expressly given with the assurance that it was all right, and that there would be no difficulty about obtaining the right of way over the land; but, this being denied by him, we lay it out of consideration. It is at least certain beyond dispute that both Poyser and Johns knew of the extension while it was being made; that they were interested in the improvement, both as stockholders of the corporation and as owners of land under the canal and dependent upon it for water; that they made no objection to the extension while it was being made, or ever afterwards, but did, in selling their lands irrigable from the improved canal, transfer to their vendees shares of their stock with their incidental water right. In December, 1889, and nearly two years after the completion of the extension, they sold their land in section 4 to the Montgomerys (the original and present nominal defendants), who two years later (in December, 1891), entered upon the canal with men and teams and scrapers and commenced leveling its embankments. This action was then commenced to enjoin the destruction of the

canal and for damages. The defendants, in addition to their answer, filed a cross bill alleging the unlawful entry of the plaintiff upon their lands, and praying the abatement and removal of the canal as a nuisance. In this condition the action slumbered until 1896. In the meantime the Montgomerys reconveyed the lands to Johns in satisfaction of a purchase-money mortgage, and he conveyed a small parcel of 40 acres (October, 1896) to J. G. James. As to all the rest of the tract the plaintiff has acquired the land or rights of way, but James, as the owner of 40 acres embracing a portion of the extension, continues the defense of the action and the prosecution of an amended cross-complaint in the name of the original defendants. In May, 1897, after the Montgomerys had ceased to be owners of any interest in the land a judgment was entered in this action, on their stipulation, in favor of the plaintiff. James moved to set aside this judgment, and, his motion being denied, appealed to this court, where the order was reversed. 124 Cal. 134, 56 Pac. 797. The cause was then tried, and upon findings of the superior court judgment was entered in favor of James for his costs. The plaintiff appeals from an order denying its motion for a new trial, and, in support of its appeal, contends that several of the material findings of the court are in conflict with the evidence.

The court, amongst other things, finds that Poyser and Johns never consented to the extension of the canal. The evidence of Poyser and Johns sustains this finding so far as an express consent is concerned, but a tacit consent, evidenced by conduct quite as significant as any express words could possibly be, is proved by evidence which is not only uncontradicted, but is expressly admitted by Poyser and Johns to be true. It is confirmed, also, by the circumstances and situation of the parties. There can be no doubt that Poyser and Johns knew that the work was being done before it was completed, and the point of diversion changed; and there is as little doubt that they gave it their tacit approval, and profited by it. The court also found that the defendants entered upon the canal and commenced destroying it, but not wrongfully or without right. This is one of the findings of fact upon an issue made by the pleadings, and is contrary to the evidence if, as matter of law, the injury to the canal was wrongful and unlawful. We think it very clear that the acts of defendants were both wrongful and unlawful. Even if no interest was involved except that of the parties to the action, we think the facts stated were sufficient to estop Poyser and Johns and their grantees from the assertion of any right to

destroy or injure the canal; but the case involves another consideration. The plaintiff is the agent of the state in the administration of a public use (Const. art. 14, § 1), and is within the protection of the principle of the decision and of the authorities cited in *Fresno Street R. Co. v. Southern P. R. Co.* 135 Cal. 202, 67 Pac. 773, and of *Southern California R. Co. v. Slauson*, 138 Cal. 342, 94 Am. St. Rep. 58, 71 Pac. 352.

It is to be presumed that a farming community dependent for a vital necessity upon the continuous operation of this canal has become established upon the lands which it covers. The establishment of such a community, with the improvements and expenditures necessarily involved, was one of the results of the acquiescence of Poyser and Johns in the extension and increased efficiency of the canal. They may have had a right to demand and receive a reasonable compensation for any damage to their lands caused by such extension. But they had no right to abate the canal by action, and no right to injure or destroy it. The Montgomerys purchased the land after the canal was completed and in operation. This was notice to them of the rights of plaintiff as against their vendors, and they took subject to those rights. If Poyser and Johns had no right to demand a removal of the canal, and no right to injure it, still less had their vendees, the original defendants, and James is certainly in no better case than they were.

The order of the Superior Court is reversed.

We concur: **Shaw, J.; Van Dyke, J.; Henshaw, J.; Angellotti, J.; Lorigan, J.; McFarland, J.**

James FEELEY, *Respt.*,
v.

J. W. BOYD, *Appt.*

(143 Cal. 282.)

Immediate delivery, followed by actual and continual change of possession, as required by statute to make valid a sale of personal property, may be found from the fact that a purchaser of fruit in bins sent a representative the same evening to take possession of it, and the next morning sent men to prepare it for shipment, although on the

day of the purchase the fruit was not moved from where it was when the sale took place.

(May 14, 1904.)

A PPEAL by defendant from a judgment of the Superior Court for Tehama County in favor of plaintiff in an action brought to recover possession of certain dried fruit which had been seized by defendant under a writ of attachment. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. McCoy & Gans, for appellant:

The pretended sale of the property was not made as required by the provisions of § 3440 of the Civil Code.

This fruit was purchased by the plaintiff on the Saturday before January 6, 1903, and there was no delivery whatever, or even pretended delivery, at the time, nor for two days thereafter. This failure to make immediate delivery and take actual possession is not cured by any subsequent possession before levy of attachment.

Watson v. Rodgers, 53 Cal. 401; *Edwards v. Sonoma Valley Bank*, 59 Cal. 148.

The sale and purchase relied upon as made on the evening of January 6th were not "accompanied by an immediate delivery," or "followed by an actual and continued change of possession."

Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500; *Weil v. Paul*, 22 Cal. 492; *Cahoon v. Marshall*, 25 Cal. 198; *Woods v. Bugbey*, 29 Cal. 467; *Hesthal v. Myles*, 53 Cal. 623; *Merrill v. Hurlburt*, 63 Cal. 494; *Bell v. McClellan*, 67 Cal. 283, 7 Pac. 699; *Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167; *Mosgrove v. Harris*, 94 Cal. 162, 29 Pac. 490; *Brown v. O'Neal*, 95 Cal. 262, 29 Am. St. Rep. 111, 30 Pac. 538; *Pearce v. Boggs*, 99 Cal. 340, 33 Pac. 906; *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857; *Rothschild v. Swope*, 116 Cal. 670, 48 Pac. 911.

The delivery must be made of the property; the vendee must take the actual possession, that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee.

Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500; *Weil v. Paul*, 22 Cal. 492.

In the case at bar Gray, the vendor, was, and continued to be, in the exclusive possession of the ranch; and he continued to exercise acts of ownership over the fruit.

NOTE.—As to when sale of goods is completed and necessity of delivery, see also *note* to *Com. v. Hess*, 17 L. R. A. 177, and the other cases in this series of *Farmers' Phosphate Co. v. Gill*, 1 L. R. A. 767, and *note*; *Nash v. Brewster*, 2 L. R. A. 409; *Dunn v. State*, 3 65 L. R. A.

L. R. A. 199, and *note*; *Daugherty v. Fowler*, 10 L. R. A. 314, and *note*; *Herr v. Denver Mill & Mercantile Co.* 6 L. R. A. 641; *New Haven Wire Co. Cases*, 5 L. R. A. 300; and *Yockey v. Norn*, 28 L. R. A. 145.

Woods v. Bugbey, 29 Cal. 467; *Merrill v. Hurlburt*, 63 Cal. 494; *Bell v. McClellan*, 67 Cal. 283, 7 Pac. 699; *Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167; *Mosgrove v. Harris*, 94 Cal. 162, 29 Pac. 490; *Pearce v. Boggs*, 99 Cal. 340, 33 Pac. 906; *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857; *Rothschild v. Swope*, 116 Cal. 670, 48 Pac. 911.

Mr. John J. Wells, for respondent:

By immediate delivery is not meant a delivery *instantly*; but the character of the property, and its situation, and all the circumstances must be taken into consideration in determining whether there was a delivery within a reasonable time, so as to meet the requirements of the statute.

Dubois v. Spinks, 114 Cal. 293, 46 Pac. 95.

Had the plaintiff engaged men to go there in the nighttime, and to sack and remove the fruit, it would have been evidence of fraud.

Porter v. Bucher, 98 Cal. 459, 33 Pac. 335.

All that plaintiff could do would have been to do as he did.

White v. Pease, 15 Utah, 170, 49 Pac. 417; *Dubois v. Spinks*, 114 Cal. 291, 46 Pac. 95.

Where the evidence tends to prove such delivery and change of possession, the finding of the court will not be disturbed.

Dubois v. Spinks, 114 Cal. 293, 46 Pac. 95; *Porter v. Bucher*, 98 Cal. 459, 33 Pac. 335; *Claudius v. Aguirre*, 89 Cal. 503, 26 Pac. 1077; *Rothschild v. Swope*, 116 Cal. 677, 48 Pac. 911; *Hesthal v. Myles*, 53 Cal. 626.

Any delivery that is sufficient to pass the title between the parties is still sufficient, the statute only adding that it shall be "immediate."

Porter v. Bucher, 98 Cal. 459, 33 Pac. 335.

In determining the kind of possession necessary to be given, regard must be had, not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property.

Ross v. Sedgwick, 69 Cal. 248, 10 Pac. 400; *Hart v. Mead*, 84 Cal. 244, 24 Pac. 118; *Morgan v. Miller*, 62 Cal. 492; *Dubois v. Spinks*, 114 Cal. 291, 46 Pac. 95.

Cooper, C., filed the following opinion:

Replevin to recover the possession of 10 tons of dried peaches taken from plaintiff by defendant, as sheriff, under a writ of attachment against Le Roy Gray and Charles Gray, hereafter called Gray Brothers, the said writ being in favor of the Cone & Kimball Company, a corporation. Plaintiff re- 65 L. R. A.

covered judgment. Defendant moved for a new trial, which was denied, and this appeal is from the order denying a new trial.

Plaintiff claims under a sale from Gray Brothers, and no question is made as to the fact of such sale, nor is there any question as to actual fraud or want of consideration. The sole contention of defendant is that the sale to plaintiff was constructively fraudulent, because not accompanied by an immediate delivery and followed by an actual and continual change of possession, as required by § 3440, Civil Code. The facts are substantially as follows: Gray Brothers owned a fruit ranch a few miles east of the town of Vina, and several miles from the town of Red Bluff. On Saturday, January 3, 1903, they had the dried fruit in question, being the crop of 1902, unsacked, lying loose in bins in a house about 80 or 100 feet from the dwelling house on said ranch. Plaintiffs on said day made a verbal contract with the said Gray Brothers to purchase the fruit at an agreed price, but no money was paid, no part delivery, and no memorandum in writing. On Tuesday, January 6th, in the afternoon, plaintiff drove from Red Bluff to the ranch where the fruit was, and about 6 o'clock of said day signed a written contract for the purchase of the fruit, and at the same time paid \$550 as part payment of the contract price, and formally took possession. He then drove to Vina and hired one Waltz to go to the ranch and take possession of the fruit. Waltz reached the ranch that same night about 9 o'clock, and went to the house in which the fruit was stored, looked at it, tried to close the door, but could not close it entirely because it was damp and swollen. He then went to the dwelling house of Gray Brothers, and went to bed. Plaintiff, on the night of the 6th, after sending Waltz out to take charge of the fruit, employed men at Vina to go out to the ranch on the morning of the 7th to sack the fruit, and these men did go to the ranch for said purpose on the following morning. On the morning of the 7th, while Waltz was at breakfast, the defendant arrived with the writ of attachment and went to the fruit house. Waltz, however, reached the house where the fruit was immediately after defendant, and informed him that plaintiff was the owner of the fruit, and that he was in charge of it for plaintiff. At the time the defendant arrived at the ranch neither of the Gray brothers was there. The court found that on the 6th day of January, 1903, the Gray brothers "sold and delivered the same [referring to the fruit] to plaintiff, and on said last-named day plaintiff took sole possession thereof, and remained in such ex-

clusive possession until the taking thereof by defendant."

We are of opinion that the finding is sustained by the evidence. The question as to whether or not there has been an immediate delivery and an actual and continued change of possession cannot be measured by any defined rule, like a problem in mathematics. It depends upon the facts and circumstances of each separate transaction. It is generally a question depending upon such conflicting evidence and such a variety of circumstances that the finding of the jury or of the trial court must govern. It is claimed that the sale really took place on January 3d, but we are of opinion that the sale must be treated as having been made on the 6th, when plaintiff went out to the ranch, viewed the fruit, made the written contract, and paid the money. Again, the appellant insists that even this is not sufficient, for the reason that the fruit remained in the same house, in the same bins, and on the same ranch at the time it was levied upon by defendant, and that there was not an immediate delivery. We think the words "immediate delivery" must be given a reasonable construction. The words do not mean a delivery *instantly*. The word "immediate" is defined in Bouvier's Law Dictionary (Rawle's Revision), where it is said: "Strictly, it implies not deferred by any lapse of time; but, as usually employed it is rather within reasonable time, having due regard to the nature and circumstances of the case. This word and 'immediately' are of no very definite signification, and are much subject to the context. In legal proceedings they do not impart the exclusion of any interval of time." The author refers to *Gaddis v. Howell*, 31 N. J. L. 313, where it was so held. In the later case of *Nelson v. Smith*, 36 N. J. L. 148, it was held that "immediate delivery" as to coal had a trade meaning among coal shippers, and meant during the current month in which the offer is made and accepted. The supreme court of Missouri held in a late case that "immediate notice" may be construed to mean reasonable notice. *McFarland v. United States Mut. Acci. Asso.* 124 Mo. 204, 27 S. W. 436. Our own court, in the early case of *Samuels v. Gorham*, 5 Cal. 227, said: "By an immediate delivery is not meant a delivery *instantly*; but the character of the property sold, its situation, and all the circumstances must be taken into consideration in determining whether there was a delivery within a reasonable time so as to meet the requirement of the statute, and this will often be a question of fact for the jury." In *Carpenter v. Clark*, 2 Nev. 246, it was said: "Perhaps a delay of two or three days in making a delivery, after the

sale is otherwise complete, might not be sufficiently immediate to meet the requirements of the statute. That is a fact, however, which is to be determined by a consideration of all the circumstances of each case." In *Bassinger v. Spangler*, 9 Colo. 189, 10 Pac. 809, it was held that the fact that property was sold one day and not delivered until the next does not render the sale void. These cases were cited and approved by this court in *Dubois v. Spinks*, 114 Cal. 289, 46 Pac. 95, where it was held that when a large pile of 126 cords of wood was placed upon land leased by the wood cutters in order to retain possession of it as security for their services, and the owner of the wood gave plaintiff a bill of sale in order to get money to pay the wood cutters, and pointed it out to him as being his, the delivery was sufficient. This occurred on November 20th. The wood was not marked in any way, nor anyone placed in charge of it. It was understood that whatever lien the wood cutters had on the wood should inure to the benefit of plaintiff. The constable, Spinks, seized the wood on November 23d by virtue of a writ of execution. It was said in the opinion that delivery is a question of fact, and, where "the evidence tends to prove such delivery and change of possession, the finding of the court will not be disturbed." In the late case of *Hickey v. Coschina*, 133 Cal. 81, 65 Pac. 313, it was held that the employment by the vendee of the vendor in and about the cigar store, although a suspicious circumstance, was not conclusive; and, in speaking of an immediate delivery and continued change of possession, the court said: "The evidence upon this question was conflicting, but the jurors were the judges of the question of fact, and by their verdict they have determined that there was such immediate delivery and actual and continued change of possession." In this case the dried fruit had to be sacked before it could be safely moved by plaintiff. It was not required of plaintiff that he should have taken men to the ranch and commenced sacking it on the night of the 6th. He did hire a man to go out to the ranch and take charge of it until the men could reach there on the morning of the 7th for the purpose of sacking it. The man so hired went to the ranch and to the fruit house. If he had slept in the fruit house, and had his breakfast brought to him there, and had been there when the sheriff arrived, it would only have informed the sheriff that the fruit had been sold to plaintiff, who was claiming possession through such hired man. The same notice was given to the sheriff immediately after he went to the fruit house. Before he attempted to move the fruit, and before any expense had been incurred in

moving it, he was met by Waltz who showed him his authority in writing from plaintiff, and said to him: "You are meddling with somebody else's fruit; that fruit belongs to Mr. Feeley." The defendant, when he went to the ranch, appears to have gone to the fruit house, and then opened the door and went in without any permission from anyone. He found no one in the fruit house. He did find Waltz on the premises, claiming to be in charge. He did not find Gray Brothers there.

We advise that the order be affirmed.

We concur: **Gray, C.; Smith, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the order appealed from is affirmed.

Lorigan, Henshaw and McFarland, JJ., concur.

Re Application of Sarah F. LEMON for Writ of Habeas Corpus.

(143 Cal. 558.)

1. The creation of a municipal corporation with the powers conferred by a particular title of the Political Code makes the provisions of such title a part of the corporate charter; and, when more than one title exists of the specified number, that title will be included which is plainly the only one applicable.
2. A classification of restaurants, for the purpose of a revenue tax, into those where meals are cooked and served by the proprietor or a member of his family, and those where they are not, imposing a lower tax upon the former, is not void as an unjust discrimination.

(*Beatty, Ch. J., and Lorigan, J., dissent.*)

(June 14, 1904.)

APPPLICATION for a writ of habeas corpus to release petitioner from the custody of J. A. Maben, marshal of the city of Marysville, to which she had been committed for alleged violation of a municipal ordinance. *Petitioner remanded.*

The facts are stated in the opinion.

NOTE.—For the similar question as to validity of statute exempting persons peddling their own products or manufactures from license tax imposed on peddlers generally, see, in this series, *State ex rel. Luria v. Wagener*, 88 L. R. A. 677, and *Rosenbloom v. State*, 57 L. R. A. 922.

As to necessity of uniformity in license or privilege taxes generally, see *Com. use of Titusville v. Clark*, 57 L. R. A. 348, and footnote thereto.
65 L. R. A.

Messrs. Jacob Samuels and W. H. Carlin, for petitioner:

The ordinance in question was passed for the purpose of raising revenue, and as such has had no validity since March 23, 1901.

Ex parte Pfirrmann, 134 Cal. 143, 66 Pac. 205; *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674; *Santa Monica v. Guidinger*, 137 Cal. 658, 70 Pac. 732.

The ordinance in question is not within the police powers of the common council of the city of Marysville, either for police control or police regulation.

Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674; *Santa Monica v. Guidinger*, 137 Cal. 658, 70 Pac. 732; *Cooley, Const. Lim.* 6th ed. p. 744; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152, 32 Pac. 870.

Mr. Arthur H. Redington, for respondent:

A restaurant may be licensed under the police power.

22 Am. & Eng. Enc. Law, 2d ed. p. 931; *Ex parte Lacey*, 108 Cal. 326, 38 L. R. A. 640, 49 Am. St. Rep. 93, 41 Pac. 411; *Los Angeles v. Hollywood Cemetery Asso.* 124 Cal. 347, 71 Am. St. Rep. 75, 57 Pac. 153; *Chicago v. Stratton*, 162 Ill. 494, 35 L. R. A. 84, 53 Am. St. Rep. 325, 44 N. E. 853; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260; *State ex rel. Spangenberg v. McMahon*, 62 Minn. 110, 64 N. W. 92; *Gundling v. Chicago*, 176 Ill. 340, 48 L. R. A. 230, 52 N. E. 44; *Re Yick Wo*, 68 Cal. 294, 58 Am. Rep. 12, 9 Pac. 139; *Re Hang Kie*, 69 Cal. 149, 10 Pac. 327; *Ex parte Ah Toy*, 57 Cal. 92; *St. Johnsbury v. Thompson*, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571; *State v. Freeman*, 38 N. H. 426; *Bannan v. Toronto*, 22 Ont. Rep. 274; *Com. v. Muir*, 180 Pa. 47, 36 Atl. 413.

The ordinance itself is one of regulation.

Horr & B. Mun. Pol. Ord. § 135, p. 105; *Ex parte Mount*, 66 Cal. 448, 6 Pac. 78; *Ex parte Li Protti*, 68 Cal. 635, 10 Pac. 113; *Amador County v. Kennedy*, 70 Cal. 458, 11 Pac. 757; *San Luis Obispo County v. Greenberg*, 120 Cal. 300, 52 Pac. 797; *Ex parte Haskell*, 112 Cal. 412, 32 L. R. A. 527, 44 Pac. 725.

The right to license under the power of regulation imports the right to exact a license fee; and the exaction of a license fee is itself a mode of regulation.

1 *Smith's Beach, Mun. Corp.* ed. 1903, § 618; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260; *Gundling v. Chicago*, 176 Ill. 340, 48 L. R. A. 230, 52 N. E. 44; *State ex rel. Spangenberg v. McMahon*, 62 Minn. 110, 64 N. W. 92; *Ex parte Mount*, 66 Cal. 448, 6 Pac. 78; *Ex parte Ah Toy*, 57 Cal. 92; *Farwell v. Chicago*, 71 Ill. 269.

If the fee required is not plainly unreasonable, the courts ought not to interfere with the discretion of the municipal authorities fixing it; and, unless the contrary appears on the face of the ordinance requiring it, they should presume it to be reasonable.

2 Smith's Beach, Mun. Corp. § 1347; 1 Tiedeman, State & Federal Control of Persons & Property, p. 483; *Ex parte McNally*, 73 Cal. 632, 15 Pac. 368; *United States Distilling Co. v. Chicago*, 112 Ill. 19; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Tomlinson v. Indianapolis*, 144 Ind. 142, 36 L. R. A. 413, 43 N. E. 9; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260.

Angellotti, J., delivered the opinion of the court:

The petitioner seeks by this proceeding to be discharged from the custody of the marshal of the city of Marysville. It appears from the record that she is detained in custody by virtue of a judgment of the police court of said city, pronounced upon a conviction of a violation of the provisions of a city ordinance prohibiting the carrying on of certain kinds of business, therein named, without first having paid for and procured the municipal license thereby required and provided. The particular business alleged to have been so carried on by her was that of a restaurant, and the section of the ordinance relative thereto reads as follows, *viz.*: "Any person or persons keeping a hotel where the charge for single meals is in every case and for every meal less than 25 cents shall pay a monthly license of \$8, all others \$10; and any person or persons keeping a restaurant, boarding house, or place where meals or board is furnished for pay, other than hotels and private boarding houses, shall pay a monthly license of \$3 where the meals are cooked and served by a proprietor or members of his family, otherwise \$8; except that where the same is opened for one day or less the license shall be for \$3. . . ." The petitioner was charged with carrying on a restaurant where the meals were neither cooked nor served by said defendant or by any member or members of her family.

Petitioner contends that the ordinance in question, so far as it relates to the business of keeping a restaurant, is solely a revenue measure and that, in view of the provisions of § 3366, Political Code, enacted in the year 1901 (Stat. 1901, p. 635, chap. 200), the city has no power to impose a license tax for revenue. We consider it unnecessary to determine whether the license tax upon the business in question, imposed by this ordinance, was imposed solely for revenue purposes, or whether, as contended 65 L. R. A.

by respondent, the imposition of such tax is a valid exercise of the police power of regulation, as we are satisfied that the city of Marysville has the power, notwithstanding the provisions of § 3366, Pol. Code, to impose and collect license taxes for revenue for municipal purposes. The city of Marysville is a municipal corporation, existing under a special act of the legislature entitled "An Act to Reincorporate the City of Marysville," approved March 7, 1876. Stat. 1875-1876, p. 149, chap. 149. In *Ex parte Helm*, 143 Cal. 553, 77 Pac. 453, we hold that cities and towns, existing under special acts of the legislature adopted prior to the taking effect of the present Constitution, have not been, since the adoption of the "municipal affairs" amendment of § 6, art. 11, of the Constitution, subject to or controlled by general laws, so far as "municipal affairs" are concerned; and that the provisions of such special acts, so far as they relate to "municipal affairs," cannot be affected by any law enacted by the legislature of the state. It was also held in that case, following *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780, that, where the power to impose a license tax for revenue for municipal purposes is conferred upon a municipality, that power becomes a "municipal affair." The question, then, is as to whether or not the special act under which Marysville exists, which is its legislative charter, confers upon it the power to impose a license tax for revenue purposes. That act does not specify the powers granted, except by reference to another statute, the provision being as follows, *viz.*:

"Section 1. The territory described in § 2 of this act, and the inhabitants therein residing, are hereby declared to be a municipal corporation, with the powers and under the provisions of title 3 of the Political Code of this state, to be known in law as the 'City of Marysville.'"

The Political Code has always contained five titles "three," one in each of the five "parts" of such Code; but the reference in question was clearly to title 3 of part 4 of said Code, the expressed title of which was "The Government of Cities." Title 3 of part 1 related to the "Political Rights and Duties of Persons," title 3 of part 2 to "Legal Distances in the State," title 3 of part 3 to "Education," and title 3 of part 5 to "Publication of the Codes," while part 4 related to "The Government of Counties, Cities, and Towns," title 3 thereof being entitled as above stated. The legal effect of the reference contained in § 1 of the Marysville reincorporation act was, therefore, to make title 3 of part 4 of the Political Code a part of the charter of the city of Marysville. *People v. Whipple*, 47 Cal. 592; *Buck v.*

Eureka, 109 Cal. 504, 508, 30 L. R. A. 409, 42 Pac. 243. By the provisions of § 4408, Pol. Code, contained within that title, as such section was originally enacted and as it existed at the time of the approval of the Marysville reincorporation act, the power to impose and collect license taxes for revenue for municipal purposes was clearly conferred upon the common council of any city or town coming within the provisions of such title. When that title was by legislative enactment made a part of the charter of Marysville, such power was necessarily conferred upon the common council thereof. It is unnecessary here to determine what would have been the effect of any subsequent amendment or repeal of any provision of this title relative to the power so conferred. Section 4408 has never been amended or repealed, and there has been no amendment of any section contained in the title, or any addition thereto, that in any way relates to the question under discussion.

It is further urged by petitioner that the provision of the ordinance relating to restaurants, boarding houses, and places where meals or board is furnished for pay, other than hotels and private boarding houses, is void, in that it unreasonably discriminates between such places where the meals are cooked and served by a proprietor or members of his family, and those where the meals are not so cooked and served; the license tax upon the former class being \$3 per month, and the tax upon the latter being \$8 per month. The method of classification here adopted is somewhat unique, but we cannot say that it was beyond the power of the council. The right to regulate the license tax to be paid by persons engaged in the same occupation according to the amount of business done is well recognized; in fact, it is often required by charter provision or legislative enactment that the license tax shall be proportionate to the amount of business. The amount to be paid by those engaged in a certain business may be made to depend upon the amount of receipts from the business (*San Luis Obispo County v. Greenberg*, 120 Cal. 300, 52 Pac. 797), or upon the amount of sales or business transacted (*Ex parte Mount*, 66 Cal. 448, 6 Pac. 78), or upon the amount of stock on hand (*Saks v. Birmingham*, 120 Ala. 190, 24 So. 728). It has been held that the amount of license tax to be paid by those engaged in the laundry business may be graded according to the number of persons employed or used, the court saying that this is one way of gauging the amount of business done by a laundry. *Ex parte Li Protti*, 68 Cal. 635, 10 Pac. 113. It has also been held that a lower rate of license tax may be fixed for the man who sells liquor at retail

at a tavern or public watering place outside of a village, town, or city than for the person elsewhere engaged in the same business; the court saying that "the difference between the *quantum* of sales made and the prospective profit to be realized . . . is manifest to everyone. This difference amply justifies the discrimination made by the ordinance." *Amador County v. Kennedy*, 70 Cal. 458, 11 Pac. 757. In *Ex parte Haskell*, 112 Cal. 412, 32 L. R. A. 527, 44 Pac. 725, discrimination between those selling certain articles at a fixed place of business and those otherwise selling the same articles was sustained; the court holding that the legislative body had the right to discriminate between different methods of conducting the same business.

License taxes on hotels, proportioned to the number of rooms therein, have been upheld (*St. Louis v. Bircher*, 7 Mo. App. 169); and in *Fulgam v. Nashville*, 8 Lea, 635, it was held that the exemption of hotels having less than ten rooms from the license tax of \$40 and 1 per cent of the actual rental or estimated value thereof, imposed on hotels, did not render the law objectionable. The rule underlying the decisions upon the matter appears to be that while the state, county, or city cannot discriminate, in the imposition of those taxes, between persons exercising the same privilege, by imposing different taxes upon persons similarly situated, it may classify and tax occupations, grading the privilege tax by the amount of business done, that different methods of accomplishing this may be adopted, and that any classification reasonably designed to attain this object is within its power to make. It is clear that as a general rule a restaurant or boarding house where the meals are wholly cooked and served by the proprietor and members of his family must be a very small affair, hardly rising to the dignity of a "restaurant" or "boarding house." Ordinarily, the accommodations and service at such a place must necessarily be very limited, and the amount of business done must consequently be very small. There may be exceptional cases, it is true, where, by reason of the magnitude of the proprietors family a very pretentious and prosperous business might be conducted without the aid of a single employee. We must, however, judge of the reasonableness of the ordinance in question by what we know of the general conditions, and not hold it void simply because in some exceptional case it may result in imposing unequal burdens. Absolute uniformity in the practical application of laws relating to taxation can never be attained, and to prohibit the enforcement of laws which fail to bring such absolute uniformity would be to abolish all taxation

The classification here adopted is probably no more likely to practically result in unfair discrimination between those similarly situated as to amount of business than a classification according to the number of rooms in a hotel, or the number of employees in a laundry; and the ordinary effect of the enforcement of the provision as it stands will be that those doing the greater amount of business will pay the higher tax fixed thereby. Speaking of a somewhat similar objection to an ordinance in *Ex parte Haskell*, 112 Cal. 412, 416, 32 L. R. A. 527, 44 Pac. 725, this court said: "It is urged . . . that the particular provision in question is unreasonable and oppressive, and that it is unequal and unlawfully discriminating. . . . A municipal ordinance must be very clearly obnoxious to such objections, as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs,—within the law, of course,—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the Constitution or laws made in pursuance thereof." This declaration finds ample support in the authorities. In this case we cannot say that the provision in question was not a reasonable exercise of the power to fix the license tax of restaurant and boarding-house keepers in proportion to the amount of business done.

The writ heretofore issued is discharged, and the petitioner remanded.

We concur: **Shaw, J.; McFarland, J.; Henshaw, J.; Van Dyke, J.**

Beatty, Ch. J., dissenting:

I dissent, upon the grounds stated in my dissenting opinion in *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780.

I dissent: **Lorigan, J.**

Sampson B. WRIGHT *et al.*, *Appts.*,
v.

Herbert W. AUSTIN *et al.*, *Respts.*

(148 Cal. 236.)

A highway easement does not include

NOTE.—As to right of city to maintain well for public use in street, see, in this series, *Lostutter v. Aurora*, 12 L. R. A. 259.

As to grant by city of right to maintain well in public street, see *Snyder v. Mt. Pulaski*, 44 L. R. A. 407.
65 L. R. A.

the right to bore wells within the limits of the highway to obtain water to sprinkle the road and keep it in repair.

(May 11, 1904.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Sonoma County in favor of defendants in an action brought to enjoin the drilling of a well. *Reversed.*

The facts are stated in the opinion.

Messrs. Butts & Weske, for appellants;

The owner of the fee over which a highway is acquired by user retains full title to the land, subject only to the right of the public to pass and repass over it, and the incidental right of the officers to keep the same in repair. He owns the grass and trees growing thereon.

People v. Foss, 80 Mich. 559, 8 L. R. A. 472, 20 Am. St. Rep. 532, 45 N. W. 480.

He owns the springs, and the public cannot divert the water therefrom.

Old Town v. Dooley, 81 Ill. 255; *Suffield v. Hathaway*, 44 Conn. 521, 26 Am. Rep. 483.

He owns the soil and mineral deposits found on the highway.

Fisher v. Rochester, 6 Lans. 225; *Gidney v. Earl*, 12 Wend. 98; *Jackson ex dem. Yates v. Hathaway*, 15 Johns. 452, 8 Am. Dec. 263.

The percolating water is a part of the soil, and belongs to the fee.

Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92, 30 Pac. 783.

The owner of the fee may sink a drain or water course below the surface of the highway.

15 Am. & Eng. Enc. Law, 2d ed. p. 419.

He may bring ejectment for the fee in case of its unlawful occupation by others.

Coburn v. Ames, 52 Cal. 387, 28 Am. Rep. 634; 15 Am. & Eng. Enc. Law, 2d ed. p. 419.

He may bring trespass against a person or corporation making a wrongful use of the highway.

Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453; *Burr v. Stevens*, 90 Me. 500, 38 Atl. 547; *Thomas v. Hunt*, 134 Mo. 392, 32 L. R. A. 857, 35 S. W. 581.

An injunction may likewise be maintained by the owner of the fee in a proper case to restrain the wrongful use of the highway.

15 Am. & Eng. Enc. Law, 2d ed. p. 419.

The public has no right to disturb the fee and remove the soil at a point where the road is not out of repair.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861, 35 N. W. 2; *Viliski v. Minneapolis*, 40 Minn. 304, 3 L. R. A. 831, 41 N. W. 1050; *Althen*

v. Kelly, 32 Minn. 280, 20 N. W. 188; *St. Anthony Falls Water-Power Co. v. King Wrought-Iron Bridge Co.* 23 Minn. 186, 23 Am. Dec. 682; *Robert v. Sddler*, 104 N. Y. 229, 58 Am. Rep. 498, 10 N. E. 428; *Gamble v. Pettijohn*, 116 Mo. 375, 22 S. W. 783; *Higgins v. Reynolds*, 31 N. Y. 151; *West Covington v. Freking*, 8 Bush, 121; *Tucker v. Eldred*, 6 R. I. 404; *Ladd v. French*, 3 Silv. Sup. Ct. 1, 6 N. Y. Supp. 56; *Aurora v. Fox*, 78 Ind. 1; *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Turner v. Rising Sun & L. Turmp. Co.* 71 Ind. 547; *Cuming v. Prang*, 24 Mich. 517; *Overman v. May*, 35 Iowa, 89; *Ootanch v. Grover*, 57 Hun, 272, 10 N. Y. Supp. 754; *Anderson v. Bement*, 13 Ind. App. 248, 41 N. E. 547; *Elliott, Roads & Streets*, p. 523; 2 Beach, Pub. Corp. § 1145; 2 Dill. Mun. Corp. §§ 687-689; *Macon v. Hill*, 58 Ga. 595; *Smith v. Rome*, 19 Ga. 89, 63 Am. Dec. 298; *Bishop, Non-Contract Law*, § 990; *Leonard v. Cinsinnati*, 26 Ohio St. 447; *Gidney v. Earl*, 12 Wend. 98; *Jackson ex dem. Yates v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Williams v. Kenney*, 14 Barb. 629; 3 Kent, Com. pp. 432, 433.

The sinking of a well at a point in the roadway where the same is not out of repair is not an incident necessary to the enjoyment, or to the maintaining, of the roadway.

Warren County v. Mankey, 29 Ind. App. 55, 63 N. E. 864; *Overman v. May*, 35 Iowa, 89; *Kelly v. Donahoe*, 2 Met. (Ky.) 482; *Small v. Danville*, 51 Me. 359; *Baker v. Shephard*, 24 N. H. 208.

The sole use to which the public put the land in question was that of travel,—the right to pass and repass over the roadway.

The rights acquired by prescription cannot extend beyond the user.

North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69; *Allen v. San José Land & Water Co.* 92 Cal. 141, 15 L. R. A. 93, 28 Pac. 215; *Buffalo v. Pratt*, 131 N. Y. 293, 15 L. R. A. 413, 27 Am. St. Rep. 592, 30 N. E. 233; *Dyer v. Walker*, 99 Wis. 404, 75 N. W. 79; *Washb. Easements*, p. 135; *McRose v. Bottyer*, 81 Cal. 125, 22 Pac. 393.

But there can be no easement acquired by prescription to percolating water.

1 Boone, Real Prop. 2d ed. § 4b; *Greenleaf v. Francis*, 18 Pick. 122; *Frazier v. Brown*, 12 Ohio St. 311; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721.

The owner of the fee is entitled to compensation for every new use or easement that may be imposed upon his property.

White v. Northwestern N. C. R. Co. 113 N. C. 610, 22 L. R. A. 627, 37 Am. St. Rep. 639, 18 S. E. 330; *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 369, 52 N. E. 713; *Postal Teleg. Cable Co. v. Eaton*, 170 Ill. 513, 39 L. R. A. 722, 62 Am. St. Rep. 65 L. R. A.

390, 49 N. E. 365; *Moore v. Clear Lake Waterworks*, 68 Cal. 146, 8 Pac. 816; *Spar-gur v. Heard*, 90 Cal. 221, 27 Pac. 198.

Messrs. C. H. Pond and R. L. Thompson, for respondents:

The contention that because the highway was not out of repair at the immediate point where the well was sunk the water could not be taken to repair and maintain the highway at other points on the highway is not tenable under the authorities.

New Haven v. Sargent, 38 Conn. 50, 9 Am. Rep. 360; 2 Dill. Mun. Corp. p. 816; *Aurora v. Fox*, 78 Ind. 1; *Anderson v. Bement*, 13 Ind. App. 248, 41 N. E. 547; *Elliott, Roads & Streets*, p. 523.

The easement is not curtailed to a bare passage, but carries with it the incidentals to maintain the passage in a reasonable manner.

West v. Bancroft, 32 Vt. 367; *Cone v. Hartford*, 28 Conn. 363; *People v. Kerr*, 27 N. Y. 188.

The proper public authorities of a town have the right to place in a highway reservoirs for the purpose of retaining water to sprinkle it, and the owner of the fee cannot maintain an action, therefor.

West v. Bancroft, 32 Vt. 367.

Where the owner of land dedicates it to the public for a road, he impliedly grants the appendant right to make such use of it as shall suitably fit it for travel.

Elliott, Roads & Streets, p. 360; *Care v. Crafts*, 53 Cal. 140; *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 360; 2 Dill. Mun. Corp. p. 16.

The county has the right to use the land and the materials thereon for the purpose of maintenance and repair.

Postal Teleg. Cable Co. v. Eaton, 170 Ill. 513, 39 L. R. A. 722, 62 Am. St. Rep. 390, 49 N. E. 365; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363; 15 Am. & Eng. Enc. Law, 2d ed. p. 418; *Bundy v. Catto*, 61 Ill. App. 209; *Overman v. May*, 35 Iowa, 89; *Anderson v. Bement*, 13 Ind. App. 248, 41 N. E. 547; *Felch v. Gilman*, 22 Vt. 38; *Cook v. Hecht*, 64 Mo. App. 273.

The county has the right to make any use of the land over which the road runs, which is necessary for the enjoyment of the road, "and may erect a house and dig a well and cellar thereon."

Robbins v. Borman, 1 Pick. 122; *Tucker v. Tucker*, 9 Pick. 109, 19 Am. Dec. 350.

Road commissioners have the authority to make all needed repairs to the public highway.

Ludy v. Colusa County (Cal.) 41 Pac. 300.

An injunction cannot be granted to prevent the execution of a public statute by off-

cers of the law for the benefit of the public.

Civil Code, § 2423, subd. 4; *People ex rel. Atty. Gen. v. Shasta County*, 75 Cal. 179, 16 Pac. 776; *Shanks v. Pearson*, 66 Kan. 168, 71 Pac. 252; *Suffield v. Hathaway*, 44 Conn. 521, 26 Am. Rep. 483; *Holtz v. Hoyt*, 135 Ill. 388, 25 N. E. 755; *State ex rel. Robinson v. Hanna*, 97 Ind. 469.

Chipman, C., filed the following opinion:

The case is here on appeal from a judgment on an agreed statement of facts. Plaintiffs are, and have been for many years, the owners of the premises described in the complaint, situated in Santa Rosa road district, Sonoma county. Along the northerly side of said lands there is a public highway which has been in use as such for more than thirty years, and occupies a strip of land 25 feet wide, and the center line of the road is the north boundary line of plaintiffs' land. Defendants are the board of supervisors of said county, and the *ex officio* road commissioner of the said road district. On May 27, 1903, defendants in their official capacity, without the consent of plaintiffs, went upon said strip of land, erected machinery for the purpose of boring a well on said highway about 4 or 5 feet from the southerly line thereof, and where said highway ran along and over plaintiffs' land. This well was 6 inches in diameter, and was bored to the depth of 44 feet, and an iron pipe or casing placed therein, and defendants erected over said well a windmill and pump and water tank. This well was bored, and the pump and tank were erected, "for the purpose of obtaining water from said well to sprinkle and keep in repair said public road." The plant was so erected as not to interfere in any way with the free use and enjoyment by the public of said highway. "Said highway was not out of repair at the point where said well was bored, . . . and said well was not bored for the purpose of getting soil to repair said highway, but was bored solely for the purpose of getting water to sprinkle said highway, and thereby to prevent the same from getting out of repair, and to render it more fit and convenient for public use." The water "sought to be taken from said well is such as flows or percolates through the soil of said premises at a depth of from 20 to 44 feet from the surface of the ground." It is further stipulated that the defendants "threaten to and will operate said pump, windmill, and water-works, and take and remove from said well large quantities of water, which flows and percolates through the side of said premises into said well, and use the same upon said highway, unless restrained by injunction of 65 L. R. A.

this court." There is no stipulation as to whether plaintiffs were making any use of the percolating waters subterranean of their land, or as to the damages alleged. Plaintiffs appeal from the judgment given in defendants' favor.

Section 2631, Pol. Code, reads: "By taking or accepting land for a highway, the public acquire only the right of way and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this and the Civil Code provided." This is but the formulation of the general rule laid down in the books and decided cases when treating of highways as easements, which they are. Speaking of the rights retained by the adjacent owner, Parker, Ch. J., in *Tucker v. Tower*, 9 Pick. 109, 19 Am. Dec. 350, said: "It is too clear to require any discussion that the proprietor of land over which a public highway has been laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public." The question here raised has, in one form or another, been before the courts frequently; and it will be found that the decisions invariably turn upon what may reasonably be said to be "incident" to either the construction, repair, or maintenance of the road constructed over the right of way. The decided cases (and they are numerous) are illustrative of the principle declared in the Code; but in none of the cases cited, and in none we have been able to find, has it been held that the easement or the dominant tenement draws to it the right, as an incident, to bore or dig wells along the right of way for the purpose above stated. It was said in *Burris v. People's Ditch Co.* 104 Cal. 248, 37 Pac. 922: "It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons; but, within the limits named, he may make repairs, improvements, or changes that do not affect its substance." In *North Fork Water Co. v. Edwards*, 121 Cal. 662, 54 Pac. 69, it was said: "Every easement includes what are termed 'secondary easements,'—that is, the right to do such things as are necessary for the full enjoyment of the easement itself; but this right is limited, and must be exercised in such reasonable manner as not to injuriously increase the burden upon the servient tenement. The burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate by any alteration in and mode of enjoying the former. The owner cannot commit a trespass upon the servient tenement beyond the limits fixed by the grant or use." If we are to hold that the county may dig or bore wells, and to any

depth necessary to obtain water at convenient distances along the highways, for the purposes named, it must be because it has the right as an incident to the principal object, which is to establish a highway, and as necessary to that object. And the right would not depend on the fact that the owner of the servient tenement was not at the time using the water or contemplating its use. Should he find it necessary to use the percolating waters in his land adjacent to the highway, and should it be found that the wells in the highway diminished his flow of water materially, the county would still have the right to a just apportionment of the water, if respondent's contention be sound, and if the percolating waters pass as incident to the easement. In other words, it must be held that the percolating waters under the surface of a highway are acquired as incident to the easement, and are a part of the grant or use,—at least to the extent needed to sprinkle the highway; and that to that extent these waters do not belong to the owner of the servient tenement. A very small mileage of the public roads of the country are sprinkled with water as a means of preservation. Doubtless such use of water on some roads is desirable in maintaining them, and adds to their convenient use; but it can hardly be said, generally, that the sprinkling of roads is necessary to their maintenance. In *Suffield v. Hathaway*, 44 Conn. 521, 26 Am. Rep. 483, it was held that the selectmen of a town have no right, as against an owner of land on the highway, to divert the water from a spring on such owner's side of the highway to a public watering trough on the other side. *Jackson ex dem. Yates v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263, was cited approvingly, where it was said: "When the sovereign imposes a public right of way upon the land of an individual, the title of the former owner is not extinguished, but is so qualified that it can only be enjoyed subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the public right of way." In the *Suffield Case*, *Woodruff v. Neal*, 28 Conn. 167, was also cited, where it was said to be well established, "in conformity with the principles of the common law, that a highway is simply an easement or servitude, conferring upon the public only the right of passing over the land on which it is laid out, and, as an incident of such right, that of using the soil and the materials upon it in a reasonable manner, for the purpose of making and repairing it. . . . Subject to this right of the public, he may take trees growing upon the land, occupy mines, sink

water courses under it, and, generally, has a right to every use and profit which can be derived from it consistent with the easement, and, when disseised (as he may be), can maintain ejectment, and recover the possession subject to the easement, and can also maintain trespass for any act done to the land, not necessary for the enjoyment of the easement, which would be an actionable injury if the land was not covered by a highway." The right of the owner of the fee to whatever may be said to belong to the owner of the land necessarily draws to it the right of appropriation and use at all times, subject only to such rights as go with the easement. At least, as between the parties to this action, the percolating waters of the land are property in the same sense as are mines, quarries, springs, and the like, and plaintiffs' right thereto is unaffected by the easement, unless it be true that defendants may, as of right, bore down to and draw the water from its subterranean sources for the purposes named. But we think that defendants have not that right, and it therefore becomes immaterial whether plaintiffs are now using the water, or that they are not now specially damaged by defendant's use. In our opinion the subterranean water underlying a highway cannot reasonably be said to be one of "the incidents necessary to enjoying and maintaining the same," any more than can the waters of a spring be said to be an incident to the easement. The county is not without authority to provide means for making the roadway more convenient by sprinkling, or to thus provide for its enjoyment and maintenance. Section 2643, subd. 10, Pol. Code, provides: "For the purpose of sprinkling the roads in any part of the county with oil or water, the board of supervisors may erect and maintain water works and oil tanks and reservoirs, and for such purposes may purchase or lease real or personal property," the cost to "be charged to the general county fund, the general road fund, or the district fund of the district or districts benefited." This statute indicates that the legislature deemed it necessary to provide some further authority for sprinkling the highways than was given in § 2631, Pol. Code. The statute referred to, at least, would seem to corroborate the view we have taken of that section. The courts said, in *Robert v. Sadler*, 104 N. Y. 229, 53 Am. Rep. 498, 10 N. E. 428: "The courts have held that where, to reach and prepare the surface of the road in accordance with its grade line, superincumbent material is necessarily removed, it may be used upon other parts of the road, and on the premises of other land-owners; and that, where there has been no negligence in construction, consequential injuries necessarily resulting cannot be recov-

ered. It was said in *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 181, 20 L. ed. 561, that this class of decisions 'have gone to the uttermost limit of sound judicial construction,' and 'in some cases beyond it.' The observation was just. To take merely an easement in land, leaving the fee in the owner, and then, by advancing stages of judicial endurance, sap the value and utility of the fee by adding its benefits to the easement, is scarcely consistent with the policy which is at the same times sedulously protecting the rights of abutters, having no fee in the street whatever, to their easements of light and air and access." In the case cited pits were dug for gravel with which to cover the roadway, and for this reason defendants claim that the case is not in point. But would it have been less so if the gravel had been obtained by sinking shafts and mining for it in such manner as not to interfere with the surface of the roadway? The question always recurs, What incidents pass with the easement, and what rights go as incidents? The diligence of counsel (and the briefs on both sides cite cases copiously), aided by our own research, has failed to disclose a case where

it has been held that the easement brings with it the right to penetrate the earth along the highway to an indefinite extent for materials with which to construct and maintain it.

Upon the facts as stipulated, we think the judgment as entered should be reversed, and judgment should be for the plaintiffs as prayed for in the complaint, restraining defendants "from taking, appropriating, or removing the percolating waters from plaintiffs' said lands" described in the complaint. It is accordingly so advised.

We concur: **Cooper, C.; Harrison, C.**

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment is reversed*, with directions to enter judgment in favor of plaintiffs as prayed for in the complaint, restraining defendants from taking, appropriating, or removing the percolating waters from plaintiffs' said land described in the complaint.

McFarland, Lorigan, and Henshaw, JJ., concur.

WISCONSIN SUPREME COURT.

Thomas ROBERTS, *Resp't.*,
v.
Samuel F. FULLERTON, *Appt.*

(117 Wis. 222.)

- *1. The boundary line of this state, as to its outlying rivers, is the main channels of such rivers.
- 2. The concurrent jurisdiction which this state has with the state of Minnesota on the Mississippi river is of a special nature,—one not incident to, nor implying concurrent dominion over, the territory covered by water between the two states, or concurrent ownership in such water, or the

*Headnotes by MARSHALL, J.

NOTE.—*Jurisdiction over boundary rivers.*

- I. *Right to exercise.*
 - a. *In general; location of boundary line,* 953.
 - b. *Grant of opposite shore,* 956.
 - c. *Effect of treaties and compacts,* 957.
- II. *Equal rights on,* 959.
- III. *What rights are exclusive,* 961.
- IV. *What concurrent jurisdiction includes,* 964.
- V. *Effect of change of counsel,* 967.
 - I. *Right to exercise.*
 - a. *In general; location of boundary line.*

Upon the general question of rivers as state
65 L. R. A.

land under the water, or the fish and game that inhabit the same.

- 3. The term "concurrent jurisdiction on the water," used in the acts of Congress providing for the admission of the states of Wisconsin and Minnesota into the Union, refers to the effect of the law of each state within the domain of the other covered by water divided by the boundary line between the two states, as regards persons or things on the water concerned or connected in some way with the use thereof for purposes of navigation. It has no reference to the land under the water or things of a permanent nature in or over the water. In respect to such matters and rights incident thereto, the jurisdiction of each state on its side of the boundary line is exclusive.

- 4. The enforcement by the state of

boundaries, see note to *Buck v. Ellenbolt* (Iowa) 15 L. R. A. 187.

If either of the states or nations which border upon a river can show title to the entire stream, it, of course, may extend its laws over the stream, and enforce them the same as it can upon the land. If, on the other hand, the title is such that each nation is presumed to own only to the thread of the stream, the absolute jurisdiction of each will extend only to that point. The practical inconveniences which have resulted from the establishment of such an indefinite line with its consequent divided jurisdiction on the river have led to treaties or compacts by which, for certain purposes, the juris-

Minnesota of its fish and game laws on the Wisconsin side of the main channel of the Mississippi river is not justifiable on the theory of common ownership of the river or things in or on or under the same on the Wisconsin side of the main channel.

5. The term "concurrent jurisdiction on the water," in the acts of Congress before referred to, must be restrained to the ordinary meaning thereof in American public law at the time the term came into use in the legislative enactments of this country.
6. The "concurrent jurisdiction above specified does not empower one state to regulate the individual enjoyment, by people of another state within its boundaries, of property held in trust by such other state for the people within its limits, such as public water and the fish and game that inhabit the same.

(Dodge, J., dissents.)

(March 21, 1903.)

diction of each nation is extended over the entire stream.

The nation which first establishes its dominion upon one of the banks of a river is considered as being the first possessor of that part of the river which bounds its territory. Vattel, Law of Nations, bk. 1, chap. 22.

Under the Baltimore grant, the whole of the Potomac river up to high-water line on the Virginia side was included in Maryland. United States v. Morris, 23 Wash. L. Rep. 745.

No title to the soil under the bed of the Potomac river was acquired under the Virginia patent, since it was all granted to Lord Baltimore, and became a part of Maryland. Morris v. United States, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649.

In *Blinn's Case*, 2 Bland, Ch. 99, it is said that in rivers flowing through conterminous states a common use is presumed, if there be no proof of a peculiar property excluding the universal or common use. But, in reference to the Potomac river, there is the most satisfactory evidence of an exclusive right. The boundaries called for in the charter to the lord proprietary of Maryland is from "the first foundation of the River Potomac, thence verging towards the south unto the further bank of the said river, and following the same on the west and south unto a certain place . . . situate near the mouth of the said river." To the full extent of this call for the right bank of the Potomac, Maryland has always held, and under that holding all the islands in the river have been granted by, patents issuing from the land office, or under legislative enactments, or titles derived from this state; and the whole of the bed of the river above tide, it is believed, has always been admitted to be a rightful parcel of the territory of Maryland. Whether the south or the north branch should be considered as the true boundary has long been, and still is, a matter of controversy; but before the Revolution many patents for lands lying between the north and south branch were issued by the lord proprietary of Maryland.

The boundary of New Hampshire extends to the west bank of the Connecticut river. *Crosby v. Hanover*, 36 N. H. 404.

But if neither of the nations on the banks of a river can prove which settled first on the

A PPEAL by defendant from a judgment of the Circuit Court for Pierce County in favor of plaintiff in an action brought to recover damages for the destruction of fishing nets belonging to plaintiff. *Affirmed.*

Statement by **Marshall, J.:**

Action to recover damages for the taking of plaintiff's fish net from where it was located by him to catch fish in the waters of Lake Pepin, it being staked to the bottom of the lake, and for the destruction of such net. Defendant answered, admitting the allegations of the complaint and pleading in justification that he was an officer of the state of Minnesota duly authorized to execute its laws for the preservation of fish, and that in doing the act complained of he was in the performance of his official duties. Plaintiff demurred to the answer for insufficiency. The

river it is supposed that both came at the same time, and the dominion will extend to the middle of the river. Vattel, Law of Nations, bk. 1, chap. 22.

When a navigable river constitutes the boundary between two independent states the middle of the main channel of the stream makes the true boundary between them, up to which each state will on its side exercise jurisdiction,—that is, the middle of the main navigable channel. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. *Iowa v. Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239.

When applied to rivers as boundaries between states, the phrases "middle of the river" and "middle of the main channel" are equivalent expressions, and both mean the center of the main channel or the thread of the stream. *Buttenuth v. St. Louis Bridge Co.* 123 Ill. 535, 17 N. W. 439; *Iowa v. Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239.

Commercial considerations make it imperative that when states or nations are divided by a navigable river, each should hold to the center thread of the main channel or current along which vessels in the carrying trade pass. *Buttenuth v. St. Louis Bridge Co.* 123 Ill. 535, 17 N. W. 439.

The boundary line between states separated by a river is the center of the navigable river, and not the center of the river from bank to bank. *State v. Keane*, 84 Mo. App. 127.

The boundary of a state which is expressly made a non-tidal river extends to the middle of the stream. *Morgan v. Reading*, 3 Smedes & M. 366.

So, under the act of Congress bounding the Mississippi territory on the west by the Mississippi river, the territorial jurisdiction extended to the middle of the river. *Ibid.*

The middle of the river must be taken as the boundary line in determining whether a collision on the Mississippi occurred in the one or the other of two contiguous states of which it forms a boundary. *Myers v. Perry*, 1 La. Ann. 372.

Between nations or states the thread of a boundary river is the line of separation, without reference to the track of navigation. *State v. Burton*, 106 La. 732, 31 So. 291.

demurrer was sustained. This appeal is from the order entered thereon.

Messrs. W. B. Douglas, Attorney General, and *Frank C. Hale*, for appellant:

The courts of Minnesota have always construed the enabling acts and constitutional provisions as giving to each state, and the courts of each state, jurisdiction to the farthestmost shore.

See *State v. George*, 60 Minn. 503, 63 N. W. 100.

The legislatures of both Wisconsin and Minnesota, by public enactments, have declared that the title to the game and fish within their respective jurisdictions is vested in the state.

Wis. Stat. 1898, § 4560; Min. Gen. Laws 1897, chap. 221, § 9.

Under such enactments, the title to the

game and fish has uniformly been held to be vested in the state in its sovereign capacity, and held in trust for the public.

State v. Rodman, 58 Minn. 393, 59 N. W. 1098; *Rossmiller v. State*, 114 Wis. 169, 58 L. R. A. 93, 91 Am. St. Rep. 910, 89 N. W. 839; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600.

The states bordering on such navigable waters have power to regulate the taking or killing of fish therein.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Vinton v. Welsh*, 9 Pick. 87; *Com. v. Essex Co.* 13 Gray, 239; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Gentile v. State*, 29 Ind. 409; *State v. Lewis*, 134 Ind. 250, 20 L. R.

The constitutional boundaries of the state of Illinois carry her territorial limits to the middle of the Mississippi river. *Phillips v. People*, 55 Ill. 429.

The word "channel," as used in the act of Congress admitting Iowa into the Union, and in the state Constitution in defining the eastern boundary of the state as the middle of the main channel of the Mississippi river, has reference to the bed in which the main stream of the river flows, and not to the deep water of the stream as followed by navigation. *Dunlieth & D. Bridge Co. v. Dubuque County*, 55 Iowa, 558, 8 N. W. 443.

The legal boundary line between Illinois and Iowa is the middle of the main navigable channel of the Mississippi river, and not the center of the stream. *Keokuk & H. Bridge Co. v. People*, 176 Ill. 267, 52 N. E. 117; *Keokuk & H. Bridge Co. v. People*, 145 Ill. 596, 34 N. E. 482; *Keokuk & H. Bridge Co. v. People*, 167 Ill. 15, 47 N. E. 313; *St. Louis Bridge Co. v. People*, 125 Ill. 226, 17 N. E. 468.

The legal western boundary of the state of Iowa is the middle of the channel of the Missouri river. *United States v. Union P. R. Co.* 4 Dill. 479, Fed. Cas. No. 16,601.

The middle of the Sabine river is the boundary line between Louisiana and Texas. *State v. Burton*, 105 La. 518, 29 So. 970.

The conflict that appears to exist between the decisions which speak of a boundary between states as being "the center of the river bed," and those which speak of it as "the center of the channel" disappears upon the examination of the whole context, from which it appears that the words "bed" and "channel" are used interchangeably. *State v. Keane*, 24 Mo. App. 127.

Prior to the Revolution, the title to the bed and channel of the Delaware river remained in the British Crown. The treaty of peace vested all the rights of the Crown in the several states, and, under the well-established and universal public law, the Delaware river being a navigable stream between New Jersey and Pennsylvania, the title of each extended from their respective shores to the middle of the river. *Com. v. Shaw*, 8 Pa. Dist. R. 509; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

The act of Congress extending the western boundary of the state of Missouri to the center of the channel of the river carried such boundary to the center

of the channel of the river. *Cooley v. Golden*, 52 Mo. App. 229.

By the act of Congress ceding to the state of Missouri the strip of land known as the "Platte purchase," between the state of Missouri and the Missouri river, over which the jurisdiction of the state should extend when the Indian title was extinguished, the middle of the channel of that river, and not the east bank of the river, became the western boundary of the state on the extinguishment of the Indian title. *St. Joseph & G. I. R. Co. v. Devereux*, 41 Fed. 15.

Ordinarily when a stream of water constitutes the boundary line between two nations, states, or towns each holds to the middle of the stream. *Flynn v. Boston*, 153 Mass. 372, 26 N. E. 868.

As a general rule the mere designation of a river as a boundary, in the absence of further description, means the channel or middle of the stream. Hence, inasmuch as the United States and Spain, by the treaty of 1819, adopted Red river as a continuous boundary, without designating either of its banks, it must be held that the channel or middle of the river was the line intended; and the jurisdiction of Texas extends to that line at least. *Spears v. State*, 8 Tex. App. 467.

But it was held that the boundary line between the United States and the British provinces on the bay and waters of Passamaquoddy is the middle of the stream or channel calculated from low-water mark. *The Fame*, 3 Mason, 147, Fed. Cas. No. 4,634.

Also that the eastern boundary of Arkansas, which is defined as "the middle of the main channel" of the Mississippi river, is the midway line between the principal bank of the river without reference to the track of navigation. The object of defining the boundary as the "main channel" was to furnish the means of determining whether or not the islands in the river belong to the state, by taking the largest channel as the true river. *Cessill v. State*, 40 Ark. 501.

In a river forming the boundary between two states the jurisdiction of either does not extend beyond its boundary, which, in the absence of anything placing it elsewhere, is at the thread of the stream. *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1.

A British tug which tows an American vessel from one domestic port to another over the

A. 52, 33 N. E. 1024; *Hooker v. Cummings*, 20 Johns. 91, 11 Am. Dec. 249; *Edson v. Crangle*, 62 Ohio St. 49, 56 N. E. 647; *Parker v. People*, 111 Ill. 588, 53 Am. Rep. 643; *Rossmiller v. State*, 114 Wis. 169, 58 L. R. A. 93, 91 Am. St. Rep. 910, 89 N. W. 839.

Fish are of such a nature that the indiscriminate placing of nets on the Wisconsin side in common waters like Lake Pepin, in the spawning season, is equivalent to destroying the fishing in the upper Mississippi. The people of Wisconsin might as well divert all the water, waste it through a large outlet, and thereby destroy the fish absolutely.

Barrous v. McDermott, 73 Me. 441; *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342, 10 Atl. 321.

The attorneys general of Minnesota and

straits of San Juan de Fuca, and navigates in so doing the British side of the strait, is within the exception of U. S. Rev. Stat., § 4370, U. S. Comp. Stat. 1901, p. 2983, imposing a penalty upon foreign tugs towing American vessels. The voyage is, in whole or in part, upon foreign waters, and it is immaterial that the towing might have been done upon the American side of the boundary line, where the foreign waters were not entered collusively, or for the purpose of evading the statute. *Dunsmuir v. Bradshaw*, 1 C. C. A. 525, 7 U. S. App. 193, 50 Fed. 440.

The state of Delaware has uniformly claimed the soil and exclusive jurisdiction over the whole of the Delaware bay to low-water mark on the Jersey shore. *Emory v. Collings*, 1 Harr. (Del.) 326; *State v. Morris*, 1 Harr. (Del.) 325, note.

The territory of New Jersey extends only to low-water mark of the Delaware river on the east side. *Pea Patch Island Case*, 1 Wall. Jr. Appx. ix., Fed. Cas. No. 10,872.

The boundary of Delaware extends within a circle of 12 miles around New Castle to low-water mark on the New Jersey shore, by virtue of a title derived through a grant to William Penn. *Ibid.*

b. Grant of opposite shore.

If a state or nation owning the land on both sides of a stream grants that on one side, retaining the river, the territory of the grantee will extend only to low-water mark on its side of the stream.

Where a power possesses a river, and cedes the territory on the other side of it making the river the boundary, it retains the river, unless there is an express stipulation for the relinquishment of the rights of soil and jurisdiction over its bed. *Howard v. Ingersoll*, 13 How. 425, 14 L. ed. 208.

The distinction between the Ohio river and other rivers which constitute state boundaries, by which low-water mark on the north side of the Ohio, instead of the middle of the channel, is held to be the state boundary, arises from the fact that the territory north of the river was granted by the state of Virginia, describing it as the territory "northwest of the River Ohio." In the construction of this grant it is held that Virginia must have intended to retain the river. *Indiana v. Kentucky*, 136 U. S. 479, 65 L. R. A.

Wisconsin have repeatedly expressed the opinion that each state had concurrent jurisdiction over the entire waters of the Mississippi, including Lake Pepin, in the matter of enforcing all reasonable regulations. While not binding upon the courts, in case of doubt the administrative construction of a statute or constitutional provision is entitled to great weight.

Black, Constr. & Interpretation of Laws, p. 220; *Sutherland*, Stat. Constr. §§ 229-307; *State v. Moffett*, 64 Minn. 294, 67 N. W. 68.

Mr. Walter C. Owen, for respondent:

Either state has cognizance of a crime committed anywhere upon the river without reference to the juxtaposition of the *locus in quo* to the boundary line; and the offender may be tried in the courts of either state.

34 L. ed. 329, 10 Sup. Ct. Rep. 1051; *Handly v. Anthony*, 5 Wheat. 374, 5 L. ed. 113.

Virginia's grant to the United States of the territory "to the northwest of the Ohio river" reserved by that description all jurisdiction over the river to low-water mark on the northwestern shore, but not beyond low-water mark. *Com. v. Garner*, 3 Gratt. 655.

Virginia, as owner of the territory through which the Ohio river runs, did not cede away her jurisdiction over the waters of the river, no matter what the stage of the water was, so long as it was confined within its banks. *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211.

The territorial jurisdiction of the state of West Virginia extends to low-water mark on the northwestern side of the Ohio river, under the act of cession by Virginia to the United States of the Northwest Territory. *Pt. Pleasant Bridge Co. v. Pt. Pleasant*, 32 W. Va. 328, 9 S. E. 231; *Barre v. Fleming*, 29 W. Va. 314, 1 S. E. 731.

The jurisdiction of West Virginia is coextensive with the water of the Ohio river while it is confined within its banks; and the state, in the proper county, has jurisdiction of offenses committed on a boat afloat on the Ohio river in time of high water, and above low-water mark and within the banks of the river, although such boat is fastened to the bank on the Ohio side. *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211.

The state of Kentucky, by the compact with Virginia and the boundary limits assigned her when erected into a state, became invested with the domain, sovereignty, and jurisdiction over the Ohio river from shore to shore from its mouth up to the Big Sandy river. *McFarland v. McKnight*, 6 B. Mon. 500; *Blanchard v. Porter*, 11 Ohio, 138.

In *Newport & C. Bridge Co. v. Hamilton County*, 8 Ohio Dec. Reprint, 564, it is said that it is a matter of record that when the Northwest Territory was organized (of which the state of Ohio was the eastern division), it was described as lying northwest of the Ohio river; so that, in frequent adjudication involving questions of boundary, the low-water mark on the north side has been recognized as the Ohio line.

A state bounded by a river extends to low-water mark, even when another state retains its dominion over the river. *Handly v. Anthony*, 5 Wheat. 374, 5 L. ed. 113.

State v. Mullen, 35 Iowa, 199; *State v. George*, 60 Minn. 503, 63 N. W. 100.

But the offenses in all such cases are offenses, not only against the law of both states, but against common law, and against law everywhere; and involve in their commission a certain degree of moral turpitude.

Here the offense consisted in taking fish with fish nets; it involves no moral turpitude, and is an offense only because the laws of the state of Minnesota, which it has passed in the exercise of its power to prescribe police regulations, makes it such, and renders this case easily distinguishable from the ones where the jurisdiction from shore to shore has been sustained.

The concurrent jurisdiction clause of the Constitution should be so limited in its ap-

plication as to exclude from its operation matters of mere police regulation upon which the bordering states are so apt to entertain different notions, and adopt varying and conflicting regulations. The mere police regulations of the state should be operative to its boundary line, whether in the water or on the land, and no further.

Iowa v. Illinois, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239.

If the taxing power of a state ceases at its boundary line, then its power of police regulation also ceases there.

Bittenhaus v. Johnston, 92 Wis. 598, 32 L. R. A. 380, 66 N. W. 805.

Sovereign authority is necessary to impose restrictions on the taking of fish; the sovereign authority of Minnesota ceases at

So the territorial limits of the state of Ohio extend on the southeast at least to the line of ordinary low-water mark on the northeast side of the Ohio river. *Booth v. Hubbard*, 8 Ohio St. 243; *Ware v. Houk*, 10 Ohio Dec. Reprint, 724.

The boundary line between the states of Kentucky and Indiana is the low-water mark of the Ohio river on the Indiana side. *Meyler v. Wedding*, 107 Ky. 310, 53 S. W. 809; *Church v. Chambers*, 3 Dana, 274; *McFall v. Com.* 2 Met. (Ky.) 394; *McFarland v. McKnight*, 6 B. Mon. 510; *Cowden v. Kerr*, 6 Blackf. 280; *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883.

But a peninsula or island on the Indiana bank of the Ohio river, separated from the main land by a channel or bayou which is filled with water only when the river rises above its banks, does not belong to Kentucky, but to Indiana. *Handly v. Anthony*, 5 Wheat. 374, 5 L. ed. 113.

By the cession from Georgia to the United States the western line of Georgia is the western bank of the Chattahoochee river, and the jurisdiction of that state extends to the lower edge of the permanent fast-land bank, where that is defined, and at other places to the line of the river bed as made by the average and mean stage of water during the entire year, without reference to extraordinary freshets of the winter or spring or extreme droughts of summer or autumn. *Alabama v. Georgia*, 23 How. 505, 16 L. ed. 556.

The jurisdiction of Georgia extends over the line which is washed by the water wherever it covers the bed of the river within its banks. *Howard v. Ingersoll*, 13 How. 425, 14 L. ed. 208.

In determining whether the courts of Alabama had jurisdiction of an action for damages by the overflowing of milling property situated between the bluffs and low-water mark on the western side of Chattahoochee river, it is held in *Howard v. Ingersoll*, 17 Ala. 780, that the term "bank," in the cession of territory, made by Georgia to the United States in 1802, designating the western bank of the Chattahoochee river as the boundary line between Georgia and the territory ceded, means low-water mark, in view of the indefiniteness of the term, and considering the intention of the parties with reference to the mutual convenience of Alabama and Georgia for purposes of jurisdiction.

65 L. R. A.

c. Effect of treaties and compacts.

By the treaty between France, Spain, and England the middle of the Mississippi river became the boundary between the French and English possessions, and the states of the United States subsequently formed, bordering on that river, succeed to the same boundary. *Missouri v. Kentucky*, 11 Wall. 305, 20 L. ed. 116; *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *Morgan v. Reading*, 3 Smedes & M. 366.

The boundary between the United States and British Columbia in the strait of San Juan de Fuca is, by treaty stipulation, a line following the middle of the strait; but vessels of either country are given the right to sail anywhere in it, and, hence, no part of it can be regarded as foreign waters, within a United States statute imposing a penalty upon foreign tugboats towing United States vessels, except the voyage be performed wholly or in part upon foreign waters. *The Pilot*, 48 Fed. 319.

By the arbitration of 1877 between Virginia and Maryland the Maryland boundary was restricted to low-water line on the Virginia side, confirming to Maryland jurisdiction of the bed of the stream. *United States v. Morris*, 23 Wash. L. Rep. 745.

But the grant by Maryland to the United States of the District of Columbia included the whole jurisdiction of Maryland over the Potomac, and was unaffected by the arbitration of 1877 between Virginia and Maryland by which the latter was restricted to low-water mark instead of high-water mark on the Virginia side. *Ibid.*

The Delaware river is, under the compact of April, 1783, the common boundary between, and a common highway for, the use of both the states of Delaware and New Jersey. *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275, Fed. Cas. No. 12,139.

The prosecutor in an indictment against one for attempting to wound by shooting at him from the South Carolina shore, when he was in a boat on the Savannah river within 30 yards of the Georgia side at a point where the river is at least 175 yards wide, was *prima facie* in the state of Georgia at the time of such attempt, in view of the convention of Beaufort of April 28, 1787, between Georgia and South Carolina, by which it was agreed that the current or thread of the channel of the Savannah river should be the boundary between the two

the boundary line of the state, and the concurrent jurisdiction clause cannot operate to extend its fish regulations beyond the boundary line.

Haggerty v. St. Louis Ice Mfg. & Storage Co. 143 Mo. 238, 40 L. R. A. 152, 65 Am. St. Rep. 647, 44 S. W. 1114; 2 Bl. Com. 410; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *Magner v. People*, 97 Ill. 320.

The state has the same interest in the fish that inhabit the water of a lake that it has in the bed of the lake.

Rossmiller v. State, 114 Wis. 169, 58 L. R. A. 93, 91 Am. St. Rep. 910, 89 N. W. 839.

There is no divided dominion.

Com. v. Garner, 3 Gratt. 724.

states. *Simpson v. State*, 92 Ga. 41, 22 L. R. A. 248, 17 S. E. 984.

The boundary line between New York and New Jersey, as fixed by a compact of the states approved by Congress in 1833, south of the 41st degree of north latitude, is the middle of the Hudson river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan bay to the main sea, except that New York retains jurisdiction over Bedloe's and Ellis's islands and such other islands within the waters mentioned as were then under the jurisdiction of that state. *People v. Central R. Co.* 42 N. Y. 283; *Re Devoe Mfg. Co.* 108 U. S. 401, 27 L. ed. 764, 2 Sup. Ct. Rep. 894.

Such compact gives New York exclusive jurisdiction over the waters to low-water mark on the New Jersey shore, and over ships, vessels, and craft of every kind for quarantine or health purposes, the protection of passengers and property, and to secure the interests of trade and commerce, and to preserve the public peace. Such jurisdiction over the waters is a limited and qualified one for police and sanitary purposes, and does not extend to piers, wharves, docks, or other improvements on the New Jersey shore, even if they constitute a public nuisance. *People v. Central R. Co.* 42 N. Y. 283.

The boundary line passes through Raritan bay at the center of a line drawn from Sandy Hook to Coney Island, and at the center of the shortest line between the New Jersey coast and Staten Island. *People ex rel. Morris v. Richmond County*, 73 N. Y. 393.

Under the compact fixing the boundary between New York and New Jersey the former state has jurisdiction to pass a law subjecting persons to liability for the deposit of material dredged from a slip, basin, or other place on the river in the waters of New York bay or Hudson river, although within the boundaries of New Jersey. *Ferguson v. Ross*, 126 N. Y. 459, 27 N. E. 954.

The jurisdiction of the state of New York over the waters of New York bay extends to the low-water mark on the New Jersey shore, but does not include, by express exception, vessels fastened to docks or wharves on such shore, so that a schooner fastened to the dock of a brick yard at Keyport is within the exclusive jurisdiction of the state of New Jersey. *The Mary McCabe*, 22 Fed. 750.

By the compact between New York and New Jersey a vessel fastened to a wharf or pier on 65 L. R. A.

Had a game warden of this state committed the acts complained of against this defendant, he would have no defense whatever to an action of this kind. Shall a game warden of the state of Minnesota receive greater protection at the hands of our courts than a game warden of our own state?

McFall v. Com. 2 Met. (Ky.) 394.

Marshall, J., delivered the opinion of the court:

It is conceded, as the fact is, that if the laws of the state of Minnesota respecting the preservation of fish may be enforced by its officers upon the Wisconsin side of the main channel of the Mississippi river, which includes, of course, Lake Pepin, the answer of defendant states a complete justification for

the New Jersey side of the Kill von Kull was within the exclusive jurisdiction of New Jersey, and therefore within the jurisdiction of the Federal courts established for that state, and not of those of New York. *Hall v. Devoe Mfg. Co.* 5 N. J. L. J. 361, 14 Fed. 183.

A vessel afloat in the Kill von Kull between Staten Island and New Jersey at the end of a dock at Bayonne, about 300 feet below low-water mark is within New Jersey, and so within the jurisdiction of the district court for the district of New Jersey. *Re Devoe Mfg. Co.* 108 U. S. 401, 27 L. ed. 764, 2 Sup. Ct. Rep. 894.

Process of the district court of the United States for the southern district of New York cannot be executed by seizure of a vessel while at a wharf in Jersey City, as the jurisdiction of the state of New York does not extend to a vessel fastened to such wharf. *The Norma*, 32 Fed. 411.

In one case the jurisdiction was extended from the New Jersey side rather farther than the terms of the compact would warrant. *Nixon, J.* holding that a vessel lying at anchor and afloat in the Hudson river between Jersey City and Manhattan Island, and on the west side of the middle of said river, is within the admiralty jurisdiction of the district court for New Jersey. *The Sarah E. Kennedy*, 25 Fed. 569.

This ruling was placed on the ground that the territorial limits of the state having been placed in the center of the channel, the jurisdiction of the Federal courts by the act creating them extends as far as the state limits, and is not affected by a compact dividing the jurisdiction between the local courts. This holding is in conflict with that of Judge Blatchford in *The L. W. Eaton*, 9 Ben. 289, Fed. Cas. No. 8,612, which follows that of Judge Betts in *United States v. The Julia Lawrence*, 6 Am. L. Rev. 383, Fed. Cas. No. 15,502.

Process of the United States courts for the district of New York may be executed upon a vessel lying in the Morris canal basin at Jersey City, made fast to piles driven into the bottom and about 40 feet from the side of the dock, the basin communicating directly with the waters of the Hudson river. *The Argo*, 7 Ben. 304, Fed. Cas. No. 515.

The state of New York has no jurisdiction to restrain the erection of structures extending into the bay or river from the New Jersey shore, even if they are a public nuisance as affecting injuriously the general and common use

the acts complained of. The question turns on the meaning of Federal laws by which the states of Minnesota and Wisconsin were given concurrent jurisdiction on the waters of the Mississippi river. The language of the two acts of Congress, the one relating to Wisconsin (Act August 6, 1846; 9 Stat. at L. 57, chap. 89), and the other to Minnesota (Act February 26, 1857; 11 Stat. at L. 166, chap. 60), is the same so far as applicable to difference in situation. That as to Wisconsin (§ 3) is as follows:

"The said state of Wisconsin shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said state of Wisconsin so far as the same shall form a common boundary to said state and any other state or states now or

hereafter to be formed or bounded by the same."

The term "concurrent jurisdiction" does not imply, as the learned attorney general for the state of Minnesota seems to suppose, that the people of the two states in their sovereign capacities are joint owners of the bed of the Mississippi river within the scope of the enabling acts referred to, or of the waters of the river or the fish therein or things thereon, under the principle laid down in *Rossmiller v. State*, 114 Wis. 169, 58 L. R. A. 93, 91 Am. St. Rep. 910, 89 N. W. 839. Ownership in that sense does not follow jurisdiction, as the term was used in the enactments under discussion. It was competent for the national legislature, in the formation of the states, to extend the laws of each for certain

of those navigable waters, since such jurisdiction was surrendered when the dividing line between the states was fixed at the middle of the stream. *People v. Central R. Co.* 42 N. Y. 283, Reversing 48 Barb. 478, where the court held that the reservation of jurisdiction in the compact conferred upon the state of New York full power and authority to preserve the river and bay from injury by encroachments from strangers acting without authority.

The holding of the lower court agreed with *State v. Babcock*, 30 N. J. L. 30.

The circuit court sitting in the southern district of New York will not take jurisdiction to enjoin the erection of a bridge on the soil of New Jersey, although the structure may project into the waters of a navigable channel coming up from the bay of New York. *Atlantic Dredging Co. v. Bergen Neck R. Co.* 44 Fed. 208.

Pennsylvania acquired no jurisdiction to the soil under the Delaware river within the territorial limits of New Jersey under the compact between those states in 1783 giving each state a concurrent jurisdiction within and upon the water between the shores of said river for certain purposes. *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1.

A stipulation in a compact between states that offenses committed at a point where the water boundary is doubtful shall be tried in the courts of one state loses its force and effect where the boundary line is subsequently ascertained and established with certainty. *Ex parte Marsh*, 57 Fed. 719.

II. Equal rights on.

A boundary stream is of such a nature that, like the larger bodies of water touching the shores of different nations, its use must of necessity be common. For all commerce and acts originating on or connected with one shore the use and control of it must be exclusively dominated by the sovereign of that shore. Yet the same right must be accorded to the opposite sovereign. No line could be drawn through the stream which would limit the jurisdiction of the respective sovereigns, because it would be so difficult to determine the location of particular acts with reference to such line that the stream would become a place of lawlessness. Therefore by tacit agreement or express compact concurrent jurisdiction over the stream is accorded to both sides. This gives certain rights to each, 65 L. R. A.

with which the other cannot interfere, because they are equally common to both.

In the absence of the exclusive occupation of a river or bay, the law of nations gives the nations inhabiting the opposite shores territorial jurisdiction to the middle of the stream. But each nation may also have the common right of passage and navigation where necessary for their common convenience and access to their own shores. *The Fame*, 3 Mason, 147, Fed. Cas. No. 4,634.

The waters of the bay of Passamaquoddy and the river Schoodic, separating the United States from the British provinces, are, upon the principles of public law, common to both powers for the purposes of navigation. *The Atlantic*, 1 Ware, 121, Fed. Cas. No. 621.

The jurisdiction of each state along the Mississippi extends to the middle of the river, and it may regulate commerce which begins and terminates within its limits; but it has no power to regulate a commerce which extends beyond its jurisdiction. *Halderman v. Beckwith*, 4 McLean, 286, Fed. Cas. No. 5,907.

A vessel arriving in a river which forms the boundary between two nations for the purpose of proceeding to a pier within one of them does not arrive within the limits of the other within the meaning of a statute imposing a customs duty, since a river which forms the boundary between two nations must be deemed subject to the common use of both of them. *The Apollon*, 9 Wheat. 371, 6 L. ed. 113.

But the compact of March 28, 1785, between Maryland and Virginia, providing that the right of fishing in the Potomac river shall be common to the citizens of both states, and that all laws necessary for the preservation of fish in the Potomac river, or for keeping open the channel in the Pocomoke river, shall be made with the mutual consent of both states, does not grant a common right of fishing, including the catching and taking of oysters in Pocomoke river, to the citizens of Maryland, or a right to joint legislation for the protection of fish in such river to the state of Maryland. *Ex parte Marsh*, 57 Fed. 719.

The common rights upon the stream require that riparian owners on one shore shall do no act which will injure owners on the other; and the courts will usually enforce this duty.

Equity can restrain one over whom it has jurisdiction, from destroying the part of the dam

purposes over territory of the other. That was done, the jurisdiction on boundary waters being extended as to each state from shore to shore, while the boundary line between them was placed at the main channel of the river. That necessarily forms the boundary between them as to sovereign rights of ownership. Sovereign right as regards ownership of the bed of the Mississippi river or anything permanently affixed thereto coincides with territorial boundaries. Therein, as to everything of a tangible character forming part of the land, whether above the water or below the water, the jurisdiction of each state is exclusive. It would seem that its authority must be the same as regards sovereign property rights incident to sovereign ownership of the land cov-

ered by water. If there is anything decided in *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529, to justify a contrary idea,—and it is believed there is not,—it is to be regretted. Certainly, it was not intended there to hold, as we understand the matter, that the state of Minnesota has such jurisdiction over, or within, or on, Wisconsin territory on its side of the main channel of the Mississippi river, or on water the main channel of which forms the boundary line between the two states, as will permit it to authorize, prohibit, regulate, or take jurisdiction over, a permanent object in the river, natural or artificial,—anything not on the river within the meaning of the term as used in the act of Congress; any jurisdiction in-

which extends into another state. *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462.

A mill owner in Pennsylvania may sustain an action in the circuit court of New Jersey for injury to his mills in Pennsylvania due to the diversion of water for canal purposes in the state of New Jersey by a corporation chartered by the latter state. *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275, Fed. Cas. No. 12,139.

An action at law to recover damages against the city of St. Louis, which constructed a dyke on the Missouri shore of the Mississippi river whereby the plaintiff's land on the Illinois shore was washed away, may be maintained in the circuit court for the eastern division of Missouri, since the common-law rule as to local actions is not applicable to such a suit. *Rutz v. St. Louis*, 2 McGrary, 344, 7 Fed. 438.

One whose mills, situated upon one side of a river forming a state boundary, are injured by a diversion of water through a canal constructed above him on the opposite side of the river may maintain an action in the state where the canal is located for injunctive relief for the injury done to his easement to take half of the water; and the laws of such state are applicable to the controversy. *Stillman v. White Rock Mfg. Co.* 3 Woodb. & M. 538, Fed. Cas. No. 13,446.

But a riparian owner cannot maintain an action for damages against a municipality which, on the opposite shore, and in another state, builds a dyke extending into the river, where he fails to show any loss consequent upon the erection of the dyke. *Rutz v. St. Louis*, 3 McGrary, 261, 10 Fed. 338.

That a dyke erected on the Missouri shore of the Mississippi river was constructed pursuant to a Missouri statute cannot, in an action by a citizen of the state of Illinois to recover damages caused to his real estate thereby, be pleaded against him, for the Missouri statute cannot operate extraterritorially. *Rutz v. St. Louis*, 2 McGrary, 344, 7 Fed. 438.

An action may be maintained by the state of Illinois against the city of St. Louis, where she voluntarily appears and files a demurrer to the merits of the bill enjoining such city from obstructing a channel of the Mississippi river by dyking the Illinois shore, this being an obstruction to navigation. *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339.

The extension of a shear boom across the navigable channel of the Mississippi river to 65 L. R. A.

near the Wisconsin shore, under authority of Minnesota, cannot be complained of as an obstruction of navigation by one who has availed himself of its advantages, to escape a lien for surveying and scaling under the state law after the logs are within the limits of Minnesota, although they have come from Wisconsin. *Lindsay & P. Co. v. Mullen*, 176 U. S. 126, 44 L. ed. 400, 20 Sup. Ct. Rep. 325.

The nonexercise of jurisdiction over waters of which two states have concurrent jurisdiction, by one state, is not available to an individual as a substantive cause of action against a corporation created by, and acting under the authority of, the other state, which has extended its works into the waters of the former state. *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 62, 38 N. W. 529.

The equal jurisdiction over the stream includes the right to grant exclusive ferry rights on the shore of the grantor.

A state owning on one side of a navigable river cannot prevent the ferrage of passengers to its shores under authority of the state lying on the opposite shore. *Challiss v. Davis*, 56 Mo. 25.

So, West Virginia cannot punish one who acts under a ferry franchise given by the state of Ohio to operate a ferry from its side of the Ohio river over that river, for charging one coming from Ohio more than is allowed by West Virginia law for ferrage over that river. *State v. Faudre*, 54 W. Va. 122, 63 L. R. A. 877, 46 S. E. 269.

A ferry franchise granted by the legislature to an individual to cross a river to another state is valid, and entitles him to damages for its destruction by the building of a bridge at the same location, notwithstanding, he may not own the soil at the landing, and that he cannot use and enjoy it without either action by the authorities of the other state or an agreement with one owning a like franchise on the other side, as these considerations affect merely the value, but not the validity, of the ferry right. *Columbia Delaware Bridge Co. v. Gelsae*, 38 N. J. L. 39.

The Canadian government may grant an exclusive ferry on waters which form an international boundary, and the owner thereof will be protected from interference by another within British waters. *Kerby v. Lewis*, 6 U. C. Q. B. O. S. 207.

A license to operate a ferry across a river

dicating sovereign property rights in Wisconsin territory. The court seems to have clearly negated any idea of joint state dominion, in saying that neither state can take, or authorize the taking, possession of any part of boundary waters from bank to bank, citing *Delaware Bridge Co. v. Trenton City Bridge Co.* 13 N. J. Eq. 46, and *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631, both of which cases in effect decide that either state, subject to the right of navigation, may take possession of such waters for any lawful purpose out to its boundary line, not interfering with the right of navigation.

It seems that the learned attorney general for Minnesota has drawn a different idea of this court's decision in *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* from our under-

standing of it, and constructed thereon the theory that sovereign territorial rights between the shores of the river are common to the states of Minnesota and Wisconsin; that concurrent jurisdiction, as the term is used in the Federal law, as viewed by this court, means concurrent dominion. We must repudiate that, and are constrained to believe that in doing so we do not need to overrule anything decided in the *Keator Case*; though we must confess, inasmuch as it dealt in some respects with permanent objects on the Wisconsin side of the main channel of the St. Croix river, language was used from which the broad idea entertained by counsel for appellant is not wholly without justification. It has been decided in many jurisdictions, including that of the Supreme Court of the

forming the boundary between two states may not only regulate the rate of ferrage for crossing from the state granting the license, but may establish a rate for round trips commencing on such side of the river. *State v. Sickmann*, 65 Mo. App. 499.

A ferry franchise granted by the state of Iowa across the Mississippi river gives no authority to ferry from the Wisconsin side. *Weld v. Chapman*, 2 Iowa, 524.

The laws of Kentucky do not profess either to grant, or to secure or protect, the right of ferrying across the Ohio river except from the Kentucky to the opposite shore; nor has there been any attempt by statute to regulate or interfere with the transportation from the other side to the Kentucky shore under authority derived from the laws and government on the opposite shore. *Reeves v. Little*, 7 Bush, 469.

The laws of Kentucky do not require ferries established on the Kentucky side to transport persons or things from the state of Ohio to the state of Kentucky across the Ohio river, and a refusal by a ferryman so to do does not subject him to any penalties imposed by the laws of Kentucky for failure or refusal on the part of ferrymen established under her laws to perform the duties imposed by such laws, and does not authorize a recovery, even for the actual damages a person may have sustained by reason of his enforced delay due to such refusal. *Ibid.*

A license for a ferry across the Mississippi river, granted under the laws of the states bordering upon that river opposite the Illinois shore, is deserving of the same respect and consideration, and is entitled to equal efficacy, with the authority granted by the state of Illinois, and cannot be forfeited under the general ferry laws of Illinois, providing that a person running a ferry within 3 miles of an established ferry without authority is liable to forfeit his boat to the owner of such other established ferry. *Gear v. Bullerdick*, 34 Ill. 74.

A statute forbidding a license to keep a ferry within 2 miles of any other licensed ferry does not apply to a ferry licensed by another state on the opposite side of the river. *Weld v. Chapman*, 2 Iowa, 524.

A keeper of a ferry from the Virginia to the Ohio shore across the Ohio river will not be restrained by injunction from landing passengers upon the lands of the keeper of a ferry on the Ohio shore, where the Ohio ferryman has no exclusive ferry right, so that there is no in-

vasion of the ferry franchise, but a mere trespass for which the trespasser is able to respond in damages. *Ross v. Page*, 6 Ohio, 166.

See, further, *note to Sistersville Ferry Co. v. Russell*, 59 L. R. A. 513, where the whole question of the establishment and regulation of ferries is considered.

III. What rights are exclusive.

While many of the rights on boundary rivers are common, there are some which are exclusive.

A compact between two states conferring concurrent jurisdiction upon a boundary river does not include sovereignty of the river. *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1.

The consequence is that whatever acts are dependent upon ownership or sovereignty are exclusively within the power of the state which owns the place where they are to take effect. The use of the soil must be under authority of the one who owns it.

A state bounded by a navigable river may authorize the erection of a structure constituting a nuisance, and its own citizens must accept the legal consequences, though not without the recovery of damages; but it cannot pass a law to govern the citizens of another state or their realty. *Rutz v. St. Louis*, 2 McCrary, 844, 7 Fed. 438.

The question of concurrent powers of a railroad company to erect a bridge over an interstate boundary river cannot be determined in one state so far as relates to the rights of the other state. *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631.

The New Jersey legislature may authorize the construction of a bridge across the Delaware river above tide waters, under the compact of 1783 between New Jersey and Pennsylvania giving each state common powers over the navigation of the stream. *Ibid.*

New Jersey, by her general railroad law, granted power to connect any railroad in that state with any other railroad out of that state, and, to that end, to cross any navigable river; and that power of itself implied and included authority, so far as the state could give it, to bridge the Delaware river for that purpose. *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1.

The legislature of the state of Kansas has the power to pass an act authorizing the organization of a corporation to build a bridge across the Missouri river at a place where such river

United States, that "concurrent jurisdiction on the river" extends only to the water and to floatable objects therein, not to bridges, dams, or any other objects of a permanent nature. If any such object be located upon the Wisconsin side of the main channel of a boundary river so as to constitute a nuisance, it must, accordingly, be deemed not only wholly within the territorial limits of Wisconsin, but within its exclusive jurisdiction. *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *Gilbert v. Moline Water Power & Mfg. Co.* 19 Iowa, 319; *Dunlieth & D. Bridge Co. v. Dubuque County*, 55 Iowa, 558, 8 N. W. 443; *Buck v. Ellenbolt*, 84 Iowa, 394, 15 L. R. A. 187, 51 N. W. 22; *Iowa v. Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239. The rule laid down in

those cases has been uniformly accepted by all courts as sound. The effect thereof is that there is no such thing as concurrent ownership, so to speak, of territory, or incidents thereof, between the shores of a river divided by the boundary line between this state and the state of Minnesota.

Having reached the conclusion that the laws of Minnesota do not for any purpose extend over the territory on the Wisconsin side of the main channel of the Mississippi river, except as regards things on the river,—things of a floatable nature,—we are now to inquire whether, by reason of respondent's net being retained in place by means of stakes driven in the bed of the lake, it partook of the nature of a permanent object in the river rather than of a floatable object or thing on

forms the boundary line between the states of Kansas and Missouri, since to render the construction of such a bridge possible it is necessary that a corporation of either state may, with the consent of the other state, build, own, and operate it in its entirety. *Hunt v. Kansas & M. Bridge Co.* 11 Kan. 412.

A local subdivision of a state has no more authority than has been conferred upon it; and therefore, under a statute providing that the several towns of a state shall build and keep in repair all necessary bridges within the limits of such towns, except when it belongs to some particular person or corporation to maintain such bridges, a town is not authorized to construct a bridge across a stream which is the dividing line between its state and another. *Abendroth v. Greenwich*, 29 Conn. 356.

Where a river forms a boundary between two states each may, in the absence of legislation by Congress, authorize the construction of booms within its own territory. *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 62, 38 N. W. 529.

Equity will not accept jurisdiction when there is doubt as to the right of a railroad company to bridge a boundary river between two states under the laws of another state, so far as relates to the portion of the bridge situated in the other state. *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1.

The determination of the Canadian department of marine that a wreck lying on the Canadian side of the Detroit river is an obstruction to navigation, and authorizing its removal, is not reviewable by the courts of this country. *The Burlington*, 73 Fed. 258.

The state courts of Iowa are without jurisdiction to abate a nuisance on an island east of the middle of the main channel of the Mississippi river, although the states of which the Mississippi river constitutes a boundary have concurrent jurisdiction over these waters. *Buck v. Ellenbolt*, 84 Iowa, 394, 15 L. R. A. 187, 51 N. W. 22.

The United States district court in Iowa has no jurisdiction of a nuisance which is east of the middle of the Mississippi river. *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311.

If a bridge across the river is a nuisance, that court can abate only the portion thereof which is west of the middle of the river. *Ibid.*

Likewise, a nuisance on the Illinois side of 65 L. R. A.

the main channel of the Mississippi river, consisting of a dam across a slough channel, is not within the jurisdiction of the Iowa courts. The concurrent jurisdiction "on the Mississippi river" of states to which it forms a common boundary applies only to things "on" the river and not to permanent obstructions or erections in the river. *Gilbert v. Moline Water Power & Mfg. Co.* 19 Iowa, 319.

The state has no right to assess for taxation any part of a bridge structure over a navigable stream forming one of its boundaries, that is located beyond the boundary line of such state. *Keokuk & H. Bridge Co. v. People*, 145 Ill. 596, 34 N. E. 482.

The easterly half of a toll bridge for freight and passengers, owned by a private company incorporated in Pennsylvania and New Jersey, and maintained for private profit, is properly assessed for taxes as real estate situate in New Jersey, and includes the piers and abutments, the land on which they stand, and the approach; but the franchise of the corporation, the extent of its profits, or tolls collected, or amount of travel, cannot be taken into consideration. *State, Easton Bridge, Prosecutor, v. Metz*, 31 N. J. L. 378.

Under the section of the Illinois revenue law authorizing the taxation of all bridge structures across any navigable stream forming the boundary line between Illinois and any other state to be assessed by the local assessor, that part of the structure of a bridge across the Mississippi river lying east of the middle thread of the main channel is subject to taxation. *Keokuk & H. Bridge Co. v. People*, 145 Ill. 596, 34 N. E. 482; *Buttenth v. St. Louis Bridge Co.* 123 Ill. 535, 17 N. E. 439.

All that part of the St. Louis bridge which lies east of the middle thread of the Mississippi river, as it now is, is within the state of Illinois, and, being so, is subject to taxation by the state; and, as the western boundaries of the county and city are coextensive with the boundary of the state, is also subject to county and city taxation. *St. Louis Bridge Co. v. People*, 125 Ill. 226, 17 N. E. 468.

In the middle of the main navigable channel, or the channel most used, in the Mississippi river is the boundary between the states of Iowa and Illinois; and the state has jurisdiction, for the purpose of taxation, over a bridge constructed from Iowa to the Illinois side of the river to the middle of that channel. *Chicago*

the river. Counsel for respondent *ex industria* added an allegation to the complaint stating the fact that the net was fastened to the bed of the lake by stakes. We do not deem that circumstance material. The net was no more an object of a permanent nature and part of the land, so to speak, to which it was attached, than a boat anchored in a stream temporarily. It was located where found for a purely temporary purpose. It was not put in place by acts on the water. The dividing line of jurisdiction as to physical objects is between those on the river and those forming a part, not of the river, strictly speaking, but of the river bed. *Gilbert v. Moline Water Power & Mfg. Co.* 19 Iowa, 319. The plaintiff's net was an object of a transitory nature. It was liable to be

moved about from place to place by enjoying the river as navigable water. The act of plaintiff, it seems, was an act in a fair sense connected with the use of the river as navigable water, and subject to be dealt with by the jurisdiction of either Wisconsin or Minnesota if the term "concurrent jurisdiction" refers to the regulation of such matters.

We have now reached these conclusions in the course of our considerations: (1) All the territory within the banks of the Mississippi river on the east side of the main channel thereof, so far as the river forms a boundary between Minnesota and Wisconsin, is exclusively Wisconsin territory, with all the incidents thereof except as modified by the provision of the Federal law giving to the

& N. W. R. Co. v. Clinton, 88 Iowa, 188, 55 N. W. 462.

The piers and abutments of a bridge across the Delaware are taxable as real estate to the middle of the river in the town on the east end, the boundaries of which extend to the state line, regardless of whether the bridge is owned in fee or is merely a leasehold. *State, Delaware & E. Bridge Co., Prosecutor, v. Metz*, 29 N. J. L. 122.

A bridge, over the Delaware, of a railroad company incorporated in Pennsylvania and authorized by that state, if the legislature of New Jersey concurred, is subject to taxation upon its New Jersey half with its eastern piers, approach, and abutment, under the general tax laws of the state, for state and local purposes. *State, Lehigh Valley R. Co., Prosecutor, v. Mutchler*, 42 N. J. L. 461.

The boundary of Kentucky extends to low-water mark on the Indiana side of the Ohio river, and municipalities in Kentucky may tax structures extending across the stream so far as that point. *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. Rep. 553.

The jurisdiction of the state of Kentucky extends to the northwestern shore of the Ohio river, and the state may tax a bridge, across the river, belonging to a private corporation, as such taxation does not amount to a discrimination in favor of local products against those of other states, or interfere with the free navigation of the river; but the city of Louisville cannot tax it, though the city limits extend to the farther shore of the river. *Louisville Bridge Co. v. Louisville*, 81 Ky. 189.

The power of the state to tax the bridge for revenue purposes cannot be denied on the ground that such taxation is an assumption by the state of the power to regulate commerce between the states contrary to the Constitution of the United States, or is an interference with the concurrent jurisdiction of other states over the Ohio river, and the use and navigation thereof guaranteed by the Virginia compact to be free and common to all citizens of the United States. *Ibid.*

IV. What concurrent jurisdiction includes.

As stated *supra*, III., concurrent jurisdiction does not include the sovereignty or ownership of the river. It is conferred, not for the purpose 65 L. R. A.

of destroying the title of either sovereign to his territory, but to render more efficient the policing of the stream, and to prevent the loss which would result from defeating actions by pleas to the jurisdiction, when it might be difficult to determine just where an act occurred. Furthermore, either state may control the acts of its own citizens wherever they may be, and it would be intolerable if they were permitted to evade its mandates by merely crossing an invisible line on a boundary stream, when they could not do so by placing an ocean between them and their sovereigns. The question how far the concurrent jurisdiction involves the establishment of positive law has not been conclusively answered by the courts.

It cannot be admitted that each state has the absolute right to establish its own laws over the entire water, because laws might be enacted which were diametrically opposed. For example, the laws of one state might favor slavery, and enact that anyone who attempted to aid the escape of a slave by transporting him across the boundary river should be guilty of a misdemeanor, while the other state might be opposed to slavery, and make it a misdemeanor to refuse to aid the escape of a slave. Such a condition would plainly defeat the very purpose for which the concurrent jurisdiction over the stream was granted. It is said in *Re Mattson*, 69 Fed. 535, that the concurrent jurisdiction of a state to enact penal laws respecting a river forming the boundary between it and another state means the power to enact such criminal laws as are agreed to, or acquiesced in, by such other state, or are in force within it.

It would seem, however, that the jurisdiction must be somewhat broader than this. A state should not be held to have surrendered its right to enact laws which it can enforce to the limit of its boundary, or which can be enforced against its own citizens. Therefore, it may authorize or forbid the doing of acts which depend on territorial rights, such as the regulation of fisheries, or the placing of structures upon the bed of the stream, or permitting obstruction of navigation on its own half of the stream, which acts cannot be interfered with by the owner of the opposite shore. But it cannot forbid fishery in the opposite half of the stream, or the placing of structures there, when those acts are authorized by the laws of the owner of that side of the stream. This principle is well illustrated by ROBERTS V. FULLERTON.

state on the opposite side of the main channel of the river concurrent jurisdiction with Wisconsin on the river on the Wisconsin side. (2) Jurisdiction on the river does not include jurisdiction of objects in the river above or below the surface, whether natural or artificial, so attached to the river bed or bank of the river as to form a part of the land itself. (3) The state of Minnesota has no jurisdiction to abate a nuisance consisting of a permanent object in the river or over the river on the Wisconsin side of the main channel. (4) The property of the plaintiff which defendant destroyed did not, at the time of its destruction, constitute such an object. (5) The placing of the plaintiff's net in the river where found was connected with the use of the river as navi-

gable water. (6) The enforcement of the law of Minnesota regarding the enjoyment of the right to fish in the Mississippi river on the Wisconsin side of the main channel cannot be justified by reason of the common ownership by the former state, or by the people thereof in their sovereign capacity, either in the bed of the river or in the water thereof or the things animate or inanimate therein. (7) The meaning of the language of the Federal law giving concurrent jurisdiction on the waters of a boundary river is to be restrained to the purposes thereof. For all other purposes the jurisdiction of each state on its side of the main channel of the river is exclusive. For examples: One state can neither authorize nor abate a permanent object in the river within the territory of the

There is nothing to prevent a state from enforcing its own laws against its own citizens on any part of the stream. But the concurrent jurisdiction appears to have been conferred principally to enable the courts of either state to take jurisdiction of a crime or misdemeanor committed anywhere upon the stream, and to take jurisdiction of civil actions arising out of acts committed upon any portion of the stream.

A good illustration of the enforcement by a state of its own penal laws upon the stream is afforded by *Dugan v. State*, 125 Ind. 130, 9 L. R. A. 321, 25 N. E. 171. In that case a steamboat having its home port in Kentucky was engaged in running Sunday excursions between points in Indiana in violation of the Indiana Sunday law. The court took jurisdiction of a prosecution against the pilot of the boat; and, while the principal discussion is as to the conflict between state and Federal jurisdiction, and nothing is said directly as to a conflict with the jurisdiction of Kentucky, yet the court does say: "Virginia gave Indiana jurisdiction over the Ohio river, and what Virginia gave Indiana accepted." In that case the jurisdiction was plain. The Indiana statute was violated by acts upon its bordering river having their beginning and end on land within the borders of the state; and, if Indiana had no jurisdiction of the offense, it would go unpunished, and the Indiana laws could be violated with impunity. The mere fact that the boat and its officers were nonresidents is immaterial. But could Indiana have enforced its law in case the boat was plying from point to point in Kentucky where the act was lawful, without touching the Indiana shore or violating its sovereignty? Clearly not. If so Indiana would be enabled to enforce its policy upon citizens of Kentucky against their will, and against the law of the domicile. The principle is illustrated in another way by the recent case of *Harrell v. Speed* (Tenn.) 81 S. W. 840, in which it was held that Tennessee might require the payment of a privilege tax before liquors could be sold at a landing in that state from a boat having its home port in Arkansas and possessing a liquor license in the latter state. Tennessee could not interfere with the exercise upon a boundary river of a right conferred by Arkansas. On the other hand, Arkansas could give no right which would entitle its recipient to do any act within the territory of Tennessee which was contrary to its laws. The exclusive legislative power of either must be

confined to its own citizens, or to matters which involve its sovereign rights over its own soil.

In case a river forms the boundary between two states, each state has the power to exclude the citizens of the other state from fishing on its side of the middle line of the stream, and it has exclusive power to regulate the fisheries within such limits. *Re Mattson*, 69 Fed. 535.

The operation of the general laws of the state without any express provision therein on the subject must be coextensive with its jurisdiction. But beyond its boundary on the St. Croix river the state of Minnesota can only take cognizance of such causes of action as arise upon "the river and its waters," and such as are appropriate to the nature of the jurisdiction which the state is entitled to exercise. *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575.

By virtue of the acts of Congress admitting the states into the Union, the states of Missouri and Illinois have concurrent jurisdiction on the Mississippi river so far as it forms a boundary between them. *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. 26, 3 L. R. A. 390, 10 S. W. 595.

By the agreement between New Jersey and Pennsylvania, the Delaware river, in its whole length and breadth, is to be and remain a common highway, equally free and open for the use of both states; and each state is to enjoy and exercise concurrent jurisdiction within and upon the water and both shores of the river. *Delaware Bridge Co. v. Trenton City Bridge Co.* 13 N. J. Eq. 46.

A common carrier chartered in New Jersey acts under New Jersey law on every part of the river. If it contracts to carry baggage from Pennsylvania into New Jersey, and the baggage is lost after leaving the Pennsylvania shore, it is liable under the New Jersey laws. *Brown v. Camden & A. R. Co.* 83 Pa. 316.

A statute of Missouri which is restricted to vessels used in navigating the waters of that state applies to vessels navigating the Mississippi river at a point where its center forms the boundary between that state and Illinois, although the transaction involved may have occurred on the Illinois side of the stream. *Swearingen v. The Lynx*, 13 Mo. 519.

The waters of the strait of San Juan de Fuca lying north of the middle of the strait, which by treaty is made the boundary line between the United States and British Columbia, are for-

other; it cannot tax property either in the river or on the river on the opposite side of the main channel thereof. *Dunlieth & D. Bridge Co. v. Dubuque County*, 55 Iowa, 558, 8 N. W. 443.

We are not unmindful of the fact that in *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* it was suggested that the term "concurrent jurisdiction" includes the exercise of all legal authority by each state over the whole river. Upon that, in part, counsel for appellant, we apprehend, pins his faith in insisting that the territory within the banks of the boundary river is common property of the two states. The inference that counsel draws is not wholly without warrant, looking to the words under consideration in their broad, general sense. The court did,

in effect, say that the term "jurisdiction," as used at the time of the Federal enactment in question, generally speaking, refers to the three co-ordinate branches of the government, legislative, executive, and judicial, and that it must be assumed that Congress used the term in that sense. In that and what the court further said,—while we confess there is some warrant for the inference that it was at least suggested that each state may exercise its whole sovereign authority over and in the waters of a boundary river between the banks thereof so far as it can consistent with the other state exercising like authority,—there is unmistakable evidence that the court did not intend to so decide. Speaking of the effect of the general grant of authority to construct and maintain booms

on waters within the meaning of a statute imposing a penalty upon foreign tugboats towing American vessels between domestic ports, except where the towing in whole or in part is upon foreign waters. *The Pilot*, 1 C. C. A. 523, 7 U. S. App. 188, 50 Fed. 437.

The provisions in the enabling acts for Wisconsin and Minnesota, and the corresponding provision in their state Constitutions, giving those states "concurrent jurisdiction" over a river forming their common boundaries, include the exercise of such legislative powers by each state as are consistent with the exercise of similar powers over the same portions of the river by the other state; and neither of those states could, as against the other, rightfully assume, or authorize the assumption of, permanent and exclusive occupancy, possession, and control of the entire navigable portion of the river; but either state may, in the aid of navigation, assume or authorize reasonable occupancy, possession, and control of portions of such navigable waters as may be reasonably consistent with similar occupancy, possession, and control which may be assumed or authorized by such other state. *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 62, 38 N. W. 520.

Sherlock v. Ailing, 44 Ind. 184, seems to have gone farther than true principle would justify in holding that the state of Indiana possesses concurrent jurisdiction with the state of Kentucky on the Ohio river where the two states possess the opposite shores for the enforcement of civil and criminal laws, although the boundary line is the low-water mark upon the Indiana side; and such jurisdiction is not limited to the service of process or to judicial proceedings, but is general, and includes the right of legislation touching all civil and criminal cases on the river.

An action may be maintained in New York, under a New Jersey statute, to recover damages for the death of plaintiff's husband, resulting from a collision caused by the negligence of one of the vessels, within the territorial jurisdiction of the state of New Jersey, viz., within 3 miles of the shore of that state. *Lennan v. Hamburg-American S. S. Co.* 73 App. Div. 357, 77 N. Y. Supp. 60.

In some of the cases in which the laws of one state have been held applicable to the whole width of the river the title of the state actually extended there.

The local laws of Kentucky are binding on all 65 L. R. A.

persons on so much of the Ohio river from shore to shore as lies on her border, except in so far as such laws interfere with the rightful power of the Federal government to regulate commerce and navigation among the states, and the rights of all persons to the free and common use and navigation of such river. *Church v. Chambers*, 3 Dana, 274.

Vessels navigating the Ohio were held subject to the laws of Kentucky as to carrying away slaves, although they were taken on board from the Indiana shore. *McFarland v. McKnight*, 6 B. Mon. 510; *Church v. Chambers*, 3 Dana, 279.

A person solemnizing marriage on a ferry boat midway between Kentucky and Ohio on the Ohio river is subject to the laws of Kentucky. *McFall v. Com.* 2 Met. (Ky.) 394.

Jurisdiction over crimes.

The states of Illinois and Missouri have concurrent jurisdiction, to enable them to redress private wrongs or punish crime, over the whole of the Mississippi river, and are not confined, in the exercise of such jurisdiction, to the middle of the river, which is the physical boundary line between the states. *Wiggins Ferry Co. v. Reddig*, 24 Ill. App. 260.

The state of Missouri has concurrent jurisdiction with the state of Kansas over offenses committed on the Kansas side of the Missouri river. *State v. Metcalf*, 65 Mo. App. 681.

To sustain a conviction of a prosecution for murder committed on a river constituting the boundary of Wisconsin, under an allegation that it was committed in a certain county therein, it is sufficient to prove that the mortal wound was given in such county if the deceased died anywhere upon such river neither above nor below the county line of that county bordering thereon, in view of the provision of the Wisconsin Constitution declaring that it shall have concurrent jurisdiction on all rivers and lakes forming a common boundary between it and any other state or territory. *State v. Cameron*, 2 Chand. (Wis.) 172, 2 Pinney (Wis.) 490.

The district courts of the state of Iowa, in counties bordering on the Mississippi river, have jurisdiction of offenses committed anywhere on the waters thereof, although such offenses were committed beyond the middle thread of the stream, under the act of Congress giving the state of Iowa concurrent jurisdiction on the

and piers on the St. Croix river contained in the Minnesota law, this language was used: "It does not in terms give such authority upon lands or waters of Wisconsin. Since the charter was granted by Minnesota alone, the defendant's authority to so enter upon and occupy would seem to be confined to the territory of Minnesota, and in no event to reach beyond its jurisdiction. The line between the two states at the points in question is 'the main channel of' the St. Croix."

There would not seem to be much doubt but that, if we were to take the view which counsel for appellant does of the scope of the decision in the *Keator Case*, and adhere to it as the law, and defendant would in his own state be protected in what he did by its laws, he should be held equally protected

by the laws of this state. Its jurisdiction is not invoked to enforce the law of Minnesota, but simply to protect its officer in the enforcement of its own laws within the territory within which he had a right to go for that purpose if the whole authority of his state could be legitimately exercised therein. However, we cannot come to the conclusion that "concurrent jurisdiction" was used by Congress in the broad sense of whole sovereign authority. That would be inconsistent with the decision of the Federal court in *Mississippi & M. R. Co. v. Ward*, 2 Black. 485, 17 L. ed. 311, as we have seen. It held, in a situation similar to the one involved here as regards the concurrent power of two states, that a permanent object in the river on one side of the main channel thereof, be-

Mississippi river. *State v. Mullen*, 35 Iowa, 199.

The states of Ohio and Virginia have concurrent jurisdiction of crimes and offenses committed on the Ohio river between such states. *State v. Stevens*, 1 Ohio Dec. Reprint, 82.

On the part of New Jersey the claim of the state of Delaware to the whole of the Delaware bay to low-water mark on the New Jersey shore, though resisted to its full extent, has been partially acceded to and acknowledged; and, for the purpose of punishment of crimes committed on its half of the bay, the jurisdiction of Delaware extends as far as the middle of the bay, jurisdiction to that extent never having been disputed by New Jersey. *State v. Morris*, 1 Harr. (Del.) 325, note.

The courts of Indiana have concurrent jurisdiction of crimes committed on the Ohio river opposite her boundaries under the Virginia donation act, although the state boundary line extends only to low-water mark on the Indiana side. *Carlisle v. State*, 32 Ind. 55.

The courts of Indiana, by virtue of the act of Virginia erecting Kentucky into a state, and as ratified and accepted by a constitutional provision and express statutes of Indiana, have jurisdiction concurrent with those of Kentucky of offenses committed on a boat anchored opposite the state in the Ohio river below low-water mark in selling intoxicating liquors without a license in violation of an Indiana statute; and in such case it is proper to charge in the indictment that the offense was committed in the county opposite the place where the boat was anchored, and it is no defense that the law makes no provision for granting licenses to sell liquor on the Ohio river. *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883.

The courts of Minnesota have jurisdiction of the offense of larceny from the person, committed on the Wisconsin side of the main channel of the Mississippi river on the wagon bridge which spans the river at Winona, over an island separated from the Wisconsin shore by non-navigable water which supports the bridge through piles, and which is subject to overflow, under the Wisconsin and Minnesota enabling acts giving each state concurrent jurisdiction on the waters of the Mississippi river. *State v. George*, 60 Minn. 503, 63 N. W. 100.

A crime committed on a bridge over the Delaware river is within the interstate compact of 1786 between Pennsylvania and New Jersey 65 L. R. A.

giving concurrent jurisdiction over offenses committed "on said river," as that refers to all places between the two shores. *Com. v. Shaw*, 8 Pa. Dist. R. 509.

A boat used as a house of ill fame, kept on the Mississippi river, although it may rest on the soil of an island for a portion of the time during low water, is within such concurrent jurisdiction. *State v. Mullen*, 35 Iowa, 199.

The rule is different where the vessel is fast to a pier. Thus, a crime committed upon a ferryboat fastened at the time to the dock on the east bank of the Mississippi river is within the jurisdiction of the state of Illinois; and the fact that the accused was convicted and punished in Iowa, upon the opposite side of the river, for the same crime, does not constitute a bar to his conviction in the former state, as the crime for which he was convicted in Iowa was alleged to have been committed within the jurisdiction of that state, and therefore cannot be regarded in law as the same offense as that committed in the state of Illinois. *Phillips v. People*, 55 Ill. 429.

Under the agreement between Pennsylvania and New Jersey of 1783, giving each state concurrent jurisdiction on the Delaware river, when one state has apprehended, and therefore had jurisdiction of, one committing an offense on the river, he cannot be arrested in the other state for the same offense. *Com. v. Frazee*, 2 Phila. 191.

Jurisdiction of civil actions.

The courts of Indiana have jurisdiction of an action for the wrongful death of a person at a point on the Ohio river opposite that state while a passenger on a steamboat, by virtue of the Virginia compact giving it concurrent jurisdiction with Kentucky on that river. *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527.

The states of Wisconsin and Minnesota have concurrent jurisdiction upon the St. Croix river and its waters, the same being a common highway between them; and, for an injury resulting in the death of a party while navigating its waters, an action may be brought in the proper court in Minnesota, and the jurisdiction of the court is not affected by the fact that the boat was at the time on the Wisconsin side of the center of the stream. *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575.

An action of trespass can be maintained

ing wholly within the territorial limits of the state on that side, is subject to judicial control solely by the courts of and for such state. Following that, as we have seen, courts have universally held that the words "concurrent jurisdiction on" the river have reference only to violations of law on the waters of the river, actually or constructively. In *Buck v. Ellenbolt*, 84 Iowa, 394, 15 L. R. A. 187, 51 N. W. 22, it was held that the effect of *Mississippi & M. R. Co. v. Ward* was to restrict the words "concurrent jurisdiction" to actions in some way connected with the navigation of the river,—things on the river. This language was used: "It has never been held that the jurisdiction of this state extends to the east shore of the channel of the Mississippi river in any case except where

against a steamboat for an assault and battery committed by one of its officers on the person of a passenger on board while such boat was navigating a river within or bordering on the state of Illinois, under a statute providing that steamboats and other water craft navigating such rivers shall be liable for any damage or injury done by the officers thereof, or by any person under the order or sanction of either of them, to any person who may be a passenger or hand on such boat at the time such injury was inflicted. *Loy v. The F. X. Aubury*, 28 Ill. 412, 81 Am. Dec. 292.

The district court for the district of Oregon has concurrent jurisdiction over the Columbia river as to matters or things actually arising or situated upon the river. *The Annie M. Smull*, 2 Sawy. 226, Fed. Cas. No. 423.

The Missouri statute giving damages for injuries resulting in death is applicable, and may be enforced, in a suit between Missouri citizens for negligent killing upon the Mississippi river near the Illinois shore opposite the state of Missouri. *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. 26, 3 L. R. A. 390, 10 S. W. 595.

The courts of Indiana have jurisdiction of an action to recover damages for the death of a person from injuries received while a passenger on a vessel navigating the Ohio river opposite the Indiana shores, caused by a collision and the burning of the boat, by virtue of its concurrent jurisdiction on that river, which it had asserted and exercised prior to the injury by constitutional provisions and appropriate legislation; and, to make a statute applicable there, it is not necessary that the legislature should expressly so declare. *Sherlock v. Alling*, 44 Ind. 184.

Process.

The lack of harmony among the courts as to the true meaning of the grant of concurrent jurisdiction is illustrated by a Kentucky case, which holds that the concurrent jurisdiction over the Ohio river, granted by the Virginia compact to the states bordering thereon on the northern side, refers only to legislative jurisdiction for the purpose of insuring to those states the free and unobstructed navigation of that river, and does not refer to civil and criminal cases; so that the service of a summons by an officer of Indiana upon a person while he is on a steamboat in the Ohio river south of low-water mark on the Indiana side, and therefore within the limits of the state of Kentucky, does 65 L. R. A.

the act complained of or cause of action was founded upon something connected with the commerce of the river." That statement, of course, was not intended to exclude a mere arrest or service of process on the river as regards causes of action accruing elsewhere. It should be restrained to just what the court was discussing,—that is, to causes of action arising on the river within the boundaries of one state which are cognizable in the courts of the other state. By reference to the former decision of the court (*Gilbert v. Mothe Water Power & Mfg. Co.* 19 Iowa, 319) the court said, in effect, that concurrent jurisdiction on the river was given so that causes of action, civil and criminal, accruing upon the water might be prosecuted in the courts of either state, and that, for the

not thereby confer jurisdiction upon an Indiana court to render a personal judgment against him, although that state claims such jurisdiction under a provision of its Constitution. *Meyler v. Wedding*, 107 Ky. 310, 53 S. W. 809.

It would seem that that decision cuts off as much of what was intended to be granted by the grant of concurrent jurisdiction as *Sherlock v. Alling*, 44 Ind. 184, adds to it.

The state of Ohio, and the states of Kentucky and Virginia, have concurrent jurisdiction over the entire waters of the Ohio river between Ohio and the latter states, under the terms of the cession of the Northwest Territory by Virginia. *State v. Hoppess*, 1 Ohio Dec. Reprint, 105, 115. The court says that for the service of civil and criminal process it has been repeatedly decided in our courts that the jurisdiction of Ohio and Kentucky was concurrent over the waters within the banks of the river, without reference to high or low water mark, although it is true that it has been decided that, if a boat was attached to either shore, for the purpose of civil or criminal process, the jurisdiction was exclusive in the state to which it attached.

The Potomac river being the boundary between Maryland and Virginia, and by compact between those states being made a common highway for navigation and commerce, those states have concurrent jurisdiction over it as a matter of necessity; and, as the District of Columbia was acquired and the Virginia portion retroceded subject to such compact, admiralty process from the eastern district of Virginia may be served on the waters of the river below Georgetown within the boundaries of Alexandria county. *Atcheson v. The Endless Chain Dredge*, 40 Fed. 253.

The district court for the southern district of Ohio has admiralty jurisdiction over a boat seized while lying at a wharf on the Ohio side of the river, which was at high-water mark. *The Cheeseman v. Two Ferryboats*, 2 Bond, 363, Fed. Cas. No. 2,633.

But boats on the Ohio river, made fast to the Ohio shore, are not subject to the jurisdiction of Kentucky for the service of process. *Eckert v. Colvin*, 1 Ohio Dec. Reprint, 11.

V. Effect of change of channel.

If the river turns out of its channel and runs into one of the states the old channel remains the boundary. *Vattel*, Law of Nations, bk. 1, chap. 22; *Indiana v. Kentucky*, 136 U. S. 479,

purposes of each such cause of action, the courts of each state should deem its laws extended to the opposite shore.

We should observe in passing that in the *Keator Case* the decision in the Federal Supreme Court in *Mississippi & M. R. Co. v. Ward* was referred to and the force thereof as regards restricting the meaning of the term "jurisdiction on the river" to narrower limits than the whole sovereign power of the state was observed. But it was in effect suggested that the court could not see that such case applied to the boundary rivers of this state, since the states on both sides of the boundary have concurrent jurisdiction over the waters, while, so far as advised, the state of Iowa did not have concurrent jurisdiction with the state of Illinois over the Mississippi river between the two states. The court failed to discover, as the fact is, that the act admitting Iowa into the Union contains precisely the same provision as that in regard to this state in respect to concurrent jurisdiction over boundary waters. The act will be found set out in full in the Annotated Code of Iowa, published in 1897, at page 55. That particular part material to our consideration is on page 56, and contained in § 3. Here is the language: "The said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state and any other state or states, now or hereafter to be formed, or

bounded by the same; such rivers to be common to both."

We should also not fail to note that this court, in *State v. St. Croix Boom Corp.* 60 Wis. 565, 19 N. W. 396, in harmony with *Mississippi & M. R. Co. v. Ward*, held that, though the jurisdiction of the state of Wisconsin and that of Minnesota is concurrent on the St. Croix river between the two states, the jurisdiction of this state as regards obstructions in the river could not extend beyond the main channel thereof.

We have still to determine whether the concurrent jurisdiction under discussion permits one state to invade another and regulate common rights of fishing therein. In none of the cases to which we have referred are we able to find the term "concurrent jurisdiction on the river" accurately defined. That it has a specific, rather than a general, meaning, however, is plain from what has been said. The meaning is something less than whole sovereign authority of the states. All the cases in other jurisdictions that we have discussed are to the effect that it pertains only to acts or causes of action on the water or in some way connected with the navigation thereof, or floatable purposes of some kind, or to the service of process upon persons while on the water in some sense. But the precise reason for the restricted meaning of the law is nowhere very satisfactorily given, that we have been able to discover, so that we may see just what subjects jurisdiction on the water extends to. It is said that the purpose of conferring con-

34 L. ed. 329, 10 Sup. Ct. Rep. 1051; *Missouri v. Kentucky*, 11 Wall. 395, 20 L. ed. 116; *Holbrook v. Moore*, 4 Neb. 437.

The boundary remains as it was before, in the center of the old channel, although no water may be flowing therein. *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396.

A sudden shifting of the channel of a navigable river so as to place a large tract of land, formerly in the bed of such river, upon the opposite side thereof, does not thereby alter the status of the title thereto, but the abandoned channel remains, as before, the boundary between the sovereignties on the opposite sides of the river. *Moss v. Gibbs*, 10 Helsk. 283.

Where, by avulsion, a river forming the boundary between two states changes its course so that the boundary remains in the old river bed, the line of the center of the old navigable channel will constitute the boundary when it can be ascertained, and not the center of the old bed of the river measuring from bank to bank. *State v. Keane*, 84 Mo. App. 127.

A change in a state boundary lying in the center of a river is not wrought when the stream is suddenly diverted to an artificial channel, although the local authorities of both states for many years thus treat and regard it. *State v. Young*, 46 Vt. 585.

Where the river forming the boundary between two states has suddenly changed its course and deserted its original channel, so that the boundary remains in the middle of the de-

serted river bed, the adjoining states do not exercise concurrent jurisdiction over the land forming such river bed, as they did over the river when it flowed there. *Cooley v. Golden*, 52 Mo. App. 229.

Service of process upon a defendant residing on an island recently formed by the cutting off of a point of land forming part of the county, from the court of which process issued, gives the court jurisdiction of the defendant, although the channel of the river which cut off the island is the state boundary, and although the main channel was at the time process was served between the mainland and the island. *Holbrook v. Moore*, 4 Neb. 437.

But this rule does not apply to changes of diminution and accretion by the mere washing of the stream. The boundary is a varying line so far as these slight changes of the river may change it. On the other hand, a change of channel by cutting through a neck of land around which the river formerly flowed in a course shaped like an oxbow leaves the boundary line where it was, in the middle of the old channel. The principle applicable to avulsion applies in the latter case, instead of that applicable to mere accretions. *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396.

In the case of the *Arctianous Boundaries*, 8 Ops. Atty. Gen. 175, it is said that in case of a river, the middle thread of which forms the boundary between two nations, the convenience of allowing it to retain its previous function,

current jurisdiction was to render immaterial, in the courts of the state assuming jurisdiction over a particular matter, upon which side of the main channel of the river it happened. Undoubtedly the term had a well-understood meaning at the time the act was passed admitting or enabling Wisconsin to be admitted into the Union. Many similar acts had theretofore been passed by the national Congress. The set phrase "jurisdiction on the river" had theretofore been used in all of them and in many laws or compacts between the states, or between the states and the general government, or between the colonies, reaching back to a period before the formation of the national Constitution. There is an identity of language in the various provisions on the subject from first to last indicating a pretty well-understood purpose at the beginning. That purpose, doubtless, though not definitely understood from the adjudications on the subject, has been carried forward to this day. Certainly, authority in this country has been concurrently exercised uniformly by states or governments upon boundary waters, and it has been as uniformly called "concurrent jurisdiction on the river (or water)." In very early decisions it will be found that, without referring to any specific law on the subject, concurrent jurisdiction upon boundary waters was recognized to exist. Before the formation of the national Constitution the state of Virginia and the state of Maryland, by some sort of compact, exercised authority which was denominated "concurrent

jurisdiction on the waters" washing their respective shores. In the Virginia act of December 18, 1789, creating the district of Kentucky as a state, it was provided that "jurisdiction on the river, etc., shall be concurrent." 1 Va. Rev. Code, p. 59; 1 Gavin & H. (Ind.) Stat. § 57. A similar provision was made in ceding the Northwest Territory to the United States. In *McFall v. Com.* (1859) 2 Met. (Ky.) 394, regret was expressed that even at that late day the exact scope of the term was not plain beyond reasonable controversy. These remarks were made by the court: "It is a part of the legislative history of the country that negotiations having in view the settlement of those questions have been several times attempted. And it may not be out of place here to express the hope that the whole subject may be finally disposed of in such manner as to secure the concurrent rights of, and to preserve the amicable relations which should continue to subsist between, the several states interested in its adjustment."

Though it was not necessary in that case to even attempt to decide the controversy suggested, the court ventured to say that "the word 'jurisdiction,' as applied to a state, and as used in the compact with Virginia, imports nothing more than the power to govern by legislation." In connection with that, the court suggested that, without some legislative enactment to enforce and carry out the jurisdiction conferred, it would not of itself be regarded as operative or effectual to protect a person in the courts of one state

notwithstanding insensible changes in its channel by accretion or erosion, outweighs the inconvenience even to the injured party involved in a detriment, which happens gradually and inappreciably in the successive moments of its progression; but the old bed continues to be the boundary, if the course of the stream is abruptly changed.

Where the boundary between two states is made the bank of a river each will continue to hold according to its original title notwithstanding the changes from washings, the abrasions from extraordinary floods, or from any of those sudden causes which in nature change the beds of rivers. *Howard v. Ingersoll*, 13 How. 425, 14 L. ed. 208.

If by the natural effect of the current one side increases while the river gradually encroaches on the opposite bank the river still remains the natural boundary of two territories. *Vattel*, Law of Nations, bk. 1, chap. 22; *Bellefontaine Improv. Co. v. Niedringhaus*, 181 Ill. 426, 55 N. E. 184; *St. Louis Bridge Co. v. People*, 125 Ill. 226, 17 N. E. 468; *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913.

Where a stream, being a boundary between a state and Indian lands, alters its channel by a gradual process of wear, the boundary shifts with the channel; but, if it changes it violently and visibly, as by making a "cut off," the boundary adheres to the abandoned channel. *Collins v. State*, 3 Tex. App. 323, 30 Am. Rep. 142.

65 L. R. A.

In the absence of treaty stipulation to the contrary, the doctrine of accretion and alluvion applies even to a stream that constitutes a boundary between two nations. *Denny v. Cotton*, 3 Tex. Civ. App. 634, 22 S. W. 122.

So, in *Nebraska v. Iowa*, 143 U. S. 369, 36 L. ed. 190, 12 Sup. Ct. Rep. 396, the court says that, by reason of the character of the soil through which the Missouri river runs, and the swiftness of the river at times of high water, the washing causes an instantaneous fall of quite the length and breadth of the superstratum of soil into the river, so that it may in one sense of the term be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. And the court says that while the disappearance, by reason of this process, of a mass of bank, may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The only thing which distinguishes this river from other streams in the matter of accretion is in the rapidity of the change created by the velocity of the current; and this in the very nature of things works no change in the principle underlying the rule of law in respect thereto. The law of accretion continues, and that even in case of the boundary line of states.

And the principle of that case was followed in *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550.

H. P. F.

or affect the right of a tribunal in such state as to the enforcement of its laws made with a view to such jurisdiction.

Going back from the Virginia enactment to which we have referred, we find that the provision as to concurrent jurisdiction on water like a lake or river divided by the boundary line between two sovereignties was but an embodiment of international law. Without any compact between the sovereignties so divided, they were accustomed to exercise concurrent jurisdiction on the same from the law of necessity. So, jurisdiction was not so much conferred in the various instances where the language under consideration was used in compacts or other laws, as it was declared and confirmed. Gardner's Institutes, p. 210. That author, at page 209, says: "It is a principle of American public law that where the middle of a navigable river, lake, or bay, forms the dividing line of states, or an intangible line upon their waters, a concurrent jurisdiction, civil and criminal, arises over such waters to the states upon the opposite shores. It extends over the whole of the dividing waters, unless it was otherwise stipulated before the adoption of the Constitution of the Union by state compact, or since, by such compact, with the assent of Congress."

That is, according to the author, the concurrent jurisdiction upon boundary waters is presumed to exist by the law of nations and by public law in the absence of some written law to the contrary. Such declarations as that contained in the Virginia act of 1789, and those that have been modeled thereon, including those involved in this case, are but declarations of existing law.—law that would be assumed to govern in the absence of some written law to the contrary. The author we have quoted further says (p. 210): "The same principle is applicable to all cases among nations where their boundaries divide navigable waters. The line being incapable of sight and ready perception, a concurrent jurisdiction, of necessity, must exist on the dividing waters. The navigable rivers, bays, and Great Lakes divided by the boundaries of our Republic and the British provinces, and Mexico, are, by national comity and necessity, subject to such concurrent jurisdiction. In all cases of such . . . jurisdiction the state first arresting or prosecuting a party is, by comity, entitled to proceed to final judgment; and that is a bar to any retrial by any other state of our Union for the same cause or offense."

That is in harmony with *Sherlock v. Alling*, 44 Ind. 184.

Without proceeding further in our investigations, we are satisfied that the term "concurrent jurisdiction" was used in the acts admitting, or providing for the admission of, 65 L. R. A.

Wisconsin and Minnesota into the Union in the same sense in which it had theretofore been used as applicable to similar situations, both in written and unwritten laws,—in the same sense that it is said concurrent jurisdiction exists by comity of nations upon waters divided by their boundary line, unless otherwise provided by some written law.

Tested by the principle above adopted, do the mere police regulations of one country regarding the exercise of the common right of fishing extend into the territory of a foreign jurisdiction, the two being separated by an imperceptible boundary line in a river or lake? Is the common right of fishing which belongs to the people of this state within all that part of its territory on the easterly side of the main channel of the Mississippi river subject to the laws of the state of Minnesota? There is no escaping the conclusion that, if such is the case, it is competent for that state to extend its police regulations as regards fishing and hunting over a large part of the waters of Lake Superior on the Wisconsin side, reaching up to the shore line, and for the state of Michigan to extend its laws on Lake Michigan on the same subject to the Wisconsin shore. We have searched in vain to find authority to sustain the affirmative of the proposition suggested. In no instance recorded in the books has one country been held entitled to exercise jurisdiction to regulate the common right of fishing in the territory of a foreign state under the measure of concurrent jurisdiction commonly exercised by the two on the waters divided by their boundary line. We venture to say that such concurrent jurisdiction has never been successfully invoked to justify interferences by one state or country with the enjoyment of the right to fish within the territorial boundaries of the other. It would be foreign to the necessities of this case to enter into a discussion regarding the limits of that jurisdiction. It is sufficient for this case that we have reached the conclusion that, while it refers to acts of a criminal or civil nature on the water, or acts in some way connected with the use of the water for navigable purposes, it does not extend to the right of one state by legislative enactment to govern the fishery rights of the people in a foreign jurisdiction. As we have before seen, this country and the British provinces exercise concurrent jurisdiction over the waters divided by their boundary line, and the same is true as to this country and Mexico. No one would venture to say that one country could enforce its laws for the preservation of fish or regulating the taking of fish within the territorial limits of the other. It is to be regretted that the nature of the

authority on waters of the Mississippi, exercisable by Wisconsin and Minnesota, has not been heretofore definitely decided. No court has yet dealt with the subject, or the meaning of the language requiring construction in similar situations, so as to cover the whole thereof satisfactorily, if at all. Many judges have deplored the uncertainty existing, but have found a convenient way of escaping the labor of removing it. The interests at stake are so great that it is not to be wondered that anyone appreciating the same should hesitate long before entering upon the difficult task of solving completely the troublesome question suggested. There is a consensus of opinion that concurrent jurisdiction does not mean concurrent dominion, and that it refers only to things afloat or on the water in some reasonable view of the situation, or so circumstanced as to be legitimately regarded as connected with the use of the water for navigable purposes. That is about as far as the courts have gone. In *Garner's Case*, 3 Gratt. 655, 676,—a case decided in a jurisdiction where, if anywhere, we would expect the term under discussion to have had a well-defined and well-understood meaning at an early day,—while the judges in lengthy opinions severally referred to it, not one of them attempted to define it. Judge Taliaferro said, it refers "only to things afloat" at best. "The question is a very important one, and I decline stating any opinion, when it does not necessarily arise in the case." Justice Fry said (p. 752): "What is the precise meaning of 'concurrent jurisdiction' I am not prepared to say. It strikes me as equivalent to 'common.'" It is our opinion that the term refers to that authority commonly exercised concurrently upon water divided by the boundary line between two countries, according to the public law as recognized in this country at the time the use of the term became common in our legislative history; that it relates to matters at least in some way connected with the use of the water for navigable purposes, to things afloat, or in some legitimate sense on the water,—things difficult to deal with if it were necessary to determine in each instance of the exercise of jurisdiction the precise location of the particular act involved as regards the boundary line; but that it does not include the right to regulate the enjoyment, by the people of one state within its domain, of rights incident to their situation, such as the right to navigate or fish. It does not empower one state to spread its mere police regulations over territory of another, regulating the sovereign property right of the latter in or to the water flowing over such territory, or to the fish therein or fowls thereon, which it holds in trust for the en-

joyment of the whole people within its boundaries, in their individual capacities, under such legal restraints as such other, in its legislative wisdom, may see fit to impose,—so long as such enjoyment does not interfere, unlawfully, with like enjoyment by the people of the state on the opposite side of the boundary.

The result is that *the order of the Circuit Court sustaining the demurrer must be affirmed.*

So ordered.

Dodge, J., dissenting:

I cannot concur in the conclusion reached by the court in this case, for the reason that I am unable to distinguish between criminal and police legislation of the state addressed to the subject of catching or destroying fish, and police or criminal legislation relating to other subjects. That the concurrent jurisdiction enjoyed by the several states of the Union over the water boundaries separating them from other states includes the promulgation of such legislation extending over such boundary waters, and the enforcement thereof in the manner prescribed by such legislation, whether by courts or by executive officers, is supported by the whole current of authority, and, so far as my examination has gone, is denied by no decided case. In *McFall v. Com.* 2 Met. (Ky.) 394, it is said: "Jurisdiction, . . . as used in the compact [for concurrent jurisdiction], . . . imports nothing more than the power to govern by legislation;" and in that case was sustained a conviction of an Ohio justice of the peace for solemnizing a marriage midway upon the Ohio river, contrary to the statutes of Kentucky, for the reason, expressly stated, that no statute of Ohio expressly authorizing him so to do had been pleaded or shown. In *Carlisle v. State*, 32 Ind. 55, it was held that the statutes of Indiana prescribing the facts which should constitute murder, and the punishment therefor, applied to an offense committed outside of its territorial boundary, but upon the Ohio river, over which that state has concurrent jurisdiction. In *Sherlock v. Alling*, 44 Ind. 184, and *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527, it was held that the statutes of Indiana imposing liability in damages for negligently causing death extended over the Ohio river by virtue of the same provision, and applied to persons navigating the same, independent of citizenship. In *Dugan v. State*, 125 Ind. 130, 9 L. R. A. 321, 25 N. E. 171, laws prohibiting Sunday labor were held so applicable to one acting as a pilot upon the river, but not engaged in interstate commerce; and in *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883, a statute prohibiting the sale

of intoxicating liquor without a license was so applied. In *State v. Mullen*, 35 Iowa, 199, a statute of Iowa against maintaining a house for prostitution, and authorizing its seizure and condemnation, was held to apply to a houseboat moored on the Illinois side of the Mississippi river, and to justify arrest of the offender there, and seizure and condemnation of the offending implements and property. In *State v. George*, 60 Minn. 503, 63 N. W. 100, the concurrent jurisdiction was held to warrant conviction under the Minnesota laws for larceny committed on a bridge across the Mississippi river, at a place east of the center of the stream, and therefore over Wisconsin territory; the court having first held that the act upon the bridge crossing the river was equivalent to the same act upon the surface of the river. It was there said: "Some of the purposes of this concurrent jurisdiction are to enforce proper police regulations on the river." The principle of these cases was adopted at a very early day in Wisconsin in *State v. Cameron*, 2 Pinney (Wis.) 490, 495, where it was decided that, by virtue of the concurrent jurisdiction of Wisconsin over the Mississippi river, its laws defining and punishing murder extended over those waters, and justified prosecution and punishment for a crime there committed, but outside of Wisconsin territory. Again, in *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 72 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529, it is decided that "concurrent jurisdiction" does not mean "joint jurisdiction," in the sense that only legislative acts adopted by both states can have effect over the boundary waters. General discussion of the subject will be found in Rorer, *Inter-State Law*, chap. 34.

As I have already said, no case has been found or cited negating the principle announced by these cases and already adopted by our own state. Their authority is at least not expressly questioned in the opinion filed on behalf of the court in this case; nor is there suggested any reason why, upon that principle, the concurrent jurisdiction "does not include the right to regulate the enjoyment, by the people of one state, within its domain, of rights incident to their situation, such as the right to navigate or fish." As I have already said, I am wholly unable to see why the conduct of a man in fishing upon a river is not as legitimately the subject of police regulation as the conduct of the man who is selling liquor, piloting a boat, or maintaining a disorderly house. At many places in the United States, harbors are situated so as to be within the concurrent jurisdiction of different states. These harbors must be policed, and, subject to the paramount authority of the United States when that authority is exercised, the 65 L. R. A.

safety of the use of that harbor must be preserved. The speed of boats, the giving of signals, the carrying of lights, the location for purpose of anchorage,—all are subjects customarily regulated, in some degree at least, by the local authorities, and are, it seems to me, directly within the scope which has been accorded to this concurrent jurisdiction. It is said in the opinion of the court, speaking of the Great Lakes between Canada and the United States, as in analogy to the case of states with concurrent jurisdiction, that "no one would venture to say that one country could enforce its laws for the preservation of fish, or regulating the taking of fish, within the territorial limits of the other." If this means upon the coterminous water boundaries, and it were conceded that concurrent jurisdiction existed in the same sense that it does by express provision between adjoining states, I think this assertion is rather too broad. I, for one, do venture the opinion that in such case each country could assert the right to regulate and punish certain methods of taking fish, dangerous to or destructive of the industry. Strangely enough, no case is cited in which such right has so much as been questioned, while, in the argument of so distinguished a lawyer and jurist as Mr. Phelps before an international tribunal, it was gravely contended, and of course sincerely, that, even upon the high seas, reasonable and proper regulation of the taking of fish by one country would, on the doctrine of comity, be deferred to by others, and permitted to be enforced against their citizens. 1 Moore's *History & Dig. of International Arbitrations*, p. 843. Further, it is discoverable that, in the compact between New York and New Jersey defining the middle of the harbor as the territorial limit, and granting to New York jurisdiction over the entire waters, New Jersey expressly excepted and reserved the right to regulate fisheries in her part of the harbor, clearly evincing the understanding of the parties that otherwise jurisdiction included authority for such regulation, and exclusive jurisdiction in New York would exclude New Jersey therefrom. Article 3, § 3, Compact New York & New Jersey, printed in 48 Barb. 505.

I do not discuss what is made the basis for a considerable portion of the court's opinion, namely, the question whether, under any circumstances, one state can prevent the obstruction and impairment of the usefulness of the river by permanent structures so affixed to the ground that they become, not river, but part of the solid territory of the opposing state, on which see *People v. Central R. Co.* 48 Barb. 478. I forego this discussion for the reason that the question is not here presented. It is

ruled in the opinion, with my entire concurrence, that the placing of the net in the waters of this lake gave it none of the characteristics of such fixture; that it no more became a part of the land of Wisconsin than would a boat because anchored to the bottom, which was the case presented in *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883.

A suggestion was made in argument that, by recognizing the law of Minnesota as a justification to her officer, we should, in effect, be enforcing her criminal laws, which, confessedly, no other sovereignty can do. *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. Such argument embodies a fallacy. It would not be enforcing the criminal laws of Minnesota to merely recognize that they constitute a defense to her officers when acting under them within her jurisdiction. The argument, if sound, would make every sheriff liable in trespass for every arrest whenever personal jurisdiction over him could be acquired in any other state, for he must admit the trespass, and could not invoke the law of his official residence and action as a defense.

To summarize my view: This state, having decided that its concurrent jurisdiction enables it to define and punish a crime upon boundary waters but in the territorial limits of Minnesota, cannot deny to that state the same right upon those waters.

George L. ARENTSEN

v.

John E. MORELAND *et al.*

(.....Wis.....)

1. A contract to sell "all the lands" controlled by the vendor is not performed by a tender of a deed subject to a contract giving a third person the right to remove all the saw timber therefrom.
2. Knowledge by one contracting to purchase real estate that the vendor has only an option contract to purchase, and has contracted to sell the saw timber on the land to a third person, will not deprive him of his right to damages for loss of his bargain in case the vendor refuses to convey anything except the land free from the timber.

(*Siebecker, J., dissents.*)

(April 19, 1904.)

CROSS-APPEALS from a judgment of the Circuit Court for Sawyer County in favor of plaintiff for a less sum than demanded in an action brought to recover dam-

NOTE.—As to measure of damages for breach of contract to convey, see also, in this series, *Johnson v. McMullin*, 4 L. R. A. 670, and *note*, and *Morgan v. Bell*, 16 L. R. A. 614. 65 L. R. A.

ages for breach of contract to convey real estate; plaintiff appealing from so much of the judgment as refused a portion of the relief claimed, and defendants appealing from so much as refused to compel the plaintiff to accept the deed tendered. *Reversed on plaintiff's appeal.*

Statement by **Cassoday**, Ch. J.:

This action was commenced October 16, 1903, to recover \$37,926, damages alleged to have been sustained for the breach of the written contract of which the following is a copy:

This agreement, entered into this 4th day of July, 1903, by and between Moreland & Pugh, of Hayward, Wis., parties of the first part, and Geo. L. Arentsen, of Hayward, Wis., party of the second part, witnesseth: The party of the first part agrees to give the party of the second part an option of ninety days (90) on all the lands they now control, belonging to the North Wisconsin Lbr. Co. excepting the west $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ Sec. 24, all the above lands situated in town 43, R. (8) west, Bayfield county, Wisconsin, about (8,500) acres. Consideration of the above option is to be three hundred dollars (\$300).

One hundred (\$100) in hand paid.

One hundred (\$100) in thirty (30) days from date.

One hundred (\$100) in sixty (60) days from date.

The purchase price of the above lands is to be three dollars (3.00) per acre.

Moreland & Pugh. [Seal.]

Geo. M. Arentsen. [Seal.]

Witness:

F. L. Clark.

C. P. Hendrickson.

After alleging the making of such contract the complaint alleges, in effect: The payment by the plaintiff of \$100 at the time of the delivery of the contract; \$100, July 8, 1903; and the last instalment of \$100 therein mentioned soon after the last-mentioned date, and prior to September 3, 1903. That a short time prior to September 26, 1903, the plaintiff, under the option in the contract, elected to purchase the lands therein referred to pursuant to the terms thereof, and so notified the defendants. That on the day and year last mentioned the plaintiff was ready, able, and willing to purchase from the defendants the lands described in the option contract, pursuant to the terms thereof, and personally demanded of the defendants the conveyance of the lands therein mentioned, and then and there offered to the defendants to accept a conveyance of the lands, and to pay the consideration in the

option contract mentioned therefor, and in all other respects to fulfil said option agreements on his part. That the defendants then and there refused to convey, and refused to furnish a conveyance of, said lands to the plaintiff, and declared then and there that they had so encumbered the said lands, by a contract of sale of all saw timber thereon, that they were unable to convey said lands, except by a conveyance reserving and excepting therefrom the saw timber thereon. That the land mentioned in said option contract is timber land, and chiefly valuable on account of the standing saw timber thereon. That the defendants could not, September 26, 1903, nor since, nor can they now, convey a marketable title, nor cause to be conveyed a marketable title to said lands; but, on the contrary, the title to said lands was at all said times, and still is, encumbered by the contract of sale to Rogan Brothers, of Cable, Wisconsin, of all of the saw timber on about 7,800 acres of said lands, by which contract said defendants had sold to said Rogan Brothers, for a consideration of \$5,000, all the saw timber on about 7,800 acres of said lands, granting to said Rogan Brothers three years from July 21, 1902, in which to remove said timber from said lands; and by reason of the refusal, neglect, and failure of the defendants to convey or cause to be conveyed said lands to the plaintiff, and the defendants' refusal, neglect, and failure to comply with the terms of said option contract on their part, the plaintiff has been damaged in the sum of \$37,926, for which amount he demands judgment, with costs. The defendants answered by way of admissions, denials, and counter allegations, to the effect: That July 21, 1900, the defendants entered into a contract with the North Wisconsin Lumber Company, the owner in fee simple of the lands in question, for the purchase thereof, a copy of which is annexed and made a part thereof, and marked "Ex. A," and which contained a specific description of the lands thereby affected, amounting to 8,508 acres. That the defendants had fully complied with the terms of their contract with the North Wisconsin Lumber Company, and the same was still in full force and effect. By the terms of that contract, and in consideration of \$5,000 therein agreed to be paid by the defendants, the North Wisconsin Lumber Company sold to the defendants, and warranted the title to them of, all the timber on the lands so described therein, with the privilege of entering thereon for five years to remove the timber. That such contract was to be closed by limitation July 21, 1905, and the defendants on said last-mentioned date were to have the privilege of purchasing the North Wisconsin Lumber Company's title

to the lands listed at \$2.50 per acre, as of July 21, 1900, with interest at 6 per cent, and taxes from that date, less the payment of \$5,000, and interest at the same rate. The answer admits the making of a contract for the sale of the timber with Rogan Brothers, and alleges, in effect, that September 13, 1902, they sold and conveyed to Rogan Brothers all the saw timber situated upon the lands specifically described in their contract with them, a copy of which is thereto annexed and made a part thereof, and marked "Ex. B," and that the same was still in full force. By the terms of that contract the defendants, in consideration of \$5,000 to be paid by Rogan Brothers, agreed to sell to them, and warrant the title to, all the saw timber on the lands therein described, with the privilege of entering thereon to remove said timber until July 21, 1905, when the contract was to be closed by limitation. The defendants, further answering, allege, in effect, that, at the time of making the optional agreement with the plaintiff, he had full notice and knowledge of the defendants' contract (exhibit A) with the North Wisconsin Lumber Company and the defendants' contract (exhibit B) with Rogan Brothers, and of all the rights of all parties thereunder; that the optional agreement of the defendants with the plaintiff was intended by the parties thereto to be an option to purchase all the right, title, and interest of the defendants in and to the lands, and no more; that at the time of making the optional agreement with the plaintiff, July 4, 1903, the defendants only controlled such lands belonging to the North Wisconsin Lumber Company as were described in exhibit A, and they were subject to the rights of Rogan Brothers under exhibit B, all of which was well known to the plaintiff; that the defendants have at all times been ready and willing to convey and execute and deliver to the plaintiff a quitclaim deed of the lands described in exhibit A, or to assign that contract to the plaintiff, subject only to their contract (exhibit B) with the Rogan Brothers, and then, by way of counterclaim, the answer alleges, in effect, that July 21, 1900, the North Wisconsin Lumber Company was the owner in fee simple, free and clear of all liens and encumbrances, of the lands described in exhibit A; that on that day the defendants made that contract with that company; that September 13, 1902, they made the contract (exhibit B) with Rogan Brothers; that July 4, 1903, they made the optional contract with the plaintiff, who had full notice and knowledge of the contracts, exhibit A and exhibit B, and of all the rights of all parties thereto and thereunder; that the plaintiff had paid to the defendants the \$300 pursuant to said optional

agreement, and on or about September 26, 1903, notified the defendants of his election to purchase the lands pursuant to that agreement; that thereupon the defendants tendered to the plaintiff a warranty deed for said lands, subject to the contract (exhibit B) with the Rogan Brothers, which the plaintiff refused to accept, or to pay for the lands, and neglects and refuses to comply with the terms of the agreement; that prior to the commencement of this action the defendants tendered to the plaintiff a deed of the premises pursuant to the agreement, which the plaintiff refused to accept and to pay the purchase price, for which they demand judgment for \$25,260 damages for breach of contract. The plaintiff, by way of reply to such counterclaim, admitted that at the time of making the optional agreement with the defendants, July 4, 1903, he had knowledge of the existence of the defendants' contract (exhibit A) with the North Wisconsin Lumber Company, but specifically denies that he had notice or knowledge of their contract (exhibit B) with the Rogan Brothers until long after the making of the optional agreement of July 4, 1903; that September 26, 1903, the defendants offered to deliver to the plaintiff a deed of a certain interest in said lands by the North Wisconsin Lumber Company, subject to the contract with the Rogan Brothers, and subject to all the encumbrances they may or might have created or placed against the lands since July 21, 1900, which plaintiff refused to accept. And save as mentioned, or otherwise controverted, the plaintiff denies each and every allegation contained in the counterclaim.

The cause having come on for trial, and a jury having been impaneled and sworn, the defendants moved upon the pleadings for judgment as prayed for in their counterclaim, whereupon it was ordered by the court that judgment be entered as follows: "It is ordered and adjudged that the contract set out in the complaint herein be, and hereby is, canceled and rescinded, and that the plaintiff do have and recover of the defendants the sum of \$304.50, principal and interest, as damages, and \$64.99 as costs,—in all, \$369.49. From the judgment so entered, both parties appeal to this court.

Messrs. John F. Riordan and Harold Harris for plaintiff.

Messrs. Tomkins, Tomkins, & Garvin for defendants.

Cassoday, Ch. J., delivered the opinion of the court:

It is conceded that the plaintiff paid the full consideration for the optional agreement, as therein prescribed. It is also conceded

that, within the ninety days therein given to him within which to exercise his option, he elected to purchase the lands therein referred to, pursuant to the term of that agreement, and so notified the defendants. By virtue of such payment and such election and notice, the optional agreement became an absolute contract, binding alike upon the plaintiff and the defendants. The first question for consideration is as to what property the defendants, by that contract, agreed to convey to the plaintiff. By the terms of the contract, the defendants agreed to convey to the plaintiff "all the lands" they then controlled, "belonging to the North Wisconsin Lumber Company," and situated in the town mentioned, and being "about 8,500 acres," excepting one piece of 80 acres, described. As indicated in the foregoing statement, the defendants then held a contract from the North Wisconsin Lumber Company whereby that company had agreed to sell to them "all the timber on the" lands therein specifically described, amounting to 8,508 acres, with the privilege of entering upon the lands to remove such timber at any time before July 21, 1905, when the contract was to be closed by limitation. The plaintiff admits that he had knowledge of the existence of that contract on and prior to the time of his making the optional agreement with the defendants, July 4, 1903. It will be observed that, while the contract which the defendants held from the lumber company only gave them the right "to all the timber" on the lands therein described, their contract with the plaintiff purported to give to him the right to "all the lands" covered by the contract, being "about 8,500 acres." Of course, the agreement to sell the lands necessarily included the timber growing upon the lands. *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467; *Seymour v. Cushway*, 100 Wis. 590, 69 Am. St. Rep. 957, 76 N. W. 769; *Mississippi River Logging Co. v. Miller*, 109 Wis. 77, 85 N. W. 193. True, the contract with the plaintiff expressly limited his option to all such lands as the defendants "now control." But it is expressly admitted in the answer "that at the time of making said agreement all the lands controlled by these defendants, belonging to the North Wisconsin Lumber Company, were those under and pursuant to said exhibit A" which the defendants had obtained from the lumber company July 21, 1900. As indicated, that contract only gave to the defendants the right to the timber upon the 8,508 acres of land therein described, with the privilege of entering thereon to remove the same prior to July 21, 1905, and with the further privilege of five years' extension upon conditions therein named; or, in lieu of such extension, it gave to the de-

defendants the privilege, to be exercised July 21, 1906, "of purchasing the North Wisconsin Lumber Company's title to the lands listed at \$2.50 per acre as of date July 21, 1900, with interest at 6 per cent and taxes from this date—less the payment of \$5,000 and interest at the same rate." In other words, such option gave to the defendants the right to purchase the title to the 8,508 acres of lands, including the timber, as of July 21, 1900, at \$2.50 per acre, and in that event the \$5,000 paid and to be paid for the timber was to be deducted as part of the purchase price. The answer, moreover, concedes that, nearly a year prior to the contract with the plaintiff, the defendants had sold and conveyed to the Rogan Brothers "all the saw timber" on nearly all the lands they so controlled, for which they received \$5,000, being the same amount which the defendants were to pay for all the timber on all of such lands. The defendants refused to convey to the plaintiff, except subject to the contract with Rogan Brothers, and the plaintiff refused to accept such a conveyance. The construction which the defendants insist shall be put upon their contract with the plaintiff is that the plaintiff is bound to accept of a conveyance of the 8,500 acres of lands mentioned in his contract, without the timber, and pay therefor \$3 per acre; that is to say, upwards of \$4,000 more than the defendants were to pay for the lands with the timber, making a difference on the value of the two contracts of more than \$9,000. The agreement was to convey the lands mentioned, being "about 8,500 acres." This court has repeatedly held that an agreement, in general terms, to convey real estate, calls for a conveyance of the entire estate in the lands sold, by a good and sufficient deed. *Young v. Wright*, 4 Wis. 144, 65 Am. Dec. 303; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453; *Bateman v. Johnson*, 10 Wis. 1, 3; *Falkner v. Guild*, 10 Wis. 564; *Taft v. Kessel*, 16 Wis. 274. The contract in question does not seem to be ambiguous, especially in view of the admissions of the parties, as to the condition of the title. It called for a conveyance of the title to "about 8,500 acres" of land, including the timber thereon. The contract was not complied with by the tender of a conveyance of the slight interest the defendants retained after they had conveyed nearly all the timber they had purchased of the lumber company to the Rogan Brothers. We must hold that by refusing to make such a conveyance the defendants breached the contract.

The important question presented is as to the measure of damages, if any, in consequence of such breach. At the commencement of the trial the defendants moved for judgment on the pleadings, and thereupon 65 L. R. A.

the court ordered and adjudged that the plaintiff's contract with the defendants be canceled and rescinded, and that the plaintiff recover back from the defendants, as damages, what he had paid, with interest. It was held at an early day in England that where a person contracted for the purchase of real estate, and the title proved bad, and the vendor, without fraud, was incapable of making a good title, the vendee could only recover back what he had paid, with interest and costs, but nothing for the loss of his bargain. *Flureau v. Thornhill*, 2 Wm. Bl. 1078. In a much later case a man, who had not obtained a conveyance, put up the lots for sale at auction, and engaged to make a good title to the purchaser by a certain day, which he was unable to do; and it was held that a purchaser of the lots at auction might recover from the vendor, not only the expenses which he had incurred, but also damages for the loss of his bargain. *Hopkins v. Grazebrook*, 6 Barn. & C. 31, 9 Dowl. & R. 22, 5 L. J. K. B. 65. In a still later case, where the breach of the contract arose, not from the inability of the vendors to make a good title, but from their refusal to take the necessary steps to give the vendee possession pursuant to their contract, the vendee could recover, not only the money paid and expenses, "but also damages for the loss of his bargain, and that the measure of damages was the profit which it was shown he could have made on a resale." *Engel v. Fitch*, L. R. 3 Q. B. 314, Affirmed in the Exchequer Chamber, L. R. 4 Q. B. 659, 10 Best & S. 738, 38 L. J. Q. B. N. S. 304, 17 Week. Rep. 894. The cases cited were reviewed and distinguished at great length in *Bain v. Fothergill*, L. R. 7 H. L. 159-213, 43 L. J. Exch. N. S. 243, 31 L. T. N. S. 387, 23 Week. Rep. 261. Twenty-five years after that decision, the cases cited were reviewed and distinguished by two of the most learned English jurists of the present time, and it was held that "a purchaser of leasehold property, which the vendor cannot assign without a license from his lessor, is entitled to damages (beyond return of the deposit, with interest and expenses) for loss of his bargain by reason of the vendor's omission to do his best to procure such license." *Day v. Singleton* [1899] 2 Ch. 320, 68 L. J. Ch. N. S. 593, 81 L. T. N. S. 306. 48 Week. Rep. 18. The trend of decisions in this country is much less liberal to the vendor than in England. 2 Sutherland, Damages, § 579. In several jurisdictions, and notably Missouri, even good faith on the part of the vendor is not allowed to prevent the vendee from recovering damages for the loss of his bargain. 2 Sutherland, Damages, § 579, and cases there cited; *Hartzell v. Crumb*, 90 Mo. 629,

3 S. W. 59; *Matheny v. Stewart*, 108 Mo. 73, 78, 17 S. W. 1014. In New York it was held long ago that "the rule that a vendor who contracts to sell and convey real property in good faith, believing he has a good title, and, on discovering it to be defective, for that reason refuses, or is unable, to fulfill his contract, is, in an action against him by the vendee for the breach, liable for only nominal damages, should not be in any degree extended, but strictly limited to those cases coming wholly and exactly within it. And where a vendor contracts to sell lands, in which he knows at the time he has not title or the power of conveyance, he is bound to make good to the vendee the loss of the bargain through his default. Nor in such case does it excuse the vendor that he acted in good faith, and believed when he entered into the contract that he should be able to procure a good title for his purchaser." *Pumpeilly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463. The late Chief Justice Cooley, after reviewing the English and American cases in his terse manner, concludes that "the principle underlying these cases is that, if a party enters into a contract to sell, knowing that he cannot make a title, he is remitted to his general liability, and the exception introduced by *Flureau v. Thornhill* does not apply. So, if a person undertakes that a third party shall convey, and is unable to fulfill his contract, the authorities are that he shall pay full damages. Such contracts are speculative in character, and the party giving them understands the risk he assumes when the covenant is entered into. . . . There are also numerous cases which decide that, if the vendor acts in bad faith,—as if, having title, he refuses to convey, or disables himself from conveying,—the proper measure of damages is the value of the land at the time of the breach, the rule in such case being the same in relation to real as to personal property; . . . and the cases before referred to, in which a party undertook to sell that which he did not own, and knew he could not control, may also, when the other party is not informed of the defect, be considered as involving a degree of bad faith, and have generally been so regarded by the courts." *Hammond v. Hannin*, 21 Mich. 374, 386, 387, 4 Am. Rep. 490. So it has been held in Ohio that when a vendor has title, and refuses to convey, or when he disables himself from conveying by parting with his title, the rule of damages is the value when the conveyance ought to have been made. *Dustin v. Newcomer*, 8 Ohio, 49. To the same effect, *Warren v. Chandler*, 98 Iowa, 237, 243, 67 N. W. 242; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Tracy v. Gunn*, 29 Kan. 508. But it is unnecessary to multiply adjudications, of 65 L. R. A.

which there is a great variety. In a standard text-book it is said: "While the general rule that the law aims to make compensation adequate to the real injury sustained, and to place the injured party, so far as money can do it, in the same position he would have occupied if the contract had been fulfilled, is recognized, it is relaxed in some jurisdictions, and an exception admitted in favor of a vendor who makes a contract to sell and convey in good faith, believing himself to be the owner of the property, when he is afterwards incapable of performing by reason of a defect in his title of which he was not aware." 2 Sutherland, *Damages*, 3d ed. § 578. And again, leaving out what is inapplicable here: "If the person selling is in default; if he knew or should have known that he could not comply with his undertaking; . . . if he has only a contract of the owner to convey, or a bond for a deed; . . . if he makes his contract, without title, in the expectation of subsequently being able to acquire it, and is unable to fulfill by reason of causes so known, as the want of concurrence of other persons; or if he has title, and refuses to convey, or disables himself from doing so by conveyance to another person,—in all such cases he is beyond the reach of the principle of *Flureau v. Thornhill*, and is liable to full compensatory damages, including those for the loss of the bargain." 2 Sutherland, *Damages*, 3d ed. § 581. Speaking of the rule of the early English case cited, another recent text writer says: "This rule, wherever it has been invoked as a rule, has never been favorably regarded by the courts, and seems to have been productive of a great diversity of opinion as to the grounds upon which it is based. It has been rejected by the Supreme Court of the United States, and is not recognized in many of the state courts, while, in states where it obtains, it is strictly limited to those cases coming wholly and exactly within it. But where the vendor contracts to sell lands which he knows at the time he has not the power to convey, he must abide by his contract, and should be held to make good to the vendee any loss he may sustain by reason of its violation. Nor is it any excuse for the vendor, in such a case, that he may have acted in good faith, and fully believed when he entered into the contract that he should be able to procure an acceptable title for his purchaser." 2 Warvelle, *Vendors*, 2d ed. § 936.

It was held in this state at an early day that the rule of damages against the vendors who had put it out of their power to convey would be the difference in the value of the land at the time the conveyance should have been made, and the sum agreed to be paid

for the land, if such value should be greater than the price fixed in the contract. *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57. That rule was followed in the more recent case where the vendor refused to give possession of the land as agreed, and wholly failed to perform the contract on his part. *Muenchow v. Roberts*, 77 Wis. 520, 522, 46 N. W. 802, 803. Mr. Justice Lyon there, speaking for the court, said: "The plaintiff is entitled to recover, if at all, the value of his bargain. The true measure of such value is the value of the land the defendant contracted to sell to him, estimated at the time the contract was broken, less what the plaintiff agreed to pay therefor. This is the general rule in this state, in an action by a purchaser to recover damages for the breach of an executory contract to sell either real or personal property, where no part of the consideration has been paid." That case seems to be in harmony with a prior case in which it was held that "one who executes a lease of a store, knowing that he cannot put the lessee in possession because another is in possession under a valid prior lease executed by himself, and not yet expired, is liable to the second lessee for the whole loss proximately sustained by reason of the failure to put him in possession." *Poposkey v. Munkwitz*, 68 Wis. 322, 60 Am. Rep. 858, 32 N. W. 35. The opinion of the court in that case refers to the early English case cited as being "somewhat limited by later adjudications," and finally concludes with a lengthy quotation from Sutherland on Damages, substantially the same as quoted above, and then says: "This quotation doubtless contains a correct statement of the law acted upon in all the states,—as well in those which have adopted the rule in *Flureau v. Thornhill*, 2 W. Bl. 1078, as in those which have not." *Poposkey v. Munkwitz*, 68 Wis. 327-329, 60 Am. Rep. 858, 32 N. W. 35. The ruling of this court is a very recent case is quite similar. *Gross v. Heckert* (Wis.) 97 N. W. 952, 955.

In the case at bar it is admitted in the pleadings that, at the time the plaintiff made his contract with the defendants, they never had any title to any of the lands they therein agreed to convey to the plaintiff, except the timber and the right to remove the same from the lands; and they had previously conveyed nearly all of such timber to the Rogan Brothers. They had secured to themselves the privilege of acquiring the title which they proposed to convey to the plaintiff, without the timber, at an advance of over \$4,000 more than they were to pay for the land with the timber. The defendants expressly refused to convey the timber, and claim that they were not bound to do so by the terms of the contract. The author-
65 L. R. A.

ities are to the effect that a vendor who has agreed to convey land which he knew at the time he had himself previously conveyed to another, or to which he had no title, is answerable in damages to his vendee for the loss of his bargain. In addition to the authorities cited above, see *Pinkston v. Huie*, 9 Ala. 252; *Gale v. Dean*, 20 Ill. 320; *Claggett v. Easterday*, 42 Md. 617; *Bryant v. Hambrick*, 9 Ga. 133; *Martin v. Wright*, 21 Ga. 504; *Irvine v. Askeo*, 74 Ga. 581; *Charlier v. Marshall*, 56 N. H. 478. In some of these cases the vendor seems to have acted in good faith, but was nevertheless held liable in damages for the loss of the vendee's bargain. In the case at bar the answer alleges that at the time of making the agreement with the plaintiff, and for some time prior thereto, the plaintiff had full notice and knowledge of the contract of the defendants with the Rogan Brothers, and of the rights of all parties thereunder. Such notice and knowledge are denied and put in issue by the plaintiff. That issue remains undetermined. If upon the trial the defendants shall fail to establish their claim that the plaintiff, at the time he so entered into the contract with them, had such notice and knowledge of their prior contract with the Rogan Brothers, then, obviously, under the authorities cited, they acted in bad faith, and would be liable in damages to the plaintiff for the loss of his bargain. If, on the contrary, it should appear that at the time of contracting with the defendants the plaintiff had such notice and knowledge, then, obviously, there was no fraud or deceit practised upon the plaintiff in procuring the contract. The question recurs whether such knowledge of the plaintiff would deprive him of damages for the loss of his bargain. There are undoubtedly cases where the defect in the title is known to the vendee as well as the vendor, and where, in consequence of such knowledge, the vendor has been held to be relieved from responding in damages for the loss of the vendee's bargain. It was so held in Pennsylvania, where the fact was well known to both parties that the vendor had nothing but a life estate. *Rohr v. Kindt*, 3 Watts & S. 563, 565, 39 Am. Dec. 53. In that case, however, the court held that, by the contract upon which the action was based, "the defendant bound herself to give the plaintiff a clear deed for the 10 acres which she held under the will" there in question, and that both parties must have understood that the agreement of the vendor was only to convey her life estate. Seven years afterwards, in an action for the breach of an agreement to make and deliver "a good and sufficient deed, clear of encumbrances," the same court, unanimously, in an opinion written by the same justice, said: "It is

scarcely an open question that upon the refusal or inability of a vendor to execute a deed clear of all encumbrances, including the wife's dower, the vendee has a right of action to recover at least nominal, or, as the case may be, compensatory, damages. Nor will it alter the case that the contingent right of dower was known to the vendee when he bargained for the land, and that, as here, he covenanted to pay her [\$5] for signing the deed. This cannot, as has been contended, have the effect of making him take the risk on himself. Nor does it excuse the vendor, so far as the right of action is involved, that he was willing and offered to comply with his covenant, and to make title as far as he was able, without his wife's consent. The defendant covenanted to make the title free from all encumbrances, and this covenant is immediately broken on the refusal of the wife, from whatever cause, to become a party to the conveyance. Damages may be recovered for the loss sustained by reason of his failure to comply, arise from what cause it may, even though he may have failed bona fide, and is unable to complete his contract on account of the default of another. . . . And it is no excuse that his inability may have arisen from the refusal of the wife to sign the deed, although it may inevitably affect her interests. Courts of law can afford no more protection to wives than from the violation of other agreements. It would be attended with the most pernicious consequences if the doctrine should receive the sanction of the court that the refusal of the wife would free the husband from all damages arising from the violation of his covenant." *Bitner v. Brough*, 11 Pa. 127, 136, 137. The opinion sanctions a charge to the jury to the effect that the vendor ought not to make anything by the violation of his agreement, and that the vendee ought not to lose anything by such violation. The jury returned a verdict of \$1,000 damages, and this was sustained on the ground that there was evidence sufficient to justify a finding of bad faith on the part of the vendor, within the early English rule stated. That case has been sanctioned by the same court in numerous adjudications since. *McDowell v. Oyer*, 21 Pa. 417, 426; *Meason v. Kaine*, 67 Pa. 126, 132; *Riesz's Appeal*, 73 Pa. 485, 490; *Rineer v. Collins*, 156 Pa. 342, 348, 27 Atl. 28. See also *Drake v. Baker*, 34 N. J. L. 358. According to such adjudication the mere fact that the vendee in a land contract, at the time of making the same, knew that the vendor did not have absolute title to the land, or that his title was encumbered, did not prevent him from recovering damages for the loss of his bargain by reason of the vendor's failure to convey title according to his agreement. For 65 L. R. A.

a much stronger reason, the vendee is not precluded from such recovery by the mere fact that at the time of making the contract he knew that the vendor had no title to the land whatever, or a mere optional right to acquire a title. As indicated, the authorities, both English and American, are to the effect that a vendor who agrees to convey what he at the time knows that he has no right to convey, because the title is in another, thereby assumes the risk of acquiring the title and making the conveyance, or responding in damages for the vendee's loss of the bargain. As aptly stated by Judge Cooley in the quotation from the Michigan case cited, "such contracts are speculative in character, and the party giving them understands the risk he assumes when the covenant is entered into." Such contracts for the future delivery of personal property have frequently been characterized by this and other courts as speculative in character. *Barnard v. Backhaus*, 52 Wis. 593, 598, 6 N. W. 252, 9 N. W. 595, and cases there cited. One of the definitions of "speculate" is to "take the risk of loss in view of possible gain." Century Dict. As indicated, in the case at bar the defendants agreed to convey to the plaintiff about 8,500 acres of land, with the timber thereof, at \$3 per acre, at a time when they had no title to any of the land, nor to any of the timber thereon. To fulfil that agreement, they assumed the risk of acquiring title to the timber and the land. It may be inferred from the answer that they afterwards acquired title to the land without the timber, but there is no pretense that they acquired back the timber which they had previously sold to the Rogan Brothers. In fact, they insist that the plaintiff must accept a deed of the land without the timber in satisfaction of their agreement to convey the land with the timber. In other words, they insist upon violating their agreement to convey the timber to the plaintiff, which they had previously sold to the Rogan Brothers for \$5,000. We are not aware of any rule of law which prevents a vendee from recovering any legitimate damages he may have sustained by reason of his vendor's refusal to perform such solemn agreement. The plaintiff in this case had the right to rely upon the agreement of the defendants to convey the complete title to the land and timber, even if he knew at the time of making the optional agreement that they had no title to either.

The judgment of the Circuit Court is reversed on the plaintiff's appeal, and the cause is remanded for further proceedings according to law. The defendants take nothing by their appeal.

Siebecke, J., dissents.

DELAWARE SUPREME COURT.

STAR PUBLISHING COMPANY, *Plff. in Err.*,

v.

John P. DONAHOE.

(.....Del.....)

A publication by a newspaper charging a candidate for nomination for a public office with a criminal offense is in no way privileged, but is made at the risk of the publisher, who, to escape liability for libel, must prove the truth of the charge made.

(July 9, 1904.)

ERROR to the Superior Court for New Castle County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged publication of a libel. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. Harvey Whiteman and Victor B. Woolley, for plaintiff in error:

The publication complained of by the defendant in error is a "qualifiedly privileged publication," the legal effect of which is, that the occasion upon which the words were uttered rebuts the presumption of malice that would otherwise arise from the publication, and imposes upon the party complaining the duty of proving malice and absence of probable cause.

The distinction should be observed between absolute and qualified privilege. In cases of absolute privilege no action can be maintained, however malicious or untrue, but in cases of qualified or conditional privilege, under proper instruction from the court, both the public interest and the private rights of parties are fully observed, for any abuse of this qualified privilege would render the publisher liable.

If, in this case, the conduct of the plaintiff was such, in the performance of his official duties, as to give reasonable grounds for the defendant's belief in the truth of the matters contained in the alleged libelous publication, then he cannot well complain of the criticism made of his conduct.

Townshend, *Slander & Libel*, § 209; *Davies v. Snead*, L. R. 5 Q. B. 608, 39 L. J. Q. B. N. S. 202, 23 L. T. N. S. 126; *Cooley*, *Torts*, 215; *Newell*, *Defamation, Slander & Libel*, 388; *Addison*, *Torts*, § 1091;

Briggs v. Garrett, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513; *Gray v. Pentland*, 4 Serg. & R. 420; *Com. v. Odell*, 3 Pittsb. 449; *Boucher v. Clark Pub. Co.* 14 S. D. 72, 84 N. W. 237; *State v. Balch*, 31 Kan. 465, 2 Pac. 609; *Redgate v. Roush*, 61 Kan. 480, 48 L. R. A. 236, 59 Pac. 1050; *Coogler v. Rhodes*, 38 Fla. 240, 56 Am. St. Rep. 170, 21 So. 109; *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678; *Mott v. Dawson*, 46 Iowa, 533; *Comfort v. Young*, 100 Iowa, 627, 69 N. W. 1032; *State v. Keenan*, 111 Iowa, 286, 82 N. W. 792; *Cherry v. Des Moines Leader*, 114 Iowa, 298, 54 L. R. A. 855, 89 Am. St. Rep. 365, 86 N. W. 323; *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785; *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605; *State v. Burnham*, 9 N. H. 34, 31 Am. Dec. 217; *Com. v. Wardwell*, 138 Mass. 164; *Brow v. Hathaway*, 13 Allen, 239; *Smith v. Higgins*, 16 Gray, 251; *Bradley v. Heath*, 12 Pick. 164, 22 Am. Dec. 418; *Streety v. Wood*, 15 Barb. 105; *Byam v. Collins*, 111 N. Y. 143, 2 L. R. A. 129, 7 Am. St. Rep. 726, 19 N. E. 75; *Decker v. Gaylord*, 35 Hun, 584; *McKnight v. Hasbrouck*, 17 R. I. 70, 20 Atl. 95; *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775; *Byrd v. Hudson*, 113 N. C. 203, 18 S. E. 209; *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931; *Express Printing Co. v. Copeland*, 64 Tex. 355; *Mayrant v. Richardson*, 1 Nott & M'C. 347, 9 Am. Dec. 707; *Finley v. Steele*, 159 Mo. 299, 52 L. R. A. 852, 60 S. W. 108; *Hess v. Ganz*, 90 Mo. App. 439; *Wagner v. Scott*, 164 Mo. 289, 63 S. W. 1107; *Vance v. Louisville Courier-Journal Co.* 95 Ky. 41, 23 S. W. 591; *Smith v. Com.* 98 Ky. 437, 33 S. W. 419; *King v. Patterson*, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705; *Rogers v. Kershaw*, 64 N. J. L. 213, 44 Atl. 844; *McNally v. Burleigh*, 91 Me. 22, 39 Atl. 285; *O'Rourke v. Lewiston Daily Sun Pub. Co.* 89 Me. 310, 36 Atl. 398; *Bearce v. Bass*, 88 Me. 521, 51 Am. St. Rep. 446, 34 Atl. 411; *Wieman v. Mabey*, 45 Mich. 484, 40 Am. Rep. 477, 8 N. W. 71; *McAllister v. Detroit Free Press Co.* 76 Mich. 338, 15 Am. St. Rep. 318, 43 N. W. 431; *Howard v. Dickie*, 120 Mich. 238, 79 N. W. 191; *Crane v. Waters*, 10 Fed. 619; *McIntyre v. McBean*, 13 U. C. Q. B. 540; *Todd v. Hawkins*, 8 Car. & P. 88, 2 Moody & R. 20; *Toogood v. Spyrring*, 1 Crompt. M. & R. 181, 4 Tyrw. 582, 3 L. J. Exch. N. S. 347; *Harrison v. Bush*, 5 El. & Bl. 344, 25

NOTE.—As to privilege of criticism of public officers or candidates, see also cases in *note* to *St. James Military Academy v. Gaiser*, 28 L. R. A. 672; *Sillars v. Collier*, 6 L. R. A. 680, and *note*; *Randall v. Evening News Asso.* 7 L. R. A. 309; *Belknap v. Ball*, 11 L. R. A. 72; *Augusta* 65 L. R. A.

Evening News v. Radford, 20 L. R. A. 533; *Upton v. Hume*, 21 L. R. A. 493; *Smith v. Utley*, 35 L. R. A. 620; *State v. Hoskins*, 47 L. R. A. 223; *Eikhoff v. Gilbert*, 51 L. R. A. 451; *Wofford v. Meeks*, 55 L. R. A. 214; and *Coffin v. Brown*, 55 L. R. A. 732.

L. J. Q. B. N. S. 25, 1 Jur. N. S. 846, 3 Week. Rep. 474; *Whiteley v. Adams*, 15 C. B. N. S. 417, 33 L. J. C. P. N. S. 89, 10 Jur. N. S. 470, 9 L. T. N. S. 483, 12 Week. Rep. 153; *Peacock v. Reynal*, 2 Brownl. & G. 151; *Clark v. Molyneux*, L. R. 3 Q. B. Div. 237, 47 L. J. Q. B. N. S. 230, 37 L. T. N. S. 694, 26 Week. Rep. 104, 14 Cox, C. C. 10; *Rice v. Simmons*, 2 Harr. (Del.) 309.

The defense of privilege, whether qualified or absolute, as a bar to the action, could be maintained under the plea of not guilty.

1 Starkie, Slander & Libel, 454; 1 Chitty, Pl. 496; Townshend, Slander & Libel, § 403; 2 Saunders, Pl. **801, 802; *Parke v. Blackiston*, 3 Harr. (Del.) 373; *Rice v. Simmons*, 2 Harr. (Del.) 417, 31 Am. Dec. 766; *Kinney v. Hosea*, 3 Harr. (Del.) 399; *Lillie v. Price*, 1 Nev. & P. 16, 5 Ad. & El. 645, 5 Dowl. P. C. 432, 2 H. & W. 381, 6 L. J. K. B. N. S. 7; *Hastings v. Lusk*, 22 Wend. 416, 34 Am. Dec. 330; *Richards v. Boutton*, 4 U. C. Q. B. O. S. 95; *Abrams v. Smith*, 8 Blackf. 95; *Stannus v. Finlay*, Ir. Rep. 8 C. L. 264; *Butterworth v. Conrow*, 1 Marv. (Del.) 361, 41 Atl. 84; *Cameron v. Corkran*, 2 Marv. (Del.) 166, 42 Atl. 454.

Qualified privilege means simply that one may publish of another without malice, when protected by privilege, that which, without the privilege, would be libelous; and when that which is published under the protection of privilege, upon a proper occasion, amounts to a statement which the defendant cannot prove to be true, or an untruth, it is not libelous or actionable in the absence of malice in fact. If the words are true, the statute supplies the defense of truth, and the defendant does not need the protection of privilege. If the words are untrue, or cannot be proved true under a plea of truth, the statutory plea of truth is of no avail, and, if the occasion warrants the publication, the defense of qualified privileges protects it until malice in fact is proved.

Com. v. Odell, 3 Pittsb. 449; *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775; *Howard v. Dickie*, 120 Mich. 238, 79 N. W. 191; *Coogler v. Rhodes*, 38 Fla. 240, 56 Am. St. Rep. 170, 21 So. 109; *Redgate v. Roush*, 61 Kan. 480, 48 L. R. A. 236, 59 Pac. 1050; *Wieman v. Mabec*, 45 Mich. 484, 40 Am. Rep. 477, 8 N. W. 71; *State v. Burnham*, 9 N. H. 34, 31 Am. Dec. 217; *Fountain v. Boodle*, 3 Q. B. 5, 2 Gale & D. 455; *Harris v. Thompson*, 13 C. B. 333; *Byrd v. Hudson*, 113 N. C. 203, 18 S. E. 209; *Byam v. Collins*, 111 N. Y. 143, 2 L. R. A. 129, 7 Am. St. Rep. 726, 19 N. E. 75; *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931; *McKnight v. Hasbrouck*, 17 R. I. 70, 20 Atl. 95; *Cooley*, Torts, *215.

Mr. William S. Hilles, for defendant in error:

To accuse one of bribery is to make an accusation of a crime, and such accusation is libelous *per se*.

State v. Davis, 2 Penn. (Del.) 139, 45 Atl. 394; *Kinney v. Hosea*, 3 Harr. (Del.) 397; *Goslin v. Cannon*, 1 Harr. (Del.) 3; *Parke v. Blackiston*, 3 Harr. (Del.) 373; *Kennedy v. Woodrow*, 6 Houst. (Del.) 46.

It was not attempted below to prove that the charge made in the publication was true; and this manifestly could not be done under the plea of the general issue.

Parke v. Blackiston, 3 Harr. (Del.) 373; *Kinney v. Hosea*, 3 Harr. (Del.) 397; *Morris v. Barker*, 4 Harr. (Del.) 520; *Nailor v. Ponder*, 1 Marv. (Del.) 406, 41 Atl. 88.

It is never privileged falsely to accuse a candidate for office of having committed a crime, and any evidence which falls short of proof of the truth of such a charge can only be considered in mitigation of damages, and as rebutting the inference of actual malice which arises out of the publication.

Davis v. Shepstone, L. R. 11 App. Cas. 187, 55 L. J. P. C. N. S. 51, 55 L. T. N. S. 1, 34 Week. Rep. 722, 50 J. P. 709; *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530; *Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676; *Smith v. Tribune Co.* 4 Biss. 477, Fed. Cas. No. 13,118; *Rearick v. Wilcox*, 81 Ill. 77; *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 671; *Wheaton v. Beecher*, 66 Mich. 307, 33 N. W. 503; *Bourreseau v. Detroit Evening Journal Co.* 63 Mich. 425, 6 Am. St. Rep. 320, 30 N. W. 376; *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507; *Belknap v. Ball*, 83 Mich. 583, 11 L. R. A. 72, 21 Am. St. Rep. 622, 47 N. W. 674; *Smith v. Burrus*, 106 Mo. 94, 13 L. R. A. 59, 27 Am. St. Rep. 329, 16 S. W. 881; *Brewer v. Weakley*, 2 Overt, 99, 5 Am. Dec. 656; *Sweeney v. Baker*, 13 W. Va. 183, 31 Am. Rep. 757; *Hamilton v. Eno*, 81 N. Y. 126; *Lewis v. Fawc*, 5 Johns. 1; *Root v. King*, 7 Cow. 613, Affirmed in 4 Wend. 113, 21 Am. Dec. 102; *Upton v. Hume*, 24 Or. 420, 21 L. R. A. 493, 41 Am. St. Rep. 863, 33 Pac. 810; *Fitzpatrick v. Daily States Pub. Co.* 48 La. Ann. 1116, 20 So. 173; *Aldrich v. Press Printing Co.* 9 Minn. 133, Gil. 123, 86 Am. Dec. 84; *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. Rep. 819, 11 S. W. 1058; *Knapp v. Campbell*, 14 Tex. Civ. App. 199, 36 S. W. 765; *Wofford v. Meeks*, 129 Ala. 349, 55 L. R. A. 214, 87 Am. St. Rep. 66, 30 So. 625; *Tiepke v. Times Pub. Co.* 20 R. I. 200, 37 Atl. 1031; *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 13 L. R. A. 97, 28 N. E. 1; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Post Pub. Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921; *Edwards v. San José Printing & Pub. Soc.* 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 760; Newell, Defamation, Slander, & Libel,

533; 18 Am. & Eng. Enc. Law, 2d ed. p. 1042.

Nicholson, Ch. J., delivered the opinion of the court:

This was an action on the case in the superior court for New Castle county, brought by John P. Donahoe, plaintiff below, to recover damages for a publication alleged to be a libel upon the plaintiff, consisting of an article published September 2, 1900, in the *Star*, a newspaper published in the city of Wilmington by the defendant company. The plaintiff's declaration, with innuendoes, contained three counts. The defendant pleaded the general issue and five separate pleas to each of said counts. The plaintiff demurred to each of said special pleas, and, for reasons assigned in an opinion delivered by Judge Boyce, the court sustained the demurrer to each of said special pleas. *Donahoe v. Star Pub. Co.* 3 Penn. (Del.) 545, 53 Atl. 1028. Afterwards the case came to trial at the February term, 1903, in the superior court for New Castle county, the plaintiff having pleaded no matter in justification, but only the general issue, and the trial resulted in a verdict of guilty with damages for the plaintiff for \$700, upon which verdict judgment was entered, and a writ of error taken.

The article alleged to be libelous is as follows:

Donahoe should be Defeated.

We trust that the Democratic voters of the fourth representative district of this city will not make it necessary for us to further expose the treachery of John P. Donahoe with respect to his action at Dover last winter, on the last day of the legislative session. Nor do we wish to speak further of his ridiculous "war record," unless we are compelled to do so. We cannot believe that the Democrats of the fourth will so far forget their own interests and those of their party as to again confide them to the keeping of a man who has more than once proved false to the faith reposed in him, and who is even now suspected of having made a bargain with Addicks for assistance in securing his return to the legislature, where he will be expected to cast his vote for the gas man for United States Senator. Only the fear of bodily harm prevented Donahoe, at the last session of the general assembly, from joining the ranks of Farlow, Clark, and King in a consummation of the disgraceful conspiracy by which a seat in the highest legislative body of the nation was to be handed over for so much cash in hand. Not having the courage to face the storm of protest and denunciation which he

saw had been evoked by the votes of the other renegades, he resorted to the flimsy trick of feigning sickness, and made repeated efforts to leave the house at the most critical stage of the proceedings, in the hope of thus giving his purchaser the benefit of at least half a vote by his absence. That he was not permitted to do even this much for his master was due entirely to the determined stand taken by a few wrathful Democratic citizens, who went upon the floor of the house and compelled him by force to remain in his seat. Do our Democratic friends of the fourth want to take the risk of having this scene repeated at the next senatorial election? Do they want to send a man to Dover who needs a body guard to prevent him from betraying them to the enemy? Do they want to trust their legislative interests to one who sells them out and cravenly deserts his post on the pretense that he's got the bellyache? These charges against Donahoe have been made time and again, publicly and privately, by reputable citizens and good Democrats. He has never attempted to deny them, and in his cringing silence we read an abject confession of his guilt. And yet this man, steeped in the mire of a foul conspiracy against his own party and against public decency, has the hardihood to again offer himself to the voters of his district as a fit person to be intrusted with the honorable and responsible duties of a legislator! It would be a disgrace to the Democratic voters of the fourth district, a disgrace to their party, and a lasting disgrace to Delaware, to send a man of Donahoe's character to represent any respectable community in the general assembly. Surely the fourth district has within its limits many Democrats of ability whose hands are not soiled by the slime of Addicks' money, and who would be willing to serve their neighbors in a public capacity. Either of the two other candidates for nomination would, we believe, make a capable and worthy representative, and there ought to be no question as to the success of one or the other of them at the nominating election next Saturday.

The plaintiff proved publication; that he was a representative in the legislature from the fourth district in 1899, and was a candidate for renomination by the Democratic party in September, 1900, at the time of the publication of the alleged libelous article. The plaintiff also introduced, as tending to show express malice, testimony in regard to interviews between himself and Jerome B. Bell, editor of the *Star*, and admitted to be the writer of the alleged libelous article, to the effect that said Bell had solicited the plaintiff to support a bill which the said

Bell had presented to the legislature, trying to buy his support; that the plaintiff had indignantly spurned his offer and refused to support the bill. Plaintiff also introduced several defamatory articles relating to him which were published in the *Star* prior to September 2, 1900.

The general issue being the only plea, proof of the truth of the charge was not admissible at the trial of the cause as a bar to the action; nor was it denied by the defendant below that the language used was libelous *per se*, and charged the commission of a crime. Testimony was admitted on the part of the defense which it contended proved that the facts and circumstances under which the defamatory matter was published were such as freed the defendant from the liability that would otherwise be imposed upon it, and made the publication "qualifiedly privileged." Then the defense prayed the court, in substance, as shortly stated in the brief of its counsel, "to charge the jury that the publication complained of, under the circumstances as detailed by the testimony, was a privileged communication, and that, if the defendant did not make the publication maliciously, they should find a verdict for the defendant."

The evidence by which the defendant below claims to have established its defense has been briefly, but fairly, summarized in the brief of its counsel substantially as follows: By the undisputed testimony of the plaintiff below, himself, as well as by evidence of the defendant below, it was shown at the trial that the plaintiff was a member of the general assembly of 1899, representing the fourth representative district of New Castle county, and at the time of the publication of the alleged libel was a candidate for renomination by the Democratic party and was soliciting the support of the voters of said representative district. There was also uncontradicted testimony that one John Edward Addicks was being balloted for by members of the legislature of 1899 for the office of United States Senator during the whole session, and that the legislature adjourned without electing a Senator; that the statement in the alleged libel published September 2, 1900, referred to the conduct of the plaintiff below on the last day of the session, while the legislature was in joint session and engaged in voting for United States Senator; that Jerome B. Bell, the admitted author of the alleged libel, was president of the company defendant, was present at the joint session of the legislature on the day of its final adjournment, and observed the conduct of the plaintiff at that time; that on that day, soon after the voting for United States Senator began in joint session, three Democratic members of

65 L. R. A.

the body, namely Farlow, Clark, and King, who were elected as Democrats, voted for said Addicks for United States Senator, said Addicks being the Union Republican candidate for that office; that the said Bell heard rumors that "Donahoe will go next;" that the said Bell observed that the plaintiff, throughout the entire joint session, which lasted several hours, voted against the separation of the two houses, although said plaintiff was importuned by his party colleagues to vote for a separation, so as to terminate the balloting for United States Senator, and make the election of Addicks impossible; that throughout the entire joint session, and while the balloting for United States Senator was being conducted, the said plaintiff frequently left the room, and was forced to return by his party colleagues; that plaintiff claimed illness, and a consequent inability to remain in the hall while the balloting was being conducted, and at the same time frequently voted against motions for a recess or an adjournment of the two houses; that plaintiff, upon all questions presented to said joint session, except as to the person voted for as United States Senator, voted with the Union Republican members of the legislature who were voting for the said John Edward Addicks. Defendant also contradicted flatly, by testimony of said Bell, the testimony offered by the plaintiff below concerning the alleged interviews between him and said plaintiff charging Bell with attempting to improperly influence him to support his bill. Testimony was also introduced, which was uncontradicted, tending to show that said Bell had been solicited to write and publish in the *Star* the alleged libelous article, or something to that effect, by the citizens residing in the district, who, like himself, believed that the criticisms contained in it were just, and the charges true.

The assignments of error given to the charge of the court below were as follows:

"That the court erred in charging the jury as follows, to wit:

"(a) Upon the plea of not guilty, the plaintiff, therefore, is entitled to your verdict for nominal damages. He would also be entitled to such actual or compensatory damages as he may have shown you by the proof in this case that he has sustained, if any such proof there be.

"(b) To rebut express malice, and in mitigation of damages, the defendant has been permitted, under the ruling of the court, to put in evidence, by a number of witnesses, the acts, expressions, and conduct of the plaintiff, and the conditions surrounding him on the last day of the session of the legislature of 1899, being the time set forth in the alleged libel, and also to prove the

general reputation and rumors relating thereto which came to the defendant before the publication of the libel. Such testimony was admitted by the court solely for the purpose of rebutting express malice and in mitigation of damages, and in no manner may be considered by you as a justification or in bar of this action.

“(c) Ordinarily under the general issue the defendant may prove that the publication was a privileged one. The defendant insists that, under the facts and circumstances proved in this case, this libel was privileged. The defendant claims that the plaintiff at the time of the publication was a candidate for public office, and as such submitted himself to all proper criticism as to character and fitness therefor; that the matter contained in the said libel was only such proper criticism. The right of free discussion in the public press of the conduct of public officers and of candidates for public office is safely guarded by the Constitutions of the United States and of the several states. The Constitution of this state, adopted in 1792, contains the following provision, which has ever since remained unchanged: “The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty.” Article 1, § 5. What is the extent of that liberty, and what is the abuse of it? The greatest freedom is allowed in the discussion and criticism of the acknowledged or proved acts of a public man. *Davis v. Shepstone*, L. R. 11 App. Cas. 187, 55 L. J. P. C. N. S. 51, 55 L. T. N. S. 1, 34 Week. Rep. 722, 50 J. P. 709. But publications of falsehoods, even about public officers or candidates for office, are never privileged. *Belknap v. Ball*, 83 Mich. 583, 11 L. R. A. 72, 21 Am. St. Rep. 622, 47 N. W. 674.

“(d) In an action for damages for writing or publishing an alleged libel, the defendant, under a statute of this state (2 Del. Laws, chap. 449, Rev. Code, 1852, chap. 107, p. 800), may plead and prove the truth of the charge, and that it was written or published properly for public information, and with no malicious or mischievous motives. If such plea is made and sustained by proof, it is a complete defense to the action. But if, on the other hand, in an action such as this, the defendant files no such plea of justification in bar of the action, but files only, as in this case, the general plea of not guilty, the utmost effect of evidence that the defendant had probable cause to believe that his charge against the plaintiff was true, and that the publication was made for the public good, would be to nega-

tive express malice and thus defeat the claim for exemplary damages.

“(e) The law therefore seems to be clear that false allegations of fact, charging a candidate for office with a criminal offense, are not privileged, and, if the charges are false, good faith and probable cause are no defense. In such case the publisher of the libel takes his own risk, and can justify only by proving the truth of the charge. In our judgment, the doctrine of privileged publication is not applicable to this case, and you may not consider it in reaching your verdict. With this instruction upon the law, we now say to you that, in any event, you should return a verdict for the plaintiff for nominal damages. In the absence of express malice, your verdict should be confined to such nominal damages, unless the plaintiff has proved that he has suffered some actual damage. If he has made such proof, whatever actual damages have been so proved would be added to nominal damages. If you should be satisfied, however, that express malice has been proved, and that the publication was maliciously and vindictively made, with intent to injure the plaintiff, you may give exemplary damages, such as the circumstances of the case may warrant, to punish the defendant, and to deter others from like offenses, without regard to proof of the actual damages. Punitive damages, however, can only be given where there is clear proof of express malice.”

There are other assignments of error, owing to the refusal of the court to charge as prayed by the defendant below, one of which is as follows: “That when a public newspaper makes a publication concerning the integrity, fitness, and fidelity of a candidate for a public office, which newspaper circulates among the electors who have the right to vote for or against such candidate, and the publication is made in good faith, for public information, it is a privileged communication.” (Being defendant’s prayer No. 10.) It is unnecessary to quote them further, for their substance has been stated already, as summed up in the brief of the counsel of the plaintiff in error.

It appears from the foregoing that but one question is before this court, and that is in reference to the correctness of that portion of the charge of the learned chief justice in the court below, already quoted, where he says: “It therefore seems to be clear that false allegations of fact, charging a candidate for office with a criminal offense, are not privileged, and, if the charges are false, good faith and probable cause are no defense. In such cases the publisher of the libel takes his own risk, and can justify only by proving the truth of the charge.” Counsel on both sides have recognized this

to be the sole point at issue, and to this alone have their arguments been directed. This question comes now for the first time before a court of law in this state for a decision. Its determination one way or another involves consequences of the gravest public importance, far-reaching and difficult to anticipate. It has been argued by counsel in the cause with an ability and thoroughness adequate to its importance, and every member of the court has devoted to its examination and consideration an amount of time and labor rarely given to a single cause.

Upon a cursory examination there appears to be great confusion and contradiction in the immense mass of authorities dealing with the general subject of "privilege" in actions of libel. And it must be admitted that in some of the adjudged cases not a little confusion of thought and lack of adequate consideration is apparent. On the whole, however, careful study and analysis will reveal the harmony actually existing between the well-considered cases, both English and American, and will prove that the development of the law of libel, even in that part of it which concerns the doctrine of privilege, called by Mr. Justice Daniel "the exceptions" (*White v. Nicholls*, 3 How. 286, 11 L. ed. 591), has been symmetrical, although gradual. It is interesting and instructive to note how closely the great English and great American judges for more than three quarters of a century have followed out the same line of reasoning, and made application of conclusions that differ only as the circumstances of the two countries differ. And although there are, of course, some contradictory cases,—some courts that have applied the accepted principles differently,—yet the weight of authority on one side of the specific question before us is overwhelming.

The great underlying principle upon which the doctrine of privileged communications rests is public policy; and, as said by Judge Taft in the case of *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 540, "the existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed." This broad principle of public advantage—the good of the community at large—has undoubtedly been the main guide for the courts in the development of this doctrine, really a doctrine of exceptions; but a more specific principle, one almost inva-

riably alluded to in the cases, is stated by Chief Justice Shaw in *Bradley v. Heath*, 12 Pick. 164, 22 Am. Dec. 418, decided in 1831, as follows. He says: "Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words; and therefore no action can be maintained in such cases without proof of express malice;" citing *Bromage v. Prosser*, 4 Barn. & C. 247, 6 Dowl. & R. 296, 1 Car. & P. 475, 3 L. J. K. B. 203, 28 Revised Rep. 241, and *Starkie, Slander & Libel*, 200. Again, in *Harrison v. Bush*, 5 El. & Bl. 348, 25 L. J. Q. B. N. S. 25, 1 Jur. N. S. 846, 3 Week. Rep. 474, decided in 1855, this specific principle is expressed by Chief Justice Campbell. He says: "During the argument a legal canon was propounded for our guidance by the plaintiff's counsel, and this we are willing to adopt, as we think it is supported by the principles and authorities upon which the doctrine of privileged communications rests. 'A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminating matter, which, without privilege, would be slanderous and actionable.'" This canon correctly expresses a guiding principle, and appears in innumerable cases with immaterial variation in phraseology; but it cannot be applied correctly unless there is applied with it the other principle we have quoted from Judge Taft, which also appears in a host of cases. Again, it is said by Chief Justice Cockburn in the case of *Wason v. Walter* (editor of the London Times), L. R. 4 Q. B. 86, 8 Best & S. 671, 38 L. J. Q. B. N. S. 34, 19 L. T. N. S. 709, 17 Week. Rep. 169: "The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual, malice is meant, while by legal malice, as explained by Bayley, J., in *Bromage v. Prosser*, 4 Barn. & C. 255, 6 Dowl. & R. 296, 1 Car. & P. 475, 3 L. J. K. B. 203, 28 Revised Rep. 241, is meant no more than the wrongful intention which the law always presumes as

accompanying a wrongful act, without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published; and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. 'The rule,' says Lord Campbell, Ch. J., in the case of *Taylor v. Hawkins*, 16 Q. B. 321, 20 L. J. Q. B. N. S. 314, 15 Jur. 746, 'is that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff, must then, if he can, give evidence of malice.' In order to a complete understanding, this quotation should be supplemented by quoting the language of Chief Justice Shaw defining "legal malice" in libel, in *Com. v. Snelling*, 15 Pick. 340. He says: "It may be conceded at once that malice is of the essence of libel, and that any definition or any charge of libel which should not embrace this essential characteristic would be defective. But, admitting this position in its fullest extent, we think it does not conduct the defendant to the conclusion at which he aims. . . . We think the fallacy of this argument consists in overlooking the plain and obvious distinction between the legal and the popular meaning of the term 'malice.' In a legal sense, any act done wilfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious. It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill will towards the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if, in pursuing that design, he wilfully inflicts a wrong on others, which is not warranted by law, such act is malicious."

We have stated these uncontested and incontestable propositions in the phraseology of distinguished judges in advance of a description of the specific question before us, because these are the principles upon which it must be decided and upon which all the authorities cited in this case were supposed to be decided, and because the lack of a clear comprehension of these elementary principles, and their mutual relation, is, in our judgment, responsible for whatever confusion exists among the authorities on privileged communications.

From the extended review we have made of the pleading and testimony in the case at bar, it appears that the defendant in error, in his declaration, charged the plaintiff in error (defendant below) with having

published a libel charging him with having committed the crime of bribery, which, under the strictest rules of interpretation, constituted a libel *per se*. To this the plaintiff in error (defendant below), under out statute, might, in bar of the action, have pleaded specially and given in evidence the truth of the libel, and that it was written and published properly for public information, and with no malicious or mischievous motives. He chose, instead, to admit that the libel was false or untrue by entering a plea of not guilty. The law presumes legal malice, by which, as above stated, is meant no more than a wrongful intention, which the law always presumes as accompanying a wrongful act, without any proof of malice in fact; yet this presumption of law might be rebutted, and this the plaintiff in error sought to do by showing that the facts and circumstances under which the defamatory matter was written were such as to render it a privileged communication; and, as malice is the gist of the action, this defense, provided it were established, and the plaintiff below did not prove malice in fact, was a bar to the action.

There is no dispute or confusion in the arguments of counsel concerning the legal effect of the pleadings as above stated, and counsel for the plaintiff in error stated its contention of privilege, in their belief, as follows: "In a case like the present one, where the publication was in a newspaper which circulated among those persons who had a right to vote for or against the plaintiff at a time when an incompetent and unfaithful candidate could be defeated in his canvass for election, then the relation of such newspaper to the public is one which takes the case out of the general rule, and imposes proof of express malice on the plaintiff. When, therefore, we speak of the publication as privileged, we simply mean that the circumstances in which they are used rebut the inference which would otherwise arise from their utterance, or, in other words, that, when their privileged character is established as a matter of law, the burden is cast upon the plaintiff of establishing, as a matter of fact, the existence of express malice." Thus has the plaintiff in error (the defendant below) presented its case to this court.

There is no authority in our own state upon the question before us. *Rice v. Simmons*, 2 Harr. (Del.) 309, 417, 31 Am. Dec. 766, we do not consider applicable. But out of the great mass of cases cited by counsel from other jurisdictions, both English and American, there are a number bearing directly upon the question we are called upon to determine, and many of them show careful consideration and thorough examination

of the authorities, as well as a vigorous grasp of the whole subject.

Judge Taft, in the case of *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 539, delivered an opinion which we quote at great length, for the authorities cited and reviewed by him are for the most part those which we would necessarily cite, and the case is almost identical with the case at bar, as are the arguments of counsel in both cases. It can be distinguished from the case before us in only one respect, and that is that in the case at bar the question is whether false or untruthful allegations of fact, charging a candidate for office with a criminal offense, are privileged, while in the case before Taft the question was broader, and included false allegations of fact,—that the candidate had committed disgraceful acts, whether criminal or not. The case was decided by the circuit court of appeals December 9, 1893, by Taft and Lurton, Circuit Judges, and Ricks, District Judge. Taft, J., delivered the opinion of the court: "Finally we come to those assignments of error which are based on the charge of the court in regard to privileged communications. The court in effect told the jury that the article in question, relating, as it did, to a matter of public interest, came within a class of communications that were conditionally privileged; that the public acts of public men (and candidates for office were public men) could be lawfully made the subject of comment and criticism, not only by the press, but also by all members of the public, for the press had no higher rights than the individual; but that while criticism and comment, however severe, if in good faith, were privileged, false allegations of fact (as, for instance, that the candidate had committed disgraceful acts) were not privileged; and that, if the charges were false, good faith and probable cause were no defense, though they might mitigate damages. Counsel for the plaintiff in error and the defendant below has argued with great vigor, and an array of authorities, that we ought not to adopt the view of the circuit court upon this important question, but should hold that the privilege extends to statements of fact as well as comment. The argument is this: Privileged communications comprehend all bona fide statements in performance of any duty, whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. *Townshend, Slander & Libel*, § 209. It is of the deepest interest to the public that they should know facts showing that a

candidate for office is unfit to be chosen. Therefore everyone who has reasonable ground for believing, and does believe, that such a candidate has committed disgraceful acts affecting his fitness for the office he seeks, should have the right to give the public the benefit of his information, without making himself liable in damages for untrue statements, unless malice is shown. Though of imperfect obligation, it is said to be the highest duty of the daily newspaper to keep the public informed of facts concerning those who are seeking their suffrages and confidence. Can it be possible, it is asked, that public policy will make privileged an unfounded charge of dishonesty or criminality against one seeking private service, when made to the private individual with whom service is sought, and yet will not extend the same protection to him who in good faith informs the public of charges against applicants for service with them? Is it not at least as important that the high functions of public office should be well discharged, as that those in private service should be faithful and honest? The *a fortiori* step in this reasoning is only apparent. It is not real. The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a bona fide statement, on reasonable ground, to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest of society. But if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of everyone who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good. We are aware that public officers and candidates for public office are often corrupt,

when it is impossible to make legal proof thereof, and, of course, it would be well if the public could be given to know in such a case what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true, in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men, and charges against them, are unduly guarded or restricted, and yet the rule complained of is the law in many of the states of the Union and in England. In *Davis v. Shepstone*, L. R. 11 App. Cas. 187, 55 L. J. P. C. N. S. 51, 55 L. T. N. S. 1, 34 Week. Rep. 722, 50 J. P. 709, Lord Chancellor Herschell delivered the judgment of the judicial committee of the privy council in an appeal from a judgment for libel recovered in the supreme court of Natal. The plaintiff below was a resident commissioner of Great Britain in Zululand, and the alleged libel charged him with having committed unprovoked and altogether indefensible assaults upon certain Zulu chiefs. The publication was made in the colony of Natal, where the conduct of the resident commissioner in Zululand was of great public interest. It was claimed that the article was conditionally privileged, and that the plaintiff ought to have succeeded only on proof of express malice. This claim was denied. The lord chancellor thus stated the law: 'There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants, in the passages which were complained of as libelous, charged the respondent, as now appears, without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious. Not only so, but they themselves vouched

for the statements by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion, there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege.' Other English cases laying down the same doctrine are *Campbell v. Spottiswoode*, 3 Post. & F. 421, 432, Affirmed in 3 Best & S. 769, 32 L. J. Q. B. N. S. 185, 9 Jur. N. S. 1069, 8 L. T. N. S. 201, 11 Week. Rep. 569, and *Popham v. Pickburn*, 7 Hurlst. & N. 891, 898, 31 L. J. Exch. N. S. 133, 8 Jur. N. S. 179, 5 L. T. N. S. 846, 10 Week. Rep. 321. The latest American case, and the most satisfactory, is that of *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 242, 13 L. R. A. 97, 28 N. E. 1, where Justice Holmes discusses the question, and quotes with approval the foregoing passage from the judgment in *Davis v. Shepstone*. Other American cases approving the same rule are *Smith v. Burrus*, 106 Mo. 94, 101, 13 L. R. A. 59, 27 Am. St. Rep. 329, 16 S. W. 881; *Wheaton v. Bencher*, 66 Mich. 307, 33 N. W. 503; *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 671; *Brewer v. Weakley*, 2 Overt. 99, 5 Am. Dec. 656; *Sweeney v. Baker*, 13 W. Va. 183, 31 Am. Rep. 757; *Hamilton v. Eno*, 81 N. Y. 126; *Rearick v. Wilcox*, 81 Ill. 77; *Negley v. Farrow*, 60 Md. 158, 176, 45 Am. Rep. 715; *Jones v. Townsend*, 21 Fla. 431, 451, 58 Am. Rep. 676; *Banner Pub. Co. v. State*, 16 Lea, 176, 57 Am. Rep. 216; *Post Pub. Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921; *Secly v. Blair*, Wright (Ohio) 358, 683; *Wilson v. Fitch*, 41 Cal. 383; *Edwards v. San José Printing & Pub. Soc.* 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128; *State v. Schmitt*, 49 N. J. L. 579, 586, 9 Atl. 774; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 760. In *Post Pub. Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921, the supreme court of Ohio says, with reference to the doctrine that statements of fact should be regarded as privileged when made concerning a candidate for an office, as follows: 'We do not think the doctrine either sound or wholesome. In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character, than he does his private property. Remedy, by due course of law, for injury to each, is secured by the same constitutional guaranty, and the one is no less inviolable than the other. To hold otherwise would, in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputation, and thus defeat the purpose of the rule contended for, and overturn the reason upon which it is sought

to sustain it. That rule has not been generally adopted in this country, and the converse of it has hitherto obtained in this state."

From the opinion of the court in *Upton v. Hume*, 24 Or. 431, 21 L. R. A. 493, 41 Am. St. Rep. 863, 33 Pac. 812,—a case precisely in point, and decided in 1893,—we quote as follows: "The rule we gather from the authorities is that the fitness and qualification of a candidate for an elective office may be a subject for the freest scrutiny and investigation, either by the proprietor of a newspaper, or by a voter or other person having an interest in the matter; and that much latitude must be allowed in the publication, for the information of voters, of charges affecting the fitness of a candidate for the place he seeks, so long as it is done honestly and without malice. Nor will such publication be actionable, without proof of express malice, although it may be harsh, unjust, and unnecessarily severe, for these are matters of opinion, of which the party making the publication has a right to judge for himself. In the case of such a publication the occasion rebuts the inference of malice which the law would otherwise raise from its falsity, and no right of action exists, even though the character of the party has suffered, unless he is able to show the existence of actual malice. But when the publication attacks the private character of a candidate by falsely imputing to him a crime, it is not privileged by the occasion, either absolutely or qualifiedly, but is actionable *per se*, the law implying malice; and it is no justification that the publication was made with an honest belief in its truth, in good faith, and for the purpose of influencing voters. Such publications can be justified only by proof of their truth. *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212; *Curtis v. Mussey*, 6 Gray, 261; *Aldrich v. Press Printing Co.* 9 Minn. 133, 86 Am. Dec. 84, Gil. 123; *Root v. King*, 7 Cow. 613, Affirmed in 4 Wend. 113, 21 Am. Dec. 102; *Hamilton v. Eno*, 81 N. Y. 116; *Com. v. Wardwell*, 136 Mass. 164; *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367; *Seely v. Blair*, Wright (Ohio) 358. If it can be said that the cases of *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785, *Mott v. Dawson*, 46 Iowa, 533, and *State v. Balch*, 31 Kan. 465, 2 Pac. 609, when read in the light of the facts, announce a contrary doctrine, they do not seem to us to be supported either by reason or the weight of authority."

The New York cases are strong, clear, and harmonious in support of the cases quoted above, and we would refer especially to the discussions and quotations contained in the early cases of *Lewis v. Few*, 5 Johns. 1, and *Root v. King*, 7 Cow. 613, Affirmed on 65 L. R. A.

error brought in 4 Wend. 113, 21 Am. Dec. 102.

Chief Justice Folger, in the latest conspicuous New York case (*Hamilton v. Eno*, 81 N. Y. 126), disregards entirely the distinction made by counsel for the plaintiff in error between an official and a candidate for office, and evidently considers the analogy between a candidate for public office, seeking the suffrages of the electors, and a servant seeking employment, to be too feeble to furnish a basis for legal action. The differences between the two situations, and the differences between the audiences to which a defamatory charge would be addressed in either case, are manifestly too great and too fundamental to permit such an analogy to be pressed successfully. The robust common sense that has marked the development of the common law cannot be effectively influenced by an analogy so remote and so rhetorical. Folger says in *Hamilton v. Eno*, 81 N. Y. 126: "Now, one may in good faith publish the truth concerning a public officer, but, if he states that which is false and aspersive, he is liable therefor, however good his motives. A person in public office is no less to be protected than one who is a candidate for public office, and the law of libel must be the same in each case. The public have as much interest in knowing the true character of one who is seeking a place of trust as that of one who holds it. There must be as much and no more privilege of utterance as to one than the other. Yet it is the law of this state that to accuse a candidate for public office of an offense is not privileged, though the charge was made without evil motive and in the exercise of a political right (*Lewis v. Few*, 5 Johns. 1), and though the libel relate to a public act of the candidate in his official place (*Ibid.*; *Root v. King*, 7 Cow. 613, Affirmed on error brought in 4 Wend. 113, 21 Am. Dec. 102). It cannot be different when the charge is against one holding an office. See *Edsall v. Brooks*, 17 Abb. Pr. 221. So it seems to be in the other states. *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212; *Curtis v. Mussey*, 6 Gray, 261; *Seely v. Blair*, Wright (Ohio) 358, 683; *Brewer v. Weakley*, 2 Overt. 99, 5 Am. Dec. 656; *Mayrant v. Richardson*, 1 Nott & M'C. 347, 9 Am. Dec. 707."

The Massachusetts cases are equally clear and harmonious. Taken together, they are most discriminating and instructive concerning the whole doctrine of privilege. They are freely cited in the cases quoted above.

Burt v. Advertiser Newspaper Co. 154 Mass. 242, 13 L. R. A. 97, 28 N. E. 1, is the latest case, and is extensively quoted by Judge Taft, as we have already seen. We would also refer especially to the Maryland

case of *Negley v. Farrow*, 60 Md. 176, 45 Am. Rep. 715, and the Michigan case of *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 671, and the Florida case of *Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676.

It is unnecessary, however, to cite authorities further. Nearly all are cited in the cases we have already quoted. It is sufficient to say that the weight of authority in general is overwhelmingly on the side of the propositions, and the argument in support of them, quoted above from the opinion of Judge Taft in *Post Pub. Co. v. Hallam*, while the sustaining cases are even more remarkable for adequate research and a vigorous grasp of the subject than for their numbers. The opposing cases, however, are really not numerous, there being but very few outside of the Iowa and Kansas cases referred to so disparagingly in *Upton v. Hume*, 24 Or. 431, 21 L. R. A. 493, 41 Am. St. Rep. 863, 33 Pac. 812, and *Briggs v. Garrett*, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513. The latter case is the one most relied upon by the plaintiff in error, and is quoted very generally. It is a question, however, whether the facts and circumstances in that case do not place it in a class of cases other than the one at bar,—a class to which we propose briefly to refer; and therefore, even were its logic convincing,—and we think it the reverse,—it might still be discriminated from the case at bar. The libel in that case consisted of a letter received by the defendant making charges against Judge Briggs, and the publication consisted in his reading it to the committee of one hundred assembled in a meeting open to the public, the so-called committee of one hundred being a well-known organization for a distinct public purpose. The South Dakota cases upon which much stress is laid by counsel for plaintiff in error appear to be based by the South Dakota courts expressly upon a provision in the Constitution of South Dakota. *Vide Ross v. Ward*, 14 S. D. 240, 86 Am. St. Rep. 746, 85 N. W. 183. Many cases have been cited and discussed by counsel on both sides that deal with facts and circumstances which place them in classes differing greatly from that of the case at bar, so that they are concerned with other applications of the doctrine of privilege. In treating a subject which requires such nice discrimination and such careful distinctions in the application of accepted principles, it is easy to perceive that confusion is constantly created by applying language properly used in one class of cases as authority for the decision of another class. I refer more especially to the numerous cases relating to the publication of reports of proceedings of legislative, ju-

dicial, and semijudicial bodies containing matter defamatory of individuals, and also to those cases that are concerned with charges made to the appointing or supervising power for the purpose of securing the discipline or removal of a subordinate official. A large proportion of the cases cited by counsel belong to one or another of these classes, and, although it is entirely unnecessary to discuss them at length, or to cite them, it seems desirable to indicate one or two in each class, in order that the distinction may appear clearly in this connection.

A leading English case belonging to the first class mentioned is *Watson v. Walter* (editor of the London Times), L. R. 4 Q. B. 84, 8 Best & S. 671, 38 L. J. Q. B. N. S. 34, 10 L. T. N. S. 409, 17 Week. Rep. 169, where for the first time (1868) it was held that the doctrine of privilege, which had already been applied to the publications of proceedings of courts of justice, extended to debates in Parliament. Chief Justice Cockburn in that case, referring to the publication of judicial proceedings, says: "It is thus that, in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public, and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged. The other and the broader principle on which this exception to the general law of libel is founded is that the advantage to the community from publicity being given to the proceedings of courts of justice is so great that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that, with a view to distinguish the publication of proceedings in Parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of Parliament are not, as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in *Re v. Wright*, 8 T. R. 298, 4 Revised Rep. 649, namely, that, 'though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than

counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.' In *Davidson v. Duncan*, 7 El. & Bl. 231, 26 L. J. Q. B. N. S. 106, 3 Jur. N. S. 613, 5 Week. Rep. 253, Lord Campbell says: 'A fair account of what takes place in a court of justice is privileged. The reason is that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court, and the proceedings are under control of judges. The inconvenience, therefore, arising from the chance of injury to private character, is infinitesimally small, as compared to the convenience of publicity.' And Wightman, J., says: 'The only foundation for the exception is the superior benefit of the publicity of judicial proceedings, which counterbalances the injury to individuals, though that at times may be great.' And Chief Justice Cockburn concludes: "Both the principles on which the exemption from legal consequences is thus extended to the publication of the proceedings of courts of justice appear to us to be applicable to the case before us."

A leading American case belonging to this class extends the application of the principles here quoted. The case is that of *Barrows v. Bell*, 7 Gray, 301, 66 Am. Dec. 479, which was an action of libel brought against a member of the Massachusetts Medical Society for the publication of proceedings of that society attending the expulsion of a member. Chief Justice Shaw's decision in that case seems to have been generally followed in this country, and seems to have established practically the American rule on this point. He says: "But whatever may be the rule as adopted and practised in England, we think that a somewhat larger liberty may be claimed in this country and in this commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people. So many municipal, parochial, and other public corporations, and so many large voluntary associations formed for almost every lawful purpose of benevolence, business, or interest, are constantly holding meetings in their nature public, and so usual is it that their proceedings are published for general use and information, that the law, to adapt itself to this necessary condition of society, must of necessity admit of these public proceedings, and a just and proper publication of them, as far as it can be done consistently with private rights. This view of the law of libel in Massachusetts is recognized, and to some extent sanctioned, by the case of *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212, and many other cases." Speaking 65 L. R. A.

of the powers of the Massachusetts Medical Society and its relation to its members, he says: "The charter invested the society, their members and licentiates, with large powers and privileges. . . . They were authorized to elect fellows, and vested with power to suspend, expel, or disfranchise any fellow or member, and to make rules and by-laws for their government. No person could be a member, but by his own act in accepting the appointment. This society was regarded by these legislative acts as a public institution, by the action of which the public would be deeply affected in one of its public interests,—the health of the people. The plaintiff, by accepting his appointment as a fellow, voluntarily submitted himself to the government and jurisdiction of the society in his professional relations, so long as they acted within the scope of their authority. . . . If, then, this charge of dishonorable or fraudulent conduct by the plaintiff in his dealings with Dr. Carpenter was within the jurisdiction of the medical society, and proceedings were instituted and carried on to their final determination in the expulsion of the plaintiff from his fellowship, then the proceedings might be rightly characterized, as in the case of *Farnsworth v. Storrs*, 5 Cush. 412, as quasi judicial, and then the only remaining question of fact was whether the publication was a true and correct narrative of such proceedings and determination." It may be observed that no line is drawn in this case between the proceedings and a publication of the proceedings.

A leading English case belonging to the second class we have mentioned is *Harrison v. Bush*, 5 El. & Bl. 345, 25 L. J. Q. B. N. S. 25, 1 Jur. N. S. 846, 3 Week. Rep. 474, in which the alleged libel was addressed to Lord Palmerston, then Prime Minister, for the purpose of securing the removal of the plaintiff, a justice of the peace, from his office. It was held qualifiedly privileged; that is, privileged if published bona fide, without malice, etc.

A conspicuous American case is *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775, where the alleged libel was addressed to the superintendent of the census, with a view to the removal of an enumerator, and it was held to be qualifiedly privileged, in the same manner.

Of the cases cited which involved strictly private and unofficial relations, such as those between employers in regard to servants or employees, the well known starting point of qualifiedly privileged communications, and between members of a family with regard to persons seeking marriage, there is obviously no occasion to speak, for that branch of

the doctrine of privilege has been too long settled, and is too well understood.

This laborious review of the authorities leaves no doubt in our mind that it would be unsound in principle, unwarranted by precedent, and contrary to public policy to hold that allegations of fact charging a candidate for office with a criminal offense are in any way privileged. If allegations of fact charging a candidate for office with a criminal offense are false or untrue (in the case at bar it is admitted by the pleadings that the charges of crime contained in the alleged libel are false or untrue), then good faith and probable cause are not a defense to the action. In such case the publisher of a libel takes his own risk, and can justify only by pleading specially and proving the truth
65 L. R. A.

of the charge. If the case at bar required us to go further than this, and we were asked to hold that no allegations of fact charging a candidate with disgraceful acts, whether criminal or not criminal, are privileged, as do many of the cases cited, we might deem it necessary to extend the discussion further, and analyze the whole subject exhaustively; but such is not the case. We are entirely agreed that this opinion should not embrace any question not actually before us, and therefore we consider further discussion unnecessary.

We think that there was no error in the rulings or charge of the learned chief justice, and therefore *the judgment of the court below is affirmed.*

END OF CASES IN BOOK 65.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1904, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. SOCIETIES.
- IV. DOMESTIC RELATIONS.
- V. TORTS; NEGLIGENCE; INJURIES.
- VI. PROPERTY RIGHTS; WILLS; DEEDS; COVENANTS; GIFTS; GUARANTY.
- VII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- VIII. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

See also *infra*, V., *Municipal Corporations*.

Bankruptcy.

A judgment determining the amount to be contributed by the stockholders of an insolvent corporation for the payment of its debts under constitutional and statutory provisions making stockholders liable for debts to the amount of the par value of the stock held by them is held to render the amount due from each stockholder a debt provable in bankruptcy proceedings against him, so as to be canceled by a discharge, although he did not appear in the proceeding against the corporation, where the judgment therein is binding upon him. (Or.) 793.

A judgment obtained by a wife for damages by reason of the alienation of the affections of her husband is held not to be released by the discharge of the judgment debtor in bankruptcy, where such alienation was accomplished by schemes and devices of the judgment debtor, and resulted in the loss of support and impairment of health to the wife. (Kan.) 523.

The obligation of a married woman, not a free trader, to pay for goods which form part of a stock in trade with which she is carrying on business, which may, in equity, be enforced against her separate estate, is held to be a "debt," within the meaning of the clause of the bankruptcy act relating to involuntary bankruptcy proceedings. (C. A. 5th C.) 106.

Assignment for creditors.

A deed of trust to secure debts executed by a corporation at its domicile in one state is held to be governed, as to its nature, character, and interpretation, by the laws of that state, although it involves choses in action in another state, where the corporation is doing business, and in whose courts the interpretation of the instrument is called in question. (Ark.) 353.

65 L. R. A.

Taxes.

The fact that a collateral-inheritance-tax statute exempts from its provisions institutions in the state organized for purposes of purely public charity, while requiring the payment of the tax by such institutions when incorporated in other states, although some of their charitable works are carried on within the state, is held not to render it unconstitutional as a grant of special privileges or immunities, or a denial of the equal protection of the laws. (Ohio) 776.

A classification of restaurants, for the purpose of a revenue tax, into those where meals are cooked and served by the proprietor or a member of his family, and those where they are not, imposing a lower tax upon the former, is held not to be void as an unjust discrimination. (Cal.) 946.

An institution for the teaching of physical culture is held to be within a constitutional provision exempting from taxation institutions of education. (Ky.) 120.

The legislature is held to have no power to permit a person who, upon bringing a stock of goods into a state after the time for levying the taxes for a year has passed, pays the tax for the whole year, to deduct from the regular assessment against him at the beginning of the next year the amount representing the time when his property was not in the state. (Wash.) 336.

A concern which sells trading stamps to merchants, to be given to customers as an inducement to secure their trade, and which redeems the stamps with articles kept in stock for that purpose, is held not to conduct a gift enterprise within the meaning of a statute authorizing municipal corporations to impose taxes on such enterprises in the same manner as upon lotteries. (N. C.) 167.

The right of a city to invoke its taxing power to raise funds to construct a bridge

which is not located upon a street or highway having a legal existence is denied. (N. D.) 187.

A statute attempting to make street car companies responsible for the payment of a privilege tax imposed upon persons leasing the right to use the cars for advertising purposes, is held to be void under a constitutional provision that no one shall be deprived of his property without due process of law. (Tenn.) 296.

Schools.

A teacher who throws a pencil at a pupil to attract his attention is held to be liable for the destruction thereby of the sight of the pupil, if he did not act with ordinary care, and the injury was the natural and probable result of his negligence. (N. C.) 890.

Officers.

One appointed for a definite time to a legislative office is held to have no vested property interest or contract right thereto of which the legislature cannot deprive him during the existence of the term. (N. C.) 697.

Executors and administrators.

A statute providing for the appointment of a special administrator in case of a person who has disappeared under circumstances justifying a belief that he is dead is held to be invalid, as depriving the person of his property and its possession without due process of law, when applied to the property of a person living, although such special administrator has no power to administer such estate generally. (N. D.) 757.

A contract by one named as executrix in a will, that, in consideration of the withdrawal of opposition to its probate, she will distribute money which comes into her hands as executrix as fast as a certain sum shall accumulate, is held to be enforceable against the promisor in her individual capacity. (Nev.) 672.

Copyrights.

Merely placing a design on the covers of an edition of an author's works without registering it as a trademark, or giving notice that it is claimed as such, is held not to protect it from use by others. (C. C. A. 2d C.) 873.

Patents.

A patent on a bogus-coin detector for use on self-operating vending machines is held not to be void for want of utility in the device because it has been used only in connection with gambling appliances, where it is equally capable of use on machines used for legitimate purposes. (C. C. A. 7th C.) 381.

65 L. R. A.

Highways.

The right to bore wells within the limits of a highway to obtain water to sprinkle the road and keep it in repair is held not to be included in a highway easement. (Cal.) 949.

The public, by laying out a highway, is held not to acquire a right to prevent the owner of the fee from removing and applying to his own use timber standing therein, which the public may desire to preserve for shade or ornamentation. (N. H.) 676.

To uphold a statute imposing the duty upon the owners or occupants of abutting land to keep the sidewalks free from snow and ice, it is held that there must be no inequality in the burden imposed on the respective classes of persons upon whom the duty is imposed, nor unjust discrimination in favor of some and against others. (D. C. App.) 430.

A municipal corporation is held to have no such title to the fee of its streets as entitles it to claim compensation from a railroad company which, by virtue of a legislative franchise, occupies a portion of a street for a crossing. (Miss.) 561.

A statute making a municipal corporation liable for injuries caused by failure to keep its streets safe for travelers "with their teams, carts, and carriages" is held not to apply in favor of one using a bicycle, when such means of conveyance subsequently comes into use. (R. I.) 234.

Intoxicating liquors.

An ordinance forbidding the use of screens in places where liquor is sold, or of side or trap doors, or the keeping of games and devices for amusements, or the maintenance of eating places therein, and requiring all liquor to be served and drunk at the counter, and that the saloon shall be closed during certain hours, and forbidding the owners thereof or their employees from being in such places during the hours when the saloons are required to be closed, is held not to be unreasonable. (N. C.) 902.

The right of the legislature to provide for the destruction of intoxicating liquors kept for illegal sale, without granting their owner a jury trial, is sustained. (Ark.) 76.

Limitation of hours of labor.

The right of the state to forbid independent contractors, performing work for it, to require their employees to labor more than a specified number of hours per day, either under its police power, or on the ground that the legislature may prescribe rules for the manner in which state work shall be performed, is denied. (N. Y.) 33.

An act providing an eight-hour day for all workmen in mines, smelters, and mills

for the reduction of ores is sustained. (Nev.) 47.

Legitimizing children of slaves.

A statute legitimating all children of slaves which have been recognized by the man as his, although the father and mother have ceased to cohabit prior to the passage of the act, is held not to be binding on a man who has become domiciled in another state. (Mass.) 177.

Restricting sale of stock of goods in bulk.

A statute prohibiting solvent merchants, under penalty, from disposing of their stocks in bulk without giving notice to their creditors is held to be an unconstitutional deprivation of liberty and property. (Utah) 308.

Seizure of gaming instruments.

A statute authorizing the seizure and withholding of gaming tables or other instruments of gaming until after the trial of the owner on a charge of using them for gambling purposes is held not to be unconstitutional as depriving a person of his property without due process of law. (W. Va.) 616.

Game laws.

A statute authorizing game wardens to seize and forfeit to the state summarily, without affording the owner thereof opportunity for a hearing, all guns, ammunition, decoys, fishing tackle, etc., in actual use by persons hunting in violation of the game law, is held to be void as depriving the owner of his property without due process of law (Neb.) 610.

Publication of state statutes.

The legislature is held not to be prohibited by any provision of the Constitution from granting to a person the right to publish the statutes of the state, and making such statutes prima facie evidence of the law, nor from purchasing such number of copies thereof as the legislature may deem necessary for the use of its officers. (Neb.) 607.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Contract in restraint of trade.

Where three coal-mining companies operating in the same vein or seam in close proximity to one another, and just having commenced the development of that particular kind of coal, organize indirectly and nominally in the names of individuals a third corporation to act as their general sales agent, and each gives it by contract the exclusive right to sell its entire output of coal at prices uniform as to all three companies; and the agent company is to advertise and introduce the coal in the markets, establish and control all agencies and sub-agencies, and make all sales and collections, and deduct for its compensation ten cents per ton out of the proceeds of sale,—it is held that the contract is illegal and void, as tending to suppress competition and restrain trade, contrary to public policy. (W. Va.) 342.

Forbidding assignment of wages.

A statute prohibiting the assignment of future wages by employees is held not to be void as an unreasonable restraint upon the liberty of the citizen, or as depriving him of his property without due process of law. (Ind.) 599.

Forbidding payment of wages in store orders.

A statute forbidding, under penalty, persons or corporations engaged in private enterprises from paying employees in store orders not redeemable in cash is held to be unconstitutional as interfering with the right to contract. (Mo.) 588.

Docking of horses' tails.

A statute forbidding the use of horses whose tails are docked after their passage is held not to be void as an unconstitutional deprivation of property. (Colo.) 424.

Right to jury trial.

The power of the court to assess the damages, in case of default, without the aid of a jury, is held not to be destroyed by a constitutional provision preserving the right of trial by jury inviolate, where, at the time of the adoption of the Constitution, the court followed the common-law practice of assessing damages in such cases without calling a jury. (R. I.) 236.

A statute which provides for a change of place of trial to another county upon the application of the state's attorney, when a fair and impartial trial cannot be had in the original county, is held not to be invalid as a deprivation of the constitutional right of trial by jury. (N. D.) 762.

Jurisdiction over boundary waters.

The enforcement by the state of Minnesota of its fish and game laws on the Wisconsin side of the main channel of the Mississippi river is held not to be justifiable on the theory of common ownership of the river or things in, or on, or under, the same on the Wisconsin side of the main channel. (Wis.) 953.

Contract made on Sunday.

The right to declare a contract made on

Sunday void because opposed to public policy is denied. (N. C.) 682.

Impossibility of performing contract.

A contract to repair a standing building and construct an annex thereto which shall become an integral part of it is held to be discharged by the destruction by lightning of the main building when the work is practically completed, so as to render repair and completion of the annex impossible without the reconstruction of the main building. (Ind.) 111.

Assignment of wages.

An assignment of wages to be earned in the future under an existing contract is held to be valid, and the fact that the term of employment is not of definite duration is held to be immaterial. (Ill.) 602.

Contract by telephone with person in other county.

An agreement by a resident of one county, in response to a telephone call from a person residing in another county, that he would honor a draft for the amount in case the latter should advance money to a third person, is held to be made in the former, within the meaning of a constitutional provision that actions on contracts may be brought in the county where they are made. (Cal.) 90.

Banks.

Knowledge by a bank of the insolvency of factors possessing authority to deposit money belonging to their customers in their own names is held not to be sufficient to charge it with liability for the misappropriation of such funds which it permits to be checked out in favor of third persons, although by the exercise of care it might have known that a misappropriation was being effected. (Tex.) 820.

Carriers.

A railroad company which refuses to deliver freight because of refusal to pay an excessive charge for carriage is held not to be able to escape liability for the loss thereby caused on the ground that the one making the demand had not obtained possession of the bill of lading or an order for delivery from the nominal consignee. (N. C.) 717.

A railroad ticket, although torn in two pieces, is held not to be "mutilated" within the meaning of a stipulation on its face that it shall not be good for passage if mutilated; and the ticket is held to be valid when both pieces are presented to the conductor at the same time, and it is apparent that they are parts of the same ticket, and that no fraud has been perpetrated upon the railroad company. (Ga.) 436.

65 L. R. A.

Insurance.

The indorsement by the clerk of an insurance company of a slip of paper notifying the company of a shipment to be covered by an open marine policy in the usual way, with the amount of the premium and the check mark indicating its readiness for entry in the books, is held not to show an acceptance of the risk in the face of its positive rejection by the officers of the company as soon as they learned that it was on property already lost, of which the assured is notified without delay. (C. C. A. 3d C.) 387.

Breach of a condition in an insurance policy on a building and the furniture, fixtures, etc., and the stock or goods therein, requiring the insured to take an inventory of the stock at stated intervals, to keep a set of books, and preserve such inventory and books in a fire-proof safe, and providing that the entire policy shall become null and void for failure to comply therewith, is held not to avoid the policy as to the insurance on the building and fixtures, where the building and its contents are described separately, and the insurance is apportioned between the building, the fixtures, and the merchandise, a certain amount being specified for each. (Okla.) 173.

The holder of a purchase-money mortgage is held to have no insurable interest in the life of the wife of the mortgagor, who did not join in the execution of the mortgage debt. (N. C.) 161.

The recovery by the next of kin on a policy upon the life of one murdered by the beneficiary named in the policy is held not to be forbidden by public policy. (Ill.) 508.

Bills of lading.

A merchant who ships goods to his broker without conveying title to him, but purely for the purpose of distribution to others, and sends to him a bill of lading indorsed in blank for the goods, the possession of which, by the general custom of trade, is regarded as evidence of the right to dispose of the property, is held not to be able, in an action of trover, to recover the goods from a bank which has, in good faith, and without notice of the owner's title, taken the bill of lading as security for a loan of money to the broker on his individual account, and converted the property upon default in payment of its debt. (Ga.) 443.

Telegrams.

In the absence of negligence on its part, a telegraph company is held not to be liable, because of the delivery of a fraudulent telegram sent by one who tapped the company's wires, to make good the loss resulting from the sendee's reliance upon the faith of its authenticity. (Tex.) 805.

Sale.

Immediate delivery, followed by actual and continual change of possession, as required by statute to make a valid sale of personal property, is held to be sufficiently shown from the fact that a purchaser of fruit in bins sent a representative the same evening to take possession of it, and the next morning sent men to prepare it for shipment, although on the day of the purchase the fruit was not moved from where it was when the sale took place. (Cal.) 943.

The sale of flour in quantity by the barrel, to one who intends to resell it under a representation that it is of a certain quality, without opportunity of inspection on the

part of the purchaser, is held to give him the right to rescind in case the flour proves to be of inferior quality. (Ark.) 80.

A purchaser of machinery is held to have no right to rescind the contract merely because the patents under which it is manufactured are in dispute. (S. C.) 294.

Attorney's duty to client.

An attorney is held to have no right to withhold from his client information acquired by him in the exercise of such attorneyship, and use the same to extort an increased compensation from his client, or coerce him into a contract he would not have entered into upon full information. (W. Va.) 348.

III. SOCIETIES.

The members of an unincorporated mutual benefit association are held not to be subject to suit by the beneficiary of a deceased member for their respective shares of such benefit, where the by-laws of the association

contemplate the collection and disbursement of benefits by officers, and forfeiture of membership is the only penalty provided for failure to pay an assessment. (Ind.) 516.

IV. DOMESTIC RELATIONS.

Custody of illegitimate child.

The putative father of a bastard child is held to be entitled to the possession of it, as against its maternal relatives, after the death of its mother, where there is nothing to show that he is an improper person to have custody of it. (Miss.) 689.

Liability for necessities furnished wife.

The obligation of a man to pay for necessities furnished to his wife, with whom he is living, upon the theory of implied agency on her part, is denied where she was amply supplied with articles of the same character

as those purchased, or was furnished with ready money with which to pay cash for them. (N. Y.) 529.

Alimony.

A pension received by a soldier of the Civil War from the Federal government is held to be properly taken into consideration as part of his resources, in fixing the future alimony to be paid by him, when his wife is granted a divorce, although, under the Federal statutes, it is not subject to seizure by any legal process until it has reached his possession. (Vt.) 332.

V. TORTS; NEGLIGENCE; INJURIES.

A street car company which removes from its tracks an obstruction wrongfully placed there by trespassers is held not to be bound to place it where it will not be dangerous to travelers upon the highway; nor to be liable for injury to a traveler in case it leaves the obstruction in the traveler's path after dark, unmarked by light, so that the traveler comes into contact with it to his injury. (R. I.) 231.

Confusion of goods.

An assignee of a gas lease, which, to avoid accounting to its assignor for his share of the profits of a well to which he is entitled under the contract of assignment, fraudulently commingles the product of the well with the product of other wells without

keeping any account or preserving any record of the amount of gas produced by it, is held to be obliged to account for the proportionate part called for by the contract, of the whole amount of gas produced and sold by it, under the principle which is applied in case of the fraudulent confusion of goods. (Pa.) 218.

Unfair competition.

The use upon bottles containing water from the Saratoga Spring of a label in which the word "Saratoga" is made inconspicuous, and the word "Vichy" prominent, so that when the bottles are standing on a table or shelf the word "Vichy" is the prominent object of sight, is held to be unfair competition with bottled waters from the com-

mune of Vichy in France, which had long been upon the market under that name. (C. C. A. 2d C.) 830.

The use of geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another, and to carry on unfair competition, is held to be lawfully enjoined by a court of equity to the same extent as the use of any other terms or symbols. (C. C. A. 8th C.) 878.

Malice.

A patron of a street railway company is held to incur no liability to a conductor by reporting to the superintendent of the company his misconduct, while on duty, toward a passenger, though in making the report he is prompted by ill will and a desire to secure the conductor's discharge from the service of the company. (Ohio) 856.

Malicious prosecution.

A right of action for malicious prosecution of a civil action in which there is no arrest or attachment of property, and no special injury inflicted which would not necessarily result from the prosecution of any similar suit, is denied. (Wash.) 826.

Libel.

A publication by a newspaper charging a candidate for nomination for a public office with a criminal offense is held to be in no way privileged, but to be made at the risk of the publisher, who, to escape liability for libel, must prove the truth of the charge made. (Del.) 980.

That two persons had been engaged in the publication of a series of libelous articles against each other is held to be properly taken into consideration in assessing the damages in a suit by one based on the publication of the other. (Ark.) 937.

The business of pretending to heal absent patients by supernatural powers without medicine or surgery is held to be fraudulent, and not protected by the law against libel, although many persons claimed to have been benefited by the treatment. (Mo.) 584.

Assault on guest at inn by servant.

An innkeeper is held not to be liable, in the absence of negligence on his part, for injuries to a guest caused by an assault committed by a servant employed in the inn. (Cal.) 88.

Imputed negligence.

One riding in a conveyance controlled by her father is held not to be chargeable with his negligence, which combines with that of persons in charge of another conveyance to bring them into collision to her injury. (N. C.) 722.

Proximate cause of injury.

That injury to one attempting to drive a
65 L. R. A.

horse across a railroad track would not have happened but for the unsnapping of a line is held not to relieve the railroad company from liability for the injury, if the horse was frightened by defendant's negligence, and the unsnapping of the line was caused by its rearing because of the fright. (Mich.) 553.

Injury to person using path along railroad right of way.

A railroad company which permits the public to use its right of way to travel on foot at a particular place so continuously and frequently as to result in a well-beaten and clearly defined path, plain and open, is held to be bound to use ordinary care not to maintain pitfalls or unsafe conditions which may result in injury to one attempting to use the path relying on the safety suggested by the implied invitation arising from the visible conditions. (S. C.) 286.

Negligence in going to rescue of person in danger.

A telephone lineman is held not to be guilty of negligence in going to the rescue of a fellow workman who, while on a telephone pole, received a shock caused by the wire he was handling coming in contact with the span wire of an electric street-car system, which, because of the defective insulation of the hanger by which it was connected with the trolley wire, was heavily charged with electricity, whereupon he fell headlong, and, his spurs catching on a spike on the pole, hung suspended in the air; and, the railroad company is held to be liable for the death of the lineman, where, in his effort to relieve his fellow worker, he seized the telephone wire, which had become charged with electricity through the negligence of the railroad company, and was instantly killed. (La.) 129.

Injury to officer serving process.

A small boat used for the common carriage of passengers for hire, and having neither sleeping apartments nor places for meals, is held not to be a dwelling house, so as to justify the forcible resistance of an officer who attempts to enter it to serve process, although a seat in the boat is used for a sleeping place by the person in possession of the boat. (Mich.) 559.

Injury to patient in hospital.

A hospital organized exclusively for charity is held not to be liable for injury to a patient caused by the negligence of its carefully selected nurse, even though a charge is made and paid for the services rendered,—at least if the amount paid does not make full pecuniary compensation for such services. (C. C. A. 1st C.) 372.

Injury by blasting.

The operation of a stone quarry on city lots for a long period of time by means of blasting, which causes vibrations of the earth and air in such a manner as to render an adjoining dwelling unsafe for occupation, and causes rents in its walls, is held to render the one responsible therefor liable for the injury, although he uses due care in the prosecution of the work. (Mont.) 655.

Blasting by the use of gunpowder or dynamite is held to be an appropriate and justifiable mode of removing rock from the right of way of a railroad in order to bring it to grade, where the blasting is done with reasonable care. (C. C. A. 8th C.) 659.

Injury by moving house in street.

A person licensed to move houses in a city is held to be legally liable for damages, done by him while moving a house through the streets, to the wires and property of a telephone company duly authorized by ordinance to establish a telephone system in such city, and maintained therein. (N. D.) 771.

Injury to servant.

A hostler in charge of an engine running through a yard is held not to be a fellow servant of a car inspector at work therein, so as to relieve the company from liability for injuries inflicted by him upon the inspector by the negligent running of the engine. (Ky.) 122.

Negligence of independent contractor.

A property owner is held not to be able to relieve himself from liability for injuries to a traveler upon the highway by reason of the negligent failure to guard and light after dark a trench opened in the highway to connect his dwelling with the street water main, by employing an independent contractor to perform the work. (N. H.) 742.

A competent person who undertakes to construct the brick work on a building with his own employees and according to his own discretion is held to be, as to such work, an independent contractor, for whose negligence the owner of the building is not responsible. (Va.) 445.

One who contracts for the sinking of a shaft on his property, agreeing to furnish the necessary tools, including a "hoist," while the other party is to furnish the labor, is held not to be liable for an injury to an employee through the breaking of a rope used on the hoist, which is sufficient when furnished, but is allowed by the contractor to become defective. (Ky.) 455.

One who contracts to construct bridge abutments according to plans and specifications already prepared for one who has taken the contract for the construction of 65 L. R. A.

the bridge is held to be an independent contractor, for whose acts the employer is not responsible, although his agent exercises some kind of general supervision for the purpose of seeing that the work is done according to the contract. (C. C. A. 6th C.) 620.

One who employs another to manufacture furniture for him, furnishing all the materials, tools, and machinery for the purpose, among which is a machine which is safe to operate under proper instructions, but dangerous to operate without instructions, is held to have no right, in an action for injury to a person using the machine because of failure to notify him of its dangerous character and give him instructions as to operating it, to set up the defense that the injured person was an employee of an independent contractor, since under the circumstances the resulting injury might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care should be omitted. (Ohio) 833.

Death of steamship passenger.

The owner of a steamship is held to be liable for the death of a passenger drowned by the swamping of a boat sent to convey him from the shore to the vessel, where the officer in charge of the boat permits it to attempt the journey in an overloaded condition, although the passengers are themselves guilty of contributory negligence in failing to leave the boat when told that it is overloaded, and requested to do so. (C. C. A. 9th C.) 84.

Municipal corporations; liability for injuries.

A municipal corporation is held not to be liable for the death of one killed by the fall of material from a building in process of construction adjoining a street, by the mere fact that it granted a permit for the construction of the building, and took no precautions to warn passersby of danger in using the street pending the construction of the building. (Wash.) 333.

A municipal corporation is held to be liable for injuries to property upon which it casts surface water in a body across intervening land by means of a drain or culvert in a highway, although no more water is collected than would have naturally flowed upon the property in a diffused condition. (R. I.) 250.

The creation by the legislature of a commission to erect public buildings for a municipal corporation is held not to relieve the city from liability for injuries caused by the negligent operation of elevators in a building after it has been turned over to the city, where the commission is given no

power to maintain, rebuild, repair, or refurnish the building after it has once parted with possession of it. (Pa.) 214.

A municipal corporation is held not to be able to ratify the act of the superintendent of its waterworks system in entering upon private property and connecting a well there located with the city water mains without the consent of its owner, so as to become liable for the water taken from the well. (S. D.) 158.

Loss of package in mails.

A railroad company transporting mail, either under contract with the government or by reason of the general laws and the regulations of the Postoffice Department, is held to be an agent of the government, and not liable to individuals for loss of mail through negligence of its subordinate employees. (C. C. A. 8th C.) 397.

VI. PROPERTY RIGHTS; WILLS; DEEDS; COVENANTS; GIFTS; GUARANTY.

Purchase pendente lite.

The title secured by a purchase, by a stranger after an appeal has been taken from the judgment, from one who has purchased mortgaged real estate at his own foreclosure sale, is held to be subject to be defeated by a reversal of the judgment, notwithstanding the execution of the judgment was not superseded pending the appeal. (Cal.) 419.

Finder.

The right of one who, while in the employ of another, finds upon the latter's premises money evidently hidden and forgotten by an unknown owner, to maintain an action of trover against his employer, where the latter takes the money out of his possession and refuses to restore it, is sustained. (Or.) 526.

Fiatures.

The main belt which transmits the power from an engine which is so affixed to the building as to be real estate, to the machinery in the mill, is held to be, as between the owner and attaching creditors, real estate. (C. C. A. 2d C.) 327.

Water rights.

Users of water from a ditch or canal are held to be entitled to sell and transfer the right to use such waters; and the purchaser is held to have a right to transfer it to other lands under the ditch or canal, so long as the change of place does not interfere with the rights of others. (Idaho) 407.

Advancements.

The execution of releases from part only of the children to whom advancements are made, of all further interest in the estate, is held not to destroy their right to share an intestate property thereafter accumulated by the ancestor, where all his children had shared equally in the advancements. (Va.) 578.

Wills.

A legacy to a particular church of which testator is a member is held to lapse with the termination of the church's existence, 65 L. R. A.

and not to be capable of administration *cy près*, although the church was for the benefit of deaf mutes, and the work in their behalf is carried on by the corporation into which the legatee was consolidated, where there is nothing to indicate that the continuation of the work, rather than the church itself, was the object of the testator's bounty. (R. I.) 225.

Deeds.

A condition in a deed of a small parcel of land that no grain shall ever be handled on the land granted, which contains no facilities for handling grain at the time of the grant, is held not to be unreasonable or contrary to public policy. (Ill.) 511.

Covenants.

A covenant on the part of a vendor of land, which forms part of the consideration of the grant, to open a way through another tract which he does not at the time own, but contemplates purchasing, is held not to run with the latter tract after it comes into possession of the vendor, and, therefore, not to be enforceable against his grantee. (Or.) 799.

Gift.

Parol instructions by one who has given money to another for safe keeping, which has been deposited by the latter's husband in a bank upon a certificate taken in his own name, to the one to whom the money was delivered, as to the persons to whom it is to be paid after the death of the donor, without any instruction in writing or delivery of the certificate of the deposit, are held not to be sufficient to effect a valid gift *causa mortis*. (Pa.) 813.

Guaranty.

Notice of acceptance is held not to be necessary to bind one who executes a paper by which he "hereby" guarantees a debt which another now owes, or may owe in the future, to a specified amount, the instrument expressly stating that it is to remain in full force until the debt is fully discharged or the agreement is relinquished in writing. (N. C.) 729.

Creditors of a vendor of a stock of goods are held to have a right of action against the grantee upon his agreement with the vendor to pay such creditors out of the purchase money. (N. C.) 736.

A child living in the family of his father, upon property in which he has no property right, is held to have a right of action against one who maintains a well on adjoining property in such a condition as to constitute a nuisance which renders the child ill to his injury. (Tex.) 818.

A member who has been wrongfully expelled from an unincorporated benefit society is held to be entitled to abandon all claims to reinstatement, and resort to an action for damages for the injury inflicted upon him by the expulsion. (Conn.) 92.

Mandamus.

The right of a writ of mandamus to compel the removal from the records of a state prison of the photograph, description, and measurements of a person sentenced to death, but whose sentence is afterwards reversed, and who is subsequently acquitted of the charge against him, is denied. (N. Y.) 104.

Ejectment.

Ejectment, and not a bill in equity for an injunction, is held to be the appropriate remedy to oust from possession one who has entered upon premises under an oil and gas lease which is alleged to be invalid, and has erected necessary machinery, drilled a well, and is proceeding to drill others. (Pa.) 209.

Specific performance.

Specific performance of a contract to sell and deliver a crop of hops is held not to be properly refused on the ground that the remedy is not mutual, because a clause in the contract leaves the purchaser free to reject the hops tendered if they are not of proper quality and in proper condition. (Or.) 783.

Injunction.

See also *supra*, V., *Unfair Competition*.

The right of the owner of an island to an injunction to compel the removal of nets set in the adjoining waters in such a manner as to constitute a public nuisance is sustained where they interfere with the access to and from the island, and the one responsible for them is insolvent, so that an action for damages would not afford adequate relief. (N. C.) 930.

The jurisdiction of a court of equity to enjoin ticket brokers from disposing of, or attempting to transfer, tickets which they have purchased with notice from persons who agreed that they should not be transferred, is sustained. (Mo.) 136.

65 L. R. A.

Estoppel.

Stockholders in, and owners of, land served by an irrigation ditch, who tacitly assent to, and are present without objection during the extension of, the canal over other land of theirs for the purpose of changing the point of intake, are held to be estopped from objecting to the maintenance of the canal after its completion. (Cal.) 940.

Removal of causes.

A denial of the right of a corporation incorporated in another state to remove a cause into a Federal court, on the ground of diverse citizenship, from a court of North Carolina, in which it has been sued by a citizen of the latter state, on the ground that the corporation has become a domestic corporation under the state statute, as it was compelled to do in order to obtain the privilege of doing business in that state, is held not to deprive the corporation of any rights under the Federal Constitution. (N. C.) 915.

Judgment.

Heirs at law are held not to be entitled to the benefit of a judgment in an action by a coheir to set aside a deed of the ancestor, where they were not made parties to the suit, and it was not brought for their benefit. (N. C.) 924.

A judgment dismissing the action and assessing costs against plaintiff, entered upon a verdict for defendant in a suit to recover possession of real estate which involves two issues,—one as to the plaintiff's title and the other as to the right of possession,—without disclosing upon which the judgment is based, is held not to bar a subsequent action for possession, although the statute contemplates that the title shall be tried in such actions, and makes the judgment conclusive as to the estate in such property and the right of possession thereof, so far as the same is thereby determined. (Or.) 790.

Evidence.

Persons sued for the search of a citizen's house without a warrant are held to be entitled to prove the presence of bloodhounds in the searching party, and the use made of them, as bearing upon the question of malice; but the right to introduce evidence as to the breeding and training of the hounds is held to be inadmissible. (Iowa) 519.

Perpendicular marks across the signature of a will, made, apparently, to cancel it, are held not be writings, within the meaning of a statute permitting the comparison of writings by experts so as to admit opinion evidence of their origin. (N. Y.) 95.

Refusal to strike out evidence.

Refusing to strike out the opinion of a witness as to the genuineness of signatures in evidence upon withdrawing other signatures which had been introduced for the purpose of comparison is held not to be error, where the witness had seen the person, who is alleged to have written the signatures, write, as to which he testifies, and is, therefore, competent to give his opinion as to their genuineness independently of any comparison with other signatures in evidence. (S. D.) 151.

Damages.

Words of provocation are held to be properly considered in mitigation of punitive, but not of compensatory, damages. (Ohio) 860.

The owner of a building negligently destroyed by fire while in possession of the tenant is held not to be able to recover from one responsible for the loss the whole value of it; but it is held that from such value

must be deducted the value of the leasehold. (Tenn.) 298.

The right to recover damages for mental suffering for failure to deliver a telegram, although not accompanied by physical suffering or injury, is sustained. (Nev.) 666.

Knowledge by one contracting to purchase real estate that the vendor has only an option contract to purchase, and has contracted to sell the sawed timber on the land to a third person, is held not to deprive him of his right to damages for loss of his bargain in case the vendor refuses to convey anything except the land free from the timber. (Wis.) 973.

One who sues for breach, before the time of performance arrived, of a contract to employ him as manager of an opera house for a compensation, to consist in part of a share of the net profits, is held not to be entitled to recover as damages a share of the amount for which his employer disposed of the lease subsequent to the time when such employment should have begun. (Tex.) 302.

VIII. CRIMINAL LAW AND PRACTICE.

Larceny.

That a man may be guilty of larceny of property which the Constitution makes the sole and separate property of his wife is decided. (Ark.) 71.

Homicide by soldier in obedience to orders.

A private soldier who has been stationed to guard a residence, which, during a time of rioting and disorder, has been dynamited, and against which threats have been made to repeat the offense, with orders to shoot to kill any person found prowling about the house, is held to be guilty of no crime if he shoots a person who approaches the building and refuses to obey his command to halt. (Pa.) 193.

65 L. R. A.

Evidence of declarations of child.

That a child is too young to be a competent witness because of inability to comprehend the obligation of an oath is held not to preclude the admission in evidence of its declarations as part of the *res gestæ*. (Tex. Crim. App.) 316.

Injunction.

A Federal court is held to have no jurisdiction to enjoin a state food commissioner from proceeding to enforce a pure-food statute of the state by criminal prosecution on the ground that he has erroneously construed the statute to include matters not within it. (C. C. A. 6th C.) 864.

INDEX TO NOTES.

(The General Index follows this.)

Advancements.

Right of one receiving advancement and
executing release of interest in estate
to share in after-acquired property:—

- I. Scope of note 578
- II. In general 578
- III. Effect of release on descendants of
deceased releasor 582
- IV. Release of interest of married woman
or infant 583
- V. Conclusion 583

Assignment for benefit of creditors.

Transfer of property out of the state by;
conflict of laws as to 358

Bankruptcy.

Transfer of property out of the state by
bankruptcy proceedings; conflict of
laws as to 353

Bastardy.

See ILLEGITIMACY.

Conflict of laws.

As to legitimacy:—

- I. Legitimacy
 - a. In general 177
 - b. Applicability of *lex rei sitæ*, or *lex domicilii decedentis*
 - 1. Legitimacy dependent upon
validity of marriage 177
 - 2. Legitimacy dependent upon
acts subsequent to birth 178
 - c. What is proper law after elimi-
nating *lex domicilii decedentis*
and *lex rei sitæ*, as such 182
- II. Adoption 186
 - As to transfer of property out of the
state by bankruptcy or insolvency pro-
ceedings or assignment for creditors:—
 - I. Voluntary assignments
 - a. When assignment regarded as vol-
untary 353
 - b. Discrimination between residents
and nonresidents, generally 354
 - c. When foreign assignment not op-
posed to *lex rei sitæ et fori* 355
 - d. Law determining validity of as-
signments
 - 1. Personal property
 - (a) General rule 358
 - (b) Formal validity 358
 - (c) Notice; record; taking
possession 359
 - (d) Preferences 360
 - (e) Exemptions 362
 - (f) Assignment by corpora-
tion 362

Conflict of laws, I.—continued.

- 2. Real property 362
 - e. Law determining assignee's right
to avoid fraudulent transfers
and conveyances 365
 - f. As to effect of assignment to avoid
previous attachment or transfer 365
 - g. As between law of assignor's dom-
icil and that of place where as-
signment made 365
- II. Assignments under insolvency or bank-
ruptcy statutes
 - a. General rule 366
 - b. Choses in action 367
 - c. Discrimination between residents
and nonresidents 368
 - d. Right of assignee to sue in other
state 369

Constitutional law.

Constitutionality of limitation of hours
of labor by statute or ordinance:—

- I. General construction and application
of statute 33
- II. Constitutionality of statute
 - a. Under Federal Constitution
 - 1. In general 38
 - 2. Due process of law 40
 - 3. Equal protection of the laws 42
 - 4. Impairing obligation of con-
tract 42
 - b. Under state Constitution 42
- III. Police power of state 44
- IV. Right to extra compensation for labor
in excess of limited time 46
- V. Criminal liability for violation of stat-
ute 50

Evidence.

Comparison of marks and spelling of dis-
puted instrument:—

- I. Comparison of marks 95
- II. Comparison of spelling 97
 - Admissibility of declarations of infant
too young to be sworn as a witness at
the trial:—
 - I. The general rule 316
 - II. *Res gestæ* as an exception to the general
rule 318
 - Procedure in proof of handwriting:—
 - I. Scope 151
 - II. Procedure generally 151
 - III. Purpose of the proof 153
 - IV. Examination of the witness 154
 - V. Deciphering of obscurities 155
 - VI. Summary 156

Handwriting.

- Procedure in proof of 151
- 1003

Husband and wife.

| | |
|--|-----|
| Liability of the husband for necessities furnished wife while living with him :— | |
| I. Scope | 529 |
| II. Introductory | 529 |
| III. Personal necessities | |
| a. Implied agency in law | 529 |
| b. Effect of notice to tradesmen | 532 |
| IV. Family necessities | 532 |
| V. Husband's liability affected by style of life he adopts | |
| a. In general | 534 |
| b. Effect of notice to tradesmen | 538 |
| c. Burden of proof | 538 |
| VI. Presumptive agency arising from cohabitation | |
| a. In general | 539 |
| b. May be rebutted | |
| 1. In general | 539 |
| 2. By proof of ample provision otherwise made by husband | |
| (a) In general | 540 |
| (b) Allowance | 542 |
| 3. By proof of notice to tradesmen | 544 |
| 4. By proof of authority in wife privately withdrawn | 545 |
| 5. By proof of extravagance of the purchases | 547 |
| 6. Burden of proof | 548 |
| VII. Authority implied from husband's assent to previous transactions | 548 |
| VIII. Liability of husband, by reason of estoppel or ratification, for wife's purchases, upon his credit, of articles for personal use | 549 |
| IX. When husband is an infant | 550 |
| X. Money loaned wife to purchase necessities | 550 |
| XI. In absence of certainty as to whom credit was given | 551 |
| XII. Statutes | 551 |
| Illegitimacy. | |
| Conflict of laws as to legitimacy | 177 |
| Right of mother or reputed father of illegitimate child to its custody or control :— | |
| I. Mother generally entitled to custody | 689 |
| II. Reputed father's right to custody in general | 690 |
| III. Rights of mother or reputed father as against each other | |
| a. Mother's right as against reputed father | 690 |
| b. Reputed father's right as against mother | 692 |
| IV. Rights of mother of reputed father as against other persons | |
| a. Mother's right as against others than reputed father | 692 |
| b. Reputed father's right as against others than mother | |
| 1. As against parish | 693 |
| 2. As against town or county | 694 |
| 3. As against strangers | 694 |
| 4. As against relatives | 694 |

Illegitimacy.—continued.

| | |
|--|-----|
| V. Right of mother or reputed father to guardianship of child | |
| a. Mother's right of guardianship | 695 |
| b. Mother's right to appoint testamentary guardian | 696 |
| c. Reputed father's right of guardianship | 696 |
| d. Reputed father's right to appoint testamentary guardian | 696 |
| VI. Right of mother or reputed father as against guardian of child | |
| a. Mother's right as against guardian | 696 |
| b. Reputed father's right as against guardian | 696 |
| VII. Rights of mother or reputed father in proceedings affecting custody | |
| a. Notice | 696 |
| b. Consent | 696 |
| c. Right to appear or be heard | 697 |

Independent contractors.

See MASTER AND SERVANT.

Infants.

| | |
|--|-----|
| Admissibility of declarations of, when too young to be sworn as a witness at the trial | 316 |
| Custody of illegitimate child; who entitled to | 689 |

Insolvency.

| | |
|---|-----|
| Transfer of property out of the state by insolvency proceedings; conflict of laws as to | 353 |
|---|-----|

Irrigation.

See WATERS.

Martial law.

| | |
|--|-----|
| Martial law when there is no actual war :— | |
| I. Scope of note | 193 |
| II. Definition of martial law | 193 |
| III. Power to proclaim and maintain martial law | 193 |
| IV. Discretion and authority of military when called to aid civil power | 198 |
| V. Power of military, in time of actual war, to arrest and punish citizens in places where civil courts are open | 200 |
| VI. Conclusion | 207 |

Master and servant.

| | |
|--|-----|
| Limitation of hours of labor by statute or ordinance | 33 |
| Persons deemed to be independent contractors within meaning of rule relieving employer from liability :— | 445 |
| I. Independent contractors distinguished from servants and agents | 447 |
| II. Persons acting in the dual capacity of contractor and servant or agent | 449 |
| III. Contractors not within purview of statutes relating to servants or agents | 451 |
| IV. Character of contract is tested by the existence or absence of a right of control on the employer's part | 453 |
| V. Presumptions entertained as to character of contract | 459 |

Master and servant.—continued.

| | |
|---|-----|
| VI. Independence of contract usually in- ferable where it is for the per- formance of an entire piece of work at a specified price | |
| a. In general | 461 |
| b. Persons engaged in construction or other work on railways | 461 |
| c. Persons who undertake the con- struction of entire buildings or specific portions thereof | 462 |
| d. Persons engaged to execute re- pairs or improvements on a building | 465 |
| e. Architects | 465 |
| f. Persons doing work on bridges | 466 |
| g. Persons engaged in other kinds of construction work | 466 |
| h. Persons undertaking various kinds of work on highways | 466 |
| i. Persons operating mines | 467 |
| j. Persons operating quarries | 467 |
| k. Persons operating mills | 467 |
| l. Master tradesmen and crafts- men | 467 |
| m. Persons who furnish teams and men to do various kinds of work | 467 |
| n. Draymen, truckmen, carters, etc. | 468 |
| o. Keepers of livery stables | 468 |
| p. Drivers | 468 |
| q. Persons who undertake various operations connected with the handling of timber | 469 |
| r. Persons employed to clear land | 469 |
| s. Persons cultivating land on shares | 469 |
| t. Persons engaged in scavenging work | 469 |
| u. Railway companies operating cars on private lines | 469 |
| v. Persons assisting in public en- tertainments | 470 |
| w. Persons conducting departments in stores | 470 |
| x. Stevedores | 470 |
| y. Construction and repair of ships | 470 |
| z. Transfer agents doing business on railway trains | 471 |
| zz. Contractors not within purview of statutes relating to servants only | 471 |
| VII. Liability arising from employment of tug | |
| a. English doctrine as to relation between owner of tug and its tow | 471 |
| b. American doctrine | 472 |
| c. Liability of harbor commission- ers | 474 |
| VIII. Liability arising out of certain other contracts of an independent nature | 474 |
| IX. Effect of reservation of a limited power of control | |
| a. In general | 475 |
| b. Clauses relating to supervision of work | 478 |
| c. Clauses providing that the work shall be done under the direc- tion of the employer | 479 |

Master and servant, IX.—continued.

| | |
|---|-----|
| d. Effect of other clauses | 483 |
| X. Effect in general of reservation of full power of control | 484 |
| XI. Matters negating independence of contractor | |
| a. Effect of specific terms of con- tract | 485 |
| 1. Work on railroads | 485 |
| 2. Construction of buildings | 486 |
| 3. Demolition of buildings | 486 |
| 4. Street improvements | 487 |
| 5. Construction of canals | 488 |
| 6. Laying of pipe lines | 488 |
| 7. Work in mines | 488 |
| 8. Scavenging work | 488 |
| 9. Work in manufacturing es- tablishments | 488 |
| 10. Sale of commodities | 489 |
| b. Effect of provisions of statute applicable to the circumstances | 490 |
| c. Effect of direct evidence that em- ployer exercised control over the work | 490 |
| 1. Work on railways | 491 |
| 2. Construction of buildings | 492 |
| 3. Work in streets | 493 |
| 4. Clearing of land | 493 |
| 5. Work in manufacturing es- tablishments | 494 |
| 6. Work done with teams | 494 |
| 7. Unloading of ships | 494 |
| 8. Sale of commodities | 494 |
| d. Effect of character of stipulated work | 495 |
| e. Effect of employment being gen- eral | 497 |
| f. Effect of partition of work among several contractors | 500 |
| XII. Nature of contract determined with reference to various factors | |
| a. Degree of skill or care required | 500 |
| b. Existence or absence of obliga- tion to perform work in person | 500 |
| c. Reservation of right to terminate contract of employment | 501 |
| d. Surrender or retention of con- trol of premises on which stipulated work is done | |
| 1. Surrender of control | 502 |
| 2. Retention of control | 504 |
| e. The basis on which the compen- sation of the employee is cal- culated | 505 |
| f. Pecuniary circumstances of per- son employed | 506 |
| g. Provision in contract that em- ployer shall be indemnified for all losses caused by the negli- gence of the person employed | 506 |
| h. Use of contractor's appliances by employer | 507 |
| i. The furnishing by the employer of the appliances or materials for the work | 507 |
| j. The fact that the stipulated work constituted a part of the employer's regular operations | 507 |
| k. Provision in contract prohibiting use of employer's name | 507 |

Master and servant, XII.—continued.

1. The fact that the contractor was a director of the employing company 507
- m. Virtual identity of an employing and contracting company 507
- XIII. Province of court and jury 508
- General rule as to absence of liability of employer for torts of independent contractor:— 620
- I. Scope of note 621
- II. General doctrine stated 622
- III. History of the doctrine
 - a. *Bush v. Steinman* considered 624
 - b. Doctrine that different rules apply to real and to personal property 626
 - c. Final rejection of doctrine making distinction between real and personal property 629
 - d. Effect of decision in *Randleson v. Murray* 630
 - e. Subsequent development of the law 631
- IV. Rationale of the doctrine 632
- V. Extent of employer's duty with respect to the supervision and direction of the work 635
- VI. Extent of duty of employer to guard against possible accidents 639
- VII. For what torts of contractor the employer is not bound to answer
 - a. In general 641
 - b. Negligence not productive of permanently dangerous conditions
 1. Work on railways 643
 2. Work on buildings 643
 3. Work on highways 644
 4. Work involving the handling of heavy articles 644
 5. Management of teams 644
 6. Management of vessels 644
 7. Entertainment at public resorts 644
 8. Loading or unloading of ships 644
 9. Blasting operations 644
 - c. Negligence productive of dangerous conditions of a more or less permanent character
 1. In general 646
 2. Work on railways 646
 3. Construction of bridges, embankments, and dams 647
 4. Construction of telegraph and telephone lines 648
 5. Laying of pipe lines 648
 6. Construction of buildings 648
 7. Repairing or reconstruction of buildings 649
 8. Demolition of buildings 649
 9. Work performed on streets and highways 650
 10. Work done on premises adjacent to streets and highways, and affecting the safety thereof 652
 11. Scavenging work 653
 12. Work in harbors 653

Master and servant, VII.—continued.

13. Excavation work 654
14. Work involving the use of fire for the destruction of timber 654
15. Work in mines 654
16. Hauling of timber 654
17. Operation of ferries 654
18. Loading or unloading of ships 654
- d. Acts constituting a trespass 655
- Liability of employer for acts of independent contractor where injury is direct result of work contracted for:— 742
- I. Scope of note 743
- II. In general 743
- III. Liability where stipulated work is illegal 746
- IV. Liability where performance of work will involve commission of trespass 748
- V. Liability where performance of work will necessarily cause injury
 - a. In general 750
 - b. Commission of nuisance 751
 - c. Blasting operations 753
- VI. Liability where work is done according to plans furnished by employer 754
- VII. Liability where work is done according to methods prescribed by employer 755
- Liability of employer for injuries caused by the performance of work by independent contractor which is dangerous unless certain precautions are observed:—
- I. Scope of note 833
- II. Doctrine stated generally 833
- III. Limits of the doctrine 838
- IV. Effect of stipulation by contractor to take appropriate precautions 841
- V. Necessity of showing that the contractor was acting under the authority of the employer 842
- VI. Liability of employer where work is dangerous to persons using highways
 - a. In general 842
 - b. Erection of buildings 843
 - c. Delivery of goods through openings in footpaths 844
 - d. Construction or repair of highways 845
 - e. Other construction work on highways
 1. Street railways 845
 2. Area under footpath 846
 3. Sewer 846
 4. Pipe line 847
 5. Telephone line 847
 - f. Removal of wrecks from navigable rivers 848
- VII. Liability where work is dangerous to adjoining landowners
 - a. In general 849
 - b. Injury to lateral support 849
 - c. Injury to adjoining building through negligent execution of work connected with party wall 851

| | |
|---|-----|
| Master and servant, VII.—continued. | |
| d. Injury to business and goods of occupant of adjoining premises | 852 |
| e. Injury from explosion caused by negligent escape of gas | 852 |
| f. Injury resulting from flooding of lands through negligent drainage operations | 853 |
| g. Injury resulting from allowing materials dredged from water to escape onto adjoining land | 853 |
| h. Injury resulting from negligent demolition of fire ruins | 853 |
| i. Injury resulting from allowing fire to escape | 853 |
| j. Injury resulting from blasting operations | 854 |
| VIII. Liability where work is dangerous to persons invited onto defendant's premises | 855 |
| IX. Liability where work is dangerous to tenants | 855 |
| X. Liability where work is dangerous to owners of vessels navigating rivers | 855 |
| Municipal corporations. | |
| Rights and duties of municipal corporations with respect to surface water | 250 |
| Nuisances. | |
| Surface water as; liability of city for | 290 |
| Rape. | |
| Admissibility of declarations of infant too young to be sworn as a witness at the trial | 316 |
| Release. | |
| Of interest in estate by one receiving advancement; effect on right to share in after-acquired property | 578 |
| Schools. | |
| Liability of school teacher for personal injury to pupil:— | 890 |
| I. Introductory | 891 |
| II. Reasonable restraint or correction | 891 |
| a. In general | 891 |
| b. When injury results from punishment on account of defect in pupil's constitution unknown to teacher | 892 |
| c. When pupil is of age | 892 |
| d. When teacher is not regularly appointed | 892 |
| III. Excessive restraint or correction | 893 |
| a. In general | 893 |
| b. Error of judgment | 894 |
| 1. The discretionary nature of the power to punish, vested in teachers | 894 |
| 2. Presumption of proper motive | 895 |
| 3. Effect of proper motive | 896 |
| c. Improper motive | 896 |
| IV. Punishment inflicted without proper cause | 897 |
| V. When cause of punishment is unknown to pupil | 897 |
| VI. Reasonableness or excessiveness of punishment is for the jury | 897 |
| a. In general | 897 |

| | |
|---|-----|
| Schools, VI.—continued. | |
| b. Material considerations | 898 |
| VII. Statutes | 899 |
| Telegraphs. | |
| Liability of telegraph company for transmission or delivery of forged message:— | 805 |
| I. Liability of company when its agent is deceived | 806 |
| a. Liability to addressee | 806 |
| b. Liability to stranger | 806 |
| II. Liability of company when its agent perpetrates the fraud | 807 |
| War. | |
| See MARTIAL LAW. | |
| Waters. | |
| Rights and duties of municipal corporations with respect to surface-water:— | |
| I. Duty to care for | |
| a. In general | 250 |
| b. Upon raising grade of street | 253 |
| c. Upon gathering water in body | 256 |
| d. Drainage of highway | 259 |
| II. Negligent or wrongful acts | |
| a. Changing course of drainage | 261 |
| b. Casting collected body on adjoining property | 262 |
| c. Accelerating or increasing flow | 265 |
| d. Damming back | 266 |
| e. Consequential injuries | 269 |
| f. Pollution of water | 273 |
| III. Acquiring right of way for drain | 273 |
| IV. Plans | 274 |
| V. Obstructed drains | 275 |
| VI. Unusual storms | 277 |
| VII. Right and duty of individual | |
| a. To avoid injury | 277 |
| b. Casting water into street | 279 |
| VIII. Nuisance | 280 |
| IX. Embankments | 281 |
| X. Remedy | |
| a. In general | 281 |
| b. Who may sue | 283 |
| c. Liability | 283 |
| d. Damages | 284 |
| e. Limitation | 285 |
| XI. Abandonment of drain | 286 |
| Transfer of right to use water for irrigation:— | |
| I. Of right acquired by appropriation | 407 |
| II. Of right in ditch | 409 |
| III. May pass by conveyance of land | 409 |
| IV. Method of transfer | 412 |
| Jurisdiction over boundary rivers:— | |
| I. Right to exercise | |
| a. In general; location of boundary line | 953 |
| b. Grant of opposite shore | 956 |
| c. Effect of treaties and compacts | 957 |
| II. Equal rights on | 959 |
| III. What rights are exclusive | 961 |
| IV. What concurrent jurisdiction includes | 963 |
| V. Effect of change of channel | 967 |
| Wills. | |
| Comparison of marks and spelling of disputed will | 95 |

GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes Precedes this.)

ACCESSION AND CONFUSION.

NOTES AND BRIEFS.

Accession and confusion; when rule of confusion of goods applies; what elements essential in intermingling of goods to justify forfeiture. 221

ACTION OR SUIT.

Malicious Prosecution of, see **MALICIOUS PROSECUTION.**

Right of Private Individual to Maintain Action for Public Nuisance, see **NUISANCES, 2.**

1. A concrete case of which the court has jurisdiction is presented by a petition on behalf of a railroad company to enjoin ticket brokers from buying and selling special tickets made nontransferable on their faces, not only as to those tickets which have already been issued, but as to such as will be issued in the future, where the injunction is to be made applicable only after the contract has been entered into, the ticket issued, and property rights thereunder have accrued. Schubach v. McDonald (Mo.) 136

2. A proceeding to set aside a deed for want of capacity of the grantor is not *in rem*. Allred v. Smith (N. C.) 924

Who may maintain.

3. The owner of property may recover for the injury to his interests by the negligent destruction of it by fire, whether he is in possession or not. Nashville, C. & St. L. R. Co. v. Heikens (Tenn.) 298

Joinder of parties.

4. Where a railroad company, in crossing the tracks of another company at a place where the public has been accustomed to use a footpath along the right of way, makes a deep cut which renders the path dangerous, both companies may be sued jointly in case no precaution is taken by either to warn 65 L. R. A.

persons attempting to use the path of the danger, so that a person falls into the cut to his injury. Matthews v. Seaboard Air Line Railway (S. C.) 286

Venue.

5. The trial judge cannot be held to have abused his discretion in refusing to transfer a case to another court for trial on the ground of prejudice, where he was called from another circuit to try the case on the allegation of prejudice on the part of the local judge, and there is nothing to show that an impartial jury had not been secured, while numerous affidavits state that a fair trial can be had, although there is some prejudice against the accused and some affidavits state that such trial cannot be had. State v. Hall (S. D.) 151

6. An agreement by telephone, in response to an inquiry from a bank located in another county, to honor a draft for the amount if the bank will advance money for the purchase of produce, is to be performed where the bank is located, within the meaning of a constitutional provision that actions on contract may be brought in the county where they are to be performed. Bank of Yolo v. Sperry Flour Co. (Cal.) 90

7. An agreement by a resident of one county, in response to a telephone call from a person residing in another county, that he would honor a draft for the amount in case the latter should advance money to a third person, is made in the former county, within the meaning of a constitutional provision that actions on contracts may be brought in the county where they are made. *Id.*

NOTES AND BRIEFS.

Action; on contract made by telephone between persons in different counties; where may be brought. 90

For injury to person on footpath along 1009

railroad right of way; joint suit against railroad company and another which, in crossing track, makes a deep cut rendering path dangerous. 287

Against unincorporated mutual benefit association. 517

Change of venue in criminal case; by state without the consent of the accused; statute authorizing, as impairment of right to trial by jury. 762

ADVANCEMENTS.

NOTES AND BRIEFS.

Advancements; right of one receiving advancement and executing release of interest in estate to share in after-acquired property:—(I.) Scope of note; (II.) in general; (III.) effect of release on descendants of deceased releasor; (IV.) release of interest of married woman or infant; (V.) conclusion. 578

ALIMONY.

See HUSBAND AND WIFE.

ANIMALS.

1. The legislature may lawfully deprive those who violate the provisions of a statute forbidding the docking of horses' tails of the right to use the horses as a penalty for such violation. *Bland v. People* (Colo.) 424

2. Proof that a docked horse was not registered is not necessary in a prosecution for using such horse contrary to the provisions of the statute, where, because of the time when the docking occurred, registration was not possible under the provisions of the act. *Id.*

NOTES AND BRIEFS.

Animals; constitutionality of statute forbidding use of docked horses. 424

APPEAL AND ERROR.

1. Where the probate court, in the settlement of the estate of a decedent, determines the liability of a devise, legacy, bequest, or inheritance to pay a collateral-inheritance tax, under the provisions of Ohio Rev. Stat. § 2731-1, appeal may be taken, by either party to the controversy regarding the tax, from the judgment of the probate court to the court of common pleas, as authorized by § 2731-13; and where the state, or the prosecuting attorney in behalf of the state, takes the appeal, it may be done without giving an undertaking for such appeal, and without filing the written notice of an intention to appeal provided for in § 6408; and the appeal may be perfected by either party according to the provisions of §§ 6411 and 5227. *Humphreys v. State* (Ohio) 776
65 L. R. A.

2. The question, what remedy may be open to a taxpayer in case of an illegal assessment or over valuation of his property, is not properly before the court upon appeal from a decision refusing to enjoin collection of the taxes on the ground that the statute under which it is levied is unconstitutional. *Nathan v. Spokane County* (Wash.) 336

3. That a defendant succeeded in obtaining a peremptory instruction in his favor in the trial court upon the facts will not prevent him from raising the question in the appellate court that the complaint does not set up a cause of action. *Abbott v. Thorne* (Wash.) 826

Objections and exceptions.

4. An exception to the "instructions on the question of exemplary damages" is too indefinite to raise any question in the appellate court. *Giddings v. Freedley* (C. C. A. 2d C.) 327

5. A single exception covering several distinct propositions of an instruction collectively is inoperative if one of the propositions is sound. *Id.*

Questions not raised below.

6. Failure to instruct the jury upon a particular branch of the case is not reversible error, where the complaining party presented no request for such instruction. *Nashville, C. & St. L. R. Co. v. Heikens* (Tenn.) 298

7. The appellate court has no jurisdiction to make a finding of fact from evidence before the trial court upon which the latter court made no finding. *Di Nola v. Allison* (Cal.) 419

Review of verdict or finding.

8. Findings of fact by the trial court on conflicting evidence will not be disturbed on appeal. *Barnes v. Western Union Teleg. Co.* (Nev.) 666

Ground for reversal.

9. Failure to give a requested instruction is not reversible error, where the instructions given were calculated to impart to the jury fully as clear an idea of the matter involved as would have been done by the use of the language in the one requested. *Nashville, C. & St. L. R. Co. v. Heikens* (Tenn.) 298

Judgment.

10. The appellate court will not, upon remanding a case after reversing a judgment because of the error of the trial judge in holding that it was barred by a former judgment, direct judgment to be entered upon a verdict rendered at the first trial of the action, where it was set aside and a new trial granted because the jury did not follow the

instructions of the court as to the effect of such judgment, although a contrary verdict was rendered at the second trial by the direction of the court, which, as the appellate court holds, was an error. *Hoover v. King* (Or.) 790

Effect of reversal.

11. The title secured by a purchase, by a stranger after an appeal has been taken from the judgment, from one who has purchased mortgaged real estate at his own foreclosure sale, is subject to be defeated by a reversal of the judgment, notwithstanding the execution of the judgment was not superseded pending the appeal. *Di Nola v. Allison* (Cal.) 419

12. A statute authorizing an appellate court, upon reversal of a judgment of foreclosure, to make restitution so far as such restitution is consistent with the protection of a purchaser at a sale under the judgment, does not operate to perfect the title of a stranger who purchases from the plaintiff in the action after an appeal is taken, since its operation must be limited to parties over whom the court has jurisdiction. *Id.*

13. An order of restitution is not necessary to enable a defendant who has appealed from a judgment of foreclosure to assert his right to the property upon reversal of the judgment. *Id.*

NOTES AND BRIEFS.

Appeal; failure to file written notice of intention to appeal. 777

ARSON.

NOTES AND BRIEFS.

Arson; burning of wife's house by husband as. 72

ASSAULT AND BATTERY.

1. An assault upon an officer with a deadly weapon by one upon whom he is attempting to serve process is not excused by the fact that the process is not fair on its face. *People v. Bernard* (Mich.) 559

2. A small boat used for the common carriage of passengers for hire, and having neither sleeping apartments nor places for meals, is not within the rule justifying the forcible resistance of an attempt to enter a dwelling house, although a seat in the boat is used for a sleeping place by the person in possession of the boat. *Id.*

ASSIGNMENT.

Effect of Discharge in Bankruptcy upon Assignment of Future Wages, see **BANKRUPTCY**, 4.

65 L. R. A.

Constitutionality of Statute Forbidding Assignment of Future Wages, see **CONSTITUTIONAL LAW**, 10.

Of Future Wages as a Violation of Public Policy, see **CONTRACTS**, 5.

Of Insurance Policy, see **INSURANCE**.

1. The court will not construe exemption laws as forbidding laborers from assigning wages yet to be earned. *Mallin v. Wenham* (Ill.) 602

2. An assignment of wages to be earned in the future under an existing contract is valid, and it is immaterial that the term of employment is not of definite duration. *Id.*

NOTES AND BRIEFS.

Assignment; of future wages; legality of; validity of statute prohibiting. 599

Of wages to be earned; validity; creation of lien by, on wages; effect, on right to enforce, of discharge of assignor in bankruptcy. 603

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Priority of Garnishment Proceedings, see **GARNISHMENT**.

1. If the purchaser of a stock of goods, who undertakes to pay the debts of the seller out of the purchase price, makes a general assignment for benefit of his creditors to one who has guaranteed performance of his undertaking, creditors of the original vendor may bring suit against the assignee, either as such, or as guarantor, or in both capacities, and compel him to show what funds came to his hands which are applicable to payment of their claims. *Voorhees v. Porter* (N. C.) 736

2. A general assignee for benefit of creditors of one who purchased a stock of goods upon the agreement to pay the debts of the vendor out of the purchase price does not take any of the property impressed with a trust in favor of the creditors of such vendor, which they can enforce in priority to claims of other creditors of the assignor; but, as creditors of the assignor, they may compel the assignee to show whether any assets came into his hands which are applicable to their claim. *Id.*

3. A deed of trust to pay debts is a mortgage, and not an assignment for benefit of creditors, where it is not the intention of the parties to divest the debtor of the title, or to make an appropriation of the property affected to the raising of a fund to pay debts. *Smead v. Chandler* (Ark.) 353

NOTES AND BRIEFS.

Assignment for creditors; conflict of laws

as to; Missouri statute in relation to; effect on common-law right to prefer creditor; right of insolvent debtor generally to give preference. 354

Transfer of property out of the state by; conflict of laws as to. 353

ASSUMPSIT.

NOTES AND BRIEFS.

Assumpsit; against corporation. 158

ATTACHMENT.

Allowance of Exemplary Damages for Unlawful Levy, see DAMAGES, 6.

Fixtures as between Owner and Attaching Creditors, see FIXTURES.

Sufficiency of Pleading in Action for Wrongful Attachment, see PLEADING, 2.

1. Damages cannot be disallowed for stoppage of gangs of saws by the wrongful removal of a belt from a mill under a writ of attachment, because they themselves might have been rightfully attached, and the same injury thereby wrought. *Giddings v. Freedley* (C. C. A. 2d C.) 327

2. Statutory authority is necessary to justify the seizure and removal from a mill of a portion of the fixtures in it under a writ of attachment. *Id.*

NOTES AND BRIEFS.

Attachment; effect of, to create lien in favor of creditor; officer's right to disturb possession of occupants; effect of, to divest debtor's interest or possession. 327

ATTORNEYS.

1. An attorney whose services are not of such character as to furnish a consideration for a contract for a contingent fee unfairly obtained from a client may recover for the value of his actual services rendered his client, upon pleadings and proofs justifying such recovery. *Dorr v. Camden* (W. Va.) 348

2. To sustain a contract for a contingent fee it must be shown that no unfair advantage was taken of his client by the attorney, but that the same was entered into by the client, after full knowledge of the facts and circumstances, for legal services of skill, judgment, and ability of a character to justify a contract for such contingent fee. *Id.*

3. Ordinary services requiring no legal ability are not a sufficient consideration for a contingent fee wholly disproportionate thereto. *Id.*

4. An attorney cannot withhold from his client information acquired by him in the exercise of such attorneyship, and use the 65 L. R. A.

same to extort an increased compensation from his client, or coerce him into a contract he would not enter into upon full information. *Id.*

NOTES AND BRIEFS.

Attorneys; contract with client to furnish information and assistance in proceedings for the recovery of land; in consideration of contingent fee; validity of agreement. 348

BANKRUPTCY.

Obligation of Married Woman as a Debtor within Meaning of Bankruptcy Act, see HUSBAND AND WIFE, 2.

1. A receiver appointed by the court to enforce payment of the statutory liability of stockholders of an insolvent corporation to contribute towards payment of its debts is a duly authorized agent of its creditors, within the meaning of the bankruptcy act, so as to be entitled to prove the claim against the estate of an insolvent stockholder. *Dight v. Chapman* (Or.) 793

2. A judgment determining the amount to be contributed by the stockholders of an insolvent corporation for the payment of its debts under constitutional and statutory provisions making stockholders liable for debts to the amount of the par value of the stock held by them renders the amount due from each stockholder a debt provable in bankruptcy proceedings against him, so as to be canceled by a discharge, although he did not appear in the proceeding against the corporation, where the judgment against the corporation is binding upon him. *Id.*

3. Notice received by a receiver of an insolvent corporation of the insolvency of one of its stockholders, against whom a decree of court has established a statutory liability to contribute towards payment of the company's debts, while acting in his capacity as cashier of a bank, to which notice of insolvency proceedings against the stockholder was sent as one of his creditors, is binding on the creditors of the insolvent corporation, so as to conclude them by the stockholder's discharge, where it does not appear that the cashier was a stockholder in the bank, or interested to conceal the information so obtained. *Id.*

4. A discharge in bankruptcy of one who has assigned wages to be earned in the future does not affect the right to enforce the assignment. *Mallin v. Wenham* (Ill.) 602

5. A judgment obtained by a wife against another woman for damages sustained by the wife by reason of the alienation of the affections of her husband is not released by the discharge of the judgment

debtor under proceedings in bankruptcy, where such alienation has been accomplished by schemes and devices of the judgment debtor, and has resulted in the loss of support and impairment of health to the wife. *Leicester v. Hoadley* (Kan.) 523

NOTES AND BRIEFS.

Bankruptcy; obligation of married woman as "debt" within meaning of bankruptcy act. 108

Order for alimony not barred by discharge in. 332

Transfer of property out of the state by bankruptcy proceedings; conflict of laws as to. 353

What are malicious and personal injuries within meaning of act; what constitutes a provable debt in; meaning of words "fraud" and "fiduciary capacity;" effect of discharge in, on judgment for alienation of affections. 523

What constitutes provable debt in; effect of, on right to enforce assignment of future wages; injunction to restrain creditor from taking after-acquired property of bankrupt. 604

Judgment fixing liability of stockholder of insolvent corporation as debt provable in; duty of receiver to present claim against bankrupt estate; necessity of scheduling claim: where one whose duty it is to present it knows of the proceedings in time to participate. 794

BANKS.

Liability of Bank Receiving Deposits from Factor of Money of Principal after Insolvency of Factor, see FACTORS, 2.

1. Knowledge by a bank of the insolvency of factors possessing authority to deposit money belonging to their customers in their own names is not sufficient to charge it with liability for the misappropriation of such funds which it permits to be checked out in favor of third persons, although by the exercise of care it might have known that a misappropriation was being thereby effected. *Interstate Nat. Bank v. Claxton* (Tex.) 820

2. Knowledge by a bank of facts which would enable it to know that a depositor holding funds in a fiduciary relation was violating his trust does not impose upon it the duty of instituting an inquiry into its customer's financial condition for the purpose of protecting the beneficiary, or charge it with participating in a misuse of the funds in case it honors the checks without such inquiry. *Id.*

3. A bank cannot apply funds deposited by a factor in his own name upon a claim 65 L. R. A.

held by it against him individually, after knowledge that he is insolvent and has committed an act of bankruptcy, where it has the means of knowing that the funds belong to the factor's principal. *Id.*

NOTES AND BRIEFS.

Banks; liability for misappropriation of trust funds deposited by factor; where bank has knowledge of nature of fund and insolvency of factors; where factors were entitled to deposit money and check it out in their own names. 820

BAR.

Of Judgment, see JUDGMENT.

BASTARDY.

Enforcement, in Foreign State, of Statute Legitimizing, see CONFLICT OF LAWS.

Recovery of Possession of, by Putative Father, see HABEAS CORPUS.

See also ILLEGITIMACY, NOTES AND BRIEFS.

BENEVOLENT SOCIETIES.

Measure of Damages for Expelling Member, see DAMAGES, 9.

1. A mutual benefit society cannot escape liability for damages for the illegal expulsion of a member on the ground that the meeting at which the expulsion occurred was not a lawful one, and that, therefore, its action was not binding on the society, where the society at a subsequent regular meeting approved the act. *Lahiff v. St. Joseph's Total Abstinence & Benev. Soc.* (Conn.) 92

2. The possibility of resorting to mandamus to compel reinstatement to his rights will not deprive a member wrongfully expelled from an unincorporated benefit society of the right to resort to an action for damages, where the circumstances are such that mandamus could not restore him to the full enjoyment of the privileges of membership. *Id.*

3. A member who has been wrongfully expelled from an unincorporated benefit society may abandon all claims to reinstatement, and resort to an action for damages for the injury inflicted upon him by the expulsion. *Id.*

NOTES AND BRIEFS.

See also INSURANCE.

Benevolent associations; unincorporated; right to bring action against, in associate name; judgment against, as judgment against individual members; members of, as partners; liability of individual members of; to beneficiary of deceased member. 517

Expulsion of member of; right to notice of charges and opportunity to be heard; damages for unlawful expulsion. 92

BERTILLON SYSTEM.

Authority to Measure Convict Awaiting Execution, see CONVICTS, 2.

BICYCLES.

Injury to Rider, see HIGHWAYS, 4, 9.

NOTES AND BRIEFS.

Bicycles; duty of municipality to keep street safe for riders of; bicycle as "carriage or vehicle." 234

BILLS OF LADING.

NOTES AND BRIEFS.

Bills of lading; effect of indorsing in blank and giving to another. 443

BLASTING.

1. The operation of a stone quarry on city lots for a long period of time by means of blasting, which causes vibrations of the earth and air in such a manner as to render an adjoining dwelling unsafe for occupation, and causes rents in its walls, will render the one responsible therefor liable for the injury, although he uses due care in the prosecution of the work. *Longtin v. Persell* (Mo.) 655

2. It is the duty of one who is lawfully using property near to that upon which another is legally engaged in blasting, and who is warned of a coming explosion, to use reasonable diligence to escape from danger on account of it; and a failure to exercise such care, which concurs in producing his injury, waives his right of action for the trespass, and constitutes contributory negligence, which is fatal to his action for damages for the injury. *Cary v. Morrison* (C. C. A. 8th C.) 659

3. While a contractor may lawfully blast with gunpowder or dynamite to remove rock in the right of way of a railroad company, he has no right by blasting to throw rocks upon persons rightfully occupying or using neighboring property. *Id.*

4. Blasting by the use of gunpowder or dynamite is an appropriate and justifiable mode of removing rock from the right of way of a railroad in order to bring it to grade; and a railroad company or its grading contractors may lawfully employ it, with reasonable care. *Id.*

5. A contractor removing rock in a railroad right of way by blasting with gunpowder must give persons rightfully occupying or using neighboring property reasonable warning of coming explosions. *Id.*
65 L. R. A.

NOTES AND BRIEFS.

Blasting; liability for injury to adjoining property by vibrations of earth and air caused by; use of, in operating quarry, as nuisance. 656

Measure of care of persons engaged in; right to employ in removing rock from railroad roadbed; duty to give warning; liability for injury caused by, without proof of negligence. 660

BLOODHOUNDS.

Use of, as Evidence of Malice in Action for Unlawful Search, see EVIDENCE, 6.

Evidence as to Breeding and Training of, see EVIDENCE, 7.

Admissibility of Photograph of, see EVIDENCE, 14.

BOUNDARY.

Between States, see STATES.

BRIDGES.

Construction of Bridge Pier in Navigable River as Constituting a Taking of Property, see EMINENT DOMAIN.

Power of Municipality to Levy Tax for Construction of, see MUNICIPAL CORPORATIONS, 10, 11.

A bridge erected under lawful authority cannot be regarded as a nuisance, so as to render those responsible for its construction liable for injuries caused to adjoining land as trespassers or tortfeasors. *Salliotte v. King Bridge Co.* (C. C. A. 6th C.) 620

NOTES AND BRIEFS.

Bridges; over navigable stream; liability for injury to riparian proprietor by; where built according to plans approved by Secretary of War in interest of navigation; acceptance of bridge by one for whom built as relieving builder from liability; as nuisance when built without authority. 623

BROKERS.

Trover by Principal against Bank Dealing with Factor, see FACTORS.

See also TICKET BROKERS, NOTES AND BRIEFS.

BUILDINGS.

Discharge of Covenant to Repair by Destruction of Building, see COVENANT, 2-5.

Right of One Repairing, to Recover under *Quantum Meruit* on Destruction of Building, see CONTRACTS, 1.

Effect of Destruction of Building upon Contract to Repair, see CONTRACTS, 8, 9, 11.

Amount of Damages Recoverable by Owner of Building Destroyed by Fire, see DAMAGES, 1.
 Liability for Injuries Caused in Moving Building along Highway, see HIGHWAYS, 1, 2.

BURDEN OF PROOF.

See EVIDENCE.

BUSINESS.

NOTES AND BRIEFS.

Business; protection of right to carry on; damages for interfering with. 858

CANCELATION OF INSTRUMENTS.

As Constituting a Proceeding *in Rem*, see ACTION OR SUIT, 2.

CARRIERS.

Liability for Loss of Mail, see POSTOFFICE.

Limitation of Liability of Vessel Owner, see SHIPPING.

See also TICKET BROKERS.

Duty and liability towards passengers.

1. The owner of a steamship is liable for the death of a passenger drowned by the swamping of a boat sent to convey him from the shore to the vessel, where the officer in charge of the boat permits it to attempt the journey in an overloaded condition, although the passengers are themselves guilty of contributory negligence in failing to leave the boat when told that it is overloaded, and requested to do so. *Weisshaar v. Kimball Steamship Co.* (C. C. A. 9th C.) 84

Tickets.

2. A purchaser of a special railroad ticket at a reduced rate, which on its face recites that it is nontransferable, and that it is supported by the consideration of a reduced rate, has no right to transfer it, a deprivation of which will give him a cause of complaint. *Schubach v. McDonald* (Mo.) 136

3. No assignee of a railroad ticket sold at a reduced rate, and which recites that fact on its face, and also that it is nontransferable, can acquire any right in the ticket as a contract for transportation, which he can assign, or which will give him a right to complain in case he is forbidden to assign it. *Id.*

4. A railroad company may issue special tickets at a reduced rate, which shall be nontransferable, either limited or unlimited as to time or occasion; and, in case the contract of which the ticket is the evidence is violated by a transfer of the ticket, it may invoke the jurisdiction of a court of equity to cancel the contract because of the fraud; or, if the ticket is used by another, it may 65 L. R. A.

maintain an action for damages for breach of the contract. *Id.*

5. To "mutilate" a railroad ticket, within the reasonable meaning of a stipulation on its face that it shall not be good for passage if mutilated in any way, it must be deprived of some essential or material part; and such a ticket is valid, although torn in two pieces, when both pieces are presented to the conductor at the same time, and it is apparent that they are parts of the same ticket, that together they form the entire ticket, and that no fraud has been perpetrated upon the railroad company. *Young v. Central of Georgia R. Co.* (Ga.) 436

Carrier of freight.

6. A railroad company which refuses to deliver freight because of refusal to pay an excessive charge for carriage cannot escape liability for the loss thereby caused on the ground that the one making the demand had not obtained possession of the bill of lading, or an order for delivery from the nominal consignee. *Clegg v. Southern R. Co.* (N. C.) 717

NOTES AND BRIEFS.

Carriers; duty to protect passengers; against negligence of fellow passengers. 84

Injunction to restrain broker from dealing in nontransferable tickets of; property right of company in its tickets; right to issue nontransferable tickets at reduced rates. 137

Owner of elevator as common carrier; rights of passenger on. 215

Obligation of railroads to carry United States mail; liability for loss or destruction of package in mail; liability to railway mail clerk injured through negligence of company or its employees; when liability for goods carried cases; duty as to property carried. 401

Stipulation on ticket that it shall not be good if mutilated; what constitutes mutilation within meaning of. 436

Right of street car conductor to eject passenger violating rules; use of unnecessary force; ejection for insulting and indecent language. 861

CERTIORARI.

NOTES AND BRIEFS.

Certiorari; by attorney general to remove indictment; where Crown defends person indicted. 764

CHARITIES.

See also TAXES.

A hospital organized exclusively for charity is not liable for injury to a patient caused by the negligence of its carefully se-

lected nurse, even though a charge is made and paid for the services rendered to the patient injured,—at least if the amount paid does not make full pecuniary compensation for the services rendered; since an agreement to hold the hospital harmless for the acts of its servants arises, by necessary implication, from the relation of the parties. *Powers v. Massachusetts Homœopathic Hospital* (C. C. A. 1st C.) 372

NOTES AND BRIEFS.

Charities; what is a charitable corporation; hospital as; when charge is made for services; liability for injury to patient through negligence. 373

Exemption of domestic charitable corporations from payment of collateral-inheritance tax; nonexemption of foreign corporation as unjust discrimination. 777

CLASS LEGISLATION.

See CONSTITUTIONAL LAW.

COLLATERAL-INHERITANCE TAX.

Appeal in Proceeding Relating to, see APPEAL AND ERROR, 1.

COMMERCE.

A statute prohibiting the coloring, coating, or polishing of an article intended for food, whereby damage or inferiority is concealed, is not in conflict with the power of Congress to regulate commerce, although applied to articles sold in original packages imported from other states. *Arbuckle v. Blackburn* (C. C. A. 6th C.) 864

CONFLICT OF LAWS.

1. A statute legitimating all children of slaves which have been recognized by the man as his, although the father and mother have ceased to cohabit prior to the passage of the act, is not binding on a man who has become domiciled in another state. *Irving v. Ford* (Mass.) 177

2. A deed of trust to secure debts executed by a corporation at its domicile in one state will, as to its nature, character, and interpretation, be governed by the laws of that state, although it involves choses in action in another state where the corporation is doing business, and in whose courts the interpretation of the instrument is called in question. *Smead v. Chandler* (Ark.) 353

3. Whether or not a valid lien has been created by an execution of a mortgage by a corporation at its domicile upon a chose in action located in another state, where the action is brought to enforce it, depends upon the law of the latter. *Id.* 65 L. R. A.

4. An action at law may be maintained to enforce payment of sums due under a decree in equity for payment of alimony rendered in another state, although the decree is not for a specific sum, but for a periodic allowance, and the remedy in the state where the decree was rendered would be by contempt proceedings in the equity court. *Wagner v. Latham* (R. I.) 816

NOTES AND BRIEFS.

Conflict of laws; as to legitimacy; as to descent and heirship of real estate. 178

As to legitimacy:—(I.) Legitimacy: (a) in general; (b) applicability of *lex rei sitæ* or *lex domicilii decedentis*: (1) legitimacy dependent upon validity of marriage; (2) legitimacy dependent upon acts subsequent to birth; (c) what is proper law after eliminating *lex domicilii decedentis* and *lex rei sitæ*, as such; (II.) adoption. 177

As to construction of deed of trust to secure debts executed in one state where interpretation is called in question in another state; as to assignment for creditors; as to contracts releasing carrier from liability for negligence; refusal to enforce contract of other state when contrary to policy of state law or statutes. 354

As to transfer of property out of the state by bankruptcy or insolvency proceedings or assignment for creditors:—(I.) Voluntary assignments: (a) when assignment regarded as voluntary; (b) discrimination between residents and nonresidents, generally; (c) when foreign assignment not opposed to *lex rei sitæ et fori*; (d) law determining validity of assignments: (1) personal property: (a) general rule; (b) formal validity; (c) notice; record; taking possession; (d) preferences; (e) exemptions; (f) assignment by corporation; (2) real property; (e) law determining assignee's right to avoid fraudulent transfers and conveyances; (f) as to effect of assignment to avoid previous attachment or transfer; (g) as between law of assignor's domicile and that of place where assignment made; (II.) assignments under insolvency or bankruptcy statutes: (a) general rule; (b) choses in action; (c) discrimination between residents and nonresidents; (d) right of assignee to sue in other state. 353

Enforcement in other state of judgment for alimony; by action at law; where amount payable in instalments. 816

CONSIDERATION.

Sufficiency to Support Guaranty, see GUARANTY, 2.

CONSPIRACY.**NOTES AND BRIEFS.**

Conspiracy; to raise prices; criminality of, at common law. 343

CONSTITUTIONAL LAW.

1. Questions relating to the wisdom, policy, and expediency of statutes are for the people's representatives in the legislature assembled, and not for the courts, to determine. *Re Boyce* (Nev.) 47

2. The liberty guaranteed by the Constitution includes the right of a citizen to use his God-given powers, employ his faculties, exercise his judgment in the affairs of life, and be free in the enjoyment and disposal of his acquisitions, subject, only, to such restrictions as are imposed by the law of the land for the public welfare. *Block v. Schwartz* (Utah) 308

3. A statute forbidding, under penalty, persons or corporations engaged in private enterprises from paying employees in store orders not redeemable in cash is unconstitutional as interfering with the right to contract. *State v. Missouri Tie & Timber Co.* (Mo.) 588

4. An act of the legislature will not be declared unconstitutional and void on the presumption that it will be used as a basis to assert an unjust or illegal claim to the property of the state. *Marsh v. Stonebraker* (Neb.) 607

5. The constitutionality of a pure-food law is to be determined by its language and purpose, and not by the alleged wrongful institution of prosecutions under it by those charged with its enforcement against those guiltless of a violation of its provisions. *Arbuckle v. Blackburn* (C. C. A. 6th C.) 864

Due process of law.

6. A street car company cannot be made responsible for the payment of a privilege tax imposed upon persons leasing the right to use the cars for advertising purposes, under a constitutional provision that no one shall be deprived of his property without due process of law. *Knoxville Traction Co. v. McMillan* (Tenn.) 296

7. A statute prohibiting, under penalty, a solvent merchant from disposing of his stock of goods in bulk without notifying his creditors, and which is applicable, also, to persons acting in a fiduciary capacity and under judicial process, when merchants who are not indebted have that privilege, unconstitutionally deprives him of his liberty and property. *Block v. Schwartz* (Utah) 308

8. A tax law cannot be held to deprive a taxpayer of his property without due process of law, because he is given no opportunity, 65 L. R. A.

by its express terms, of having the assessment reviewed by a board of equalization or otherwise, if it gives him an opportunity to submit his proofs and make a showing to the assessor in the matter of the assessment of his property. *Nathan v. Spokane County* (Wash.) 336

9. No unconstitutional deprivation of property is effected by a statute forbidding the use of horses whose tails are docked after its passage. *Bland v. People* (Colo.) 424

10. A statute prohibiting the assignment of future wages by employees is not void as an unreasonable restraint upon the liberty of the citizen, or as depriving him of his property without due process of law. *International Text-Book Co. v. Weissinger* (Ind.) 599

11. A statute authorizing the game warden to seize and forfeit to the state, without a hearing, all guns, dogs, decoys, fishing tackle, etc., used by any person hunting or fishing without a license, when such license is required by the act, is unconstitutional and void. *McConnell v. McKillip* (Neb.) 610

12. An act authorizing the seizure of gaming tables, or other instruments of gaming, before a conviction of the owner upon a charge of keeping them for gaming purposes, is not unconstitutional as depriving a person of property without due process of law. *Woods v. Cottrell* (W. Va.) 616

13. A statute providing for the appointment of a special administrator in cases where "the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe, either that he is dead, or has been secreted, confined, or otherwise unlawfully done away with," is invalid as depriving the person of his property and its possession without notice or due process of law, when applied to the property of a person living, although such special administrator has no power to administer such estate generally. *Clapp v. Houg* (N. D.) 757

14. A denial of the right of a corporation incorporated in another state to remove a cause into a Federal court, on the ground of diverse citizenship, from a court of North Carolina in which it has been sued by a citizen of the latter state, on the ground that the corporation has become a domestic corporation under Pub. Laws 1899, chap. 62, as it was compelled to do in order to obtain the privilege of doing business in that state, does not deprive the corporation of any rights under the Federal Constitution as a citizen of the United States, or deny it due

process of law or the equal protection of the laws. *Debnam v. Southern Bell Teleph. & Teleg. Co.* (N. C.) 915

Equal protection and privileges.

15. A classification of restaurants, for the purpose of a revenue tax, into those where meals are cooked and served by the proprietor or a member of his family, and those where they are not, imposing a lower tax upon the former, is not void as an unjust discrimination. *Re Lemon* (Cal.) 946

16. A law permitting the use of docked horses registered within a certain time after its passage, and forbidding the use of all other docked horses, is not void as objectionable class legislation. *Bland v. People* (Colo.) 424

17. To uphold a statute imposing the duty upon the owners or occupants of abutting land to keep the sidewalks free from ice and snow, there must be no inequality in the burden imposed upon the respective classes of persons upon whom the duty is imposed, nor unjust discrimination in favor of some and against others. *McGuire v. District of Columbia* (D. C. App.) 430

18. The fact that the owners of unimproved property may be nonresidents is no excuse for making different provisions with respect to the removal of snow from the walks in front of such property from those relating to improved property. *Id.*

19. A collateral-inheritance tax statute which exempts from its provisions domestic institutions organized for purely charitable purposes, but does not exempt such institutions when incorporated in other states, even though some of their charitable work is carried on within the state, is not obnoxious to the Ohio Bill of Rights, § 2, forbidding the grant of special privileges or immunities, or to the provision of U. S. Const. 14th Amend., against the abridgment of privileges or immunities of citizens and the denial of the equal protection of the law. *Humphreys v. State* (Ohio) 776

Vested rights.

20. One appointed for a definite time to a legislative office has no vested property interest or contract right thereto of which the legislature cannot deprive him during the existence of the term. *State ex rel. Mial v. Ellington* (N. C.) 697

Police power.

21. The legislature has inherent authority, under the general police power of the state, to enact laws for the promotion of the health, safety, and welfare of the people, and its arm cannot be stayed when exercised for these purposes. *Re Boyce* (Nev.) 47

22. An act providing an eight-hour day 65 L. R. A.

for all workingmen in mines, smelters, and mills for the reduction of ores is not unconstitutional as class legislation, or as a deprivation of property without due process of law, or an abridgment of the privileges or immunities of citizens, but is a legitimate exercise of the police power in the interest of the health of workingmen. *Id.*

23. The state cannot forbid independent contractors, performing work for it, to require their employees to labor more than a specified number of hours per day, either under its police power, or on the ground that the legislature may prescribe rules for the manner in which state work shall be performed. *People v. Orange County Road Constr. Co.* (N. Y.) 33

24. The police power will not justify an act prohibiting solvent merchants from disposing of their stocks in bulk without giving notice to their creditors. *Block v. Schwartz* (Utah) 308

25. The constant use of horses with docked tails tends to corrupt the public morals so as to bring the prohibition of the use of such animals within the police power of the state. *Bland v. People* (Colo.) 424

26. Under the police power of the state, the legislature has power to declare property which may be used only for an unlawful purpose to be a public nuisance, and to authorize the same to be abated summarily by public officers; but if property of a nature innocent in itself and susceptible of a beneficial use has been used for an unlawful purpose, a statutory provision subjecting it to summary forfeiture to the state as a penalty or punishment for the wrongful use, without affording the owner thereof opportunity for a hearing, deprives him of his property without due process of law. *McConnell v. McKillip* (Neb.) 610

27. Taking possession of a person's property, under authority of a statute providing for the appointment of a special administrator in case of a person who has disappeared under circumstances which afford reasonable grounds for believing that he is dead, cannot be upheld as a proper exercise of the police power of the state. *Clapp v. Houg* (N. D.) 757

NOTES AND BRIEFS.

Constitutional law; constitutionality of limitation of hours of labor by statute or ordinance:—(I.) General construction and application of statute; (II.) constitutionality of statute: (a) under Federal Constitution: (1) in general; (2) due process of law; (3) equal protection of the laws; (4) impairing obligation of contract; (b) under state Constitution; (III.) police power

of state; (IV.) right to extra compensation for labor in excess of limited time; (V.) criminal liability for violation of statute. 33

Validity of statute prohibiting sale of merchant's goods in bulk without notifying creditors; constitutional rights of life, liberty, and property. 308

What is meant by public policy; power of legislature to determine; regulation of warehouses and elevators. 512

Forbidding payment of wages in store orders not redeemable in cash; validity; when applied to corporations only. 597

Validity of statute authorizing individual to publish laws of state, and providing for distribution of copies to public officers. 607

Statute authorizing game wardens to seize and forfeit to the state all guns, etc., in actual use in violation of game law; seizure of ships used for smuggling, gambling property, and intoxicating liquor kept for unlawful sale. 611

Protection of right to use one's property; extent of protection of property rights; prohibiting use of docked horses. 424

Validity of statutes imposing upon abutting owners or occupants duty to keep sidewalks free from snow and ice. 430

When statute may be declared unconstitutional; unreasonableness or oppressiveness of, not sufficient; extent of police power; class legislation; limiting hours of work in mines, smelters, etc.; eight-hour laws generally; regulating manner of paying wages; Sunday laws. 48

Limitation of hours of labor; on public works; discretion of legislature as to use of funds of state and municipal corporations; giving money of state to aid private undertaking; right to prescribe rate of wages. 33

Right to day in court; meaning of; statute providing for destruction of liquor kept for illegal sale without jury trial; validity of statutes making certain facts *prima facie* case. 76

Validity of ordinance forbidding giving of trading stamps. 169

Right of citizens of each state to privileges and immunities of citizens in the several states. 179

Statute making license tax imposed on advertisers in street cars collectible from street car company; validity of. 296

Statute permitting administration on estate of person who has disappeared under circumstances justifying a belief that he is dead. 758

Constitutional right to jury trial; what intended by; impairment of; statute per- 65 L. R. A.

mitting change of venue by state without consent of defendant as impairment of. 762

Statute forbidding coating, glazing, or polishing of article of food to conceal inferiority. 869

Validity of statute prohibiting assignment of future wages. 599

Constitutionality of state regulation of sales of intoxicating liquors. 906

Constitutionality of act requiring foreign corporation to become domesticated as condition of doing business in state. 915

CONTINGENT FEE.

See ATTORNEYS.

CONTRACTS.

Discharge of Covenant to Repair by Destruction of Building, see COVENANT, 2-5.

Damages for Breach of, see DAMAGES, 7.

Violation of Public Policy by Condition in Deed, see DEEDS, 1.

Individual Liability of Executrix, see EXECUTORS AND ADMINISTRATORS, 1.

Sufficiency of Consideration to Support Guaranty, see GUARANTY, 2.

For Performance of Public Works, see PUBLIC IMPROVEMENTS.

Made on Sunday, see SUNDAY.

For Sale of Land, see VENDOR AND PURCHASER.

See also SPECIFIC PERFORMANCE.

1. One who has contracted to repair a house for an entire consideration cannot, in case the house is destroyed by lightning when the work is nearly completed, so that he is not entitled to enforce payment under the contract, recover the value of the work done under a *quantum meruit*. *Krause v. Crothersville School Trustees (Ind.)* 111

Mutuality.

2. The mutuality of a contract for the purchase and sale of hops to be grown in the future is not destroyed by a clause leaving the purchaser free to reject those tendered if they are not of proper quality and in proper condition. *Livesley v. Johnston (Or.)* 783

Consideration.

3. An agreement to pay the purchase price is a sufficient consideration to support a contract to convey real estate. *Rodman v. Robinson (N. C.)* 682

Validity.

4. A contract by which an ice manufacturing company undertakes to sell waste water to a railroad company which needs it

to supply its engines cannot be held void for collusion because the railroad company undertakes to lay the necessary pipes, which the ice company has no power to do for want of a franchise to lay pipes in the streets. *Canton v. Canton Cotton Warehouse Co.* (Miss.) 561

5. Public policy does not invalidate an assignment of future wages to be earned under an existing contract of employment. *Mallin v. Wenham* (Ill.) 602

6. Where three coal-mining companies operating in the same vein or seam in close proximity to one another, and just having commenced the development of that particular kind of coal, organize indirectly and nominally in the names of individuals another corporation to act as their general sales agent; and each gives it, by contract, the exclusive right to sell its entire output of coal at prices uniform as to all three companies, and not to be departed from without the consent of all the companies; and the agent company is to advertise and introduce the coal in the markets, establish and control all agencies and subagencies, and make all sales and collections, and deduct for its compensation 10 cents per ton out of the proceeds of sales,—the contract is illegal and void as tending to suppress competition and restrain trade, contrary to public policy. *Slaughter v. Thacker Coal & Coke Co.* (W. Va.) 342

Grounds for rescission.

7. One who has contracted to convey real estate is not entitled to relief from performance of his contract because he has made a bad bargain, in the absence of fraud or mistake. *Rodman v. Robinson* (N. C.) 682

Performance.

8. The question of the right of the owner to insure a building which another has contracted to repair and enlarge has no bearing upon the question of the liability of the contractor to comply with his contract after the building has been destroyed by lightning. *Krause v. Crothersville School Trustees* (Ind.) 111

9. Provision in a contract for the repair of, and addition to, a building, that the owner "shall not be in any manner responsible for any loss or damage that shall, or may, happen to said work or any part thereof," does not throw the loss caused by the accidental destruction of the building by lightning after the work is nearly completed upon the contractor. *Id.*

10. One who has agreed to sell and deliver a crop of hops cannot avoid performance on the ground that those produced were not of the agreed quality, where the purchaser

is willing to receive them. *Livesley v. Johnston* (Or.) 783

11. Where one who has undertaken to repair and add to a building has paid out, in the execution of his contract, more than he has received at the time of the destruction of the building by lightning, such payments which have entered into the value of the property must be treated as an execution of the contract *pro tanto*. *Krause v. Crothersville School Trustees* (Ind.) 111

Who may enforce.

12. A legatee may enforce a provision in an agreement by the executrix to distribute money received by her whenever a certain amount shall accumulate, in consideration of the withdrawal of opposition to the probate of the will, although the agreement was not signed by such legatee. *Painter v. Kaiser* (Nev.) 672

13. Creditors of a vendor of a stock of goods have a right of action against the vendee upon his agreement with the vendor to pay such creditors out of the purchase money. *Voorhees v. Porter* (N. C.) 736

Impairing obligation.

14. By the passage of an ordinance authorizing the establishment of a telephone system in a city, and its acceptance by the company, and its expenditures thereunder, a contractual relation was created between the company and the city, which became a vested right that could not be impaired by subsequent action of the city, directly or indirectly, annulling it for purposes not public, and for purposes of a personal or private nature. *Northwestern Teleph. Exchange Co. v. Anderson* (N. D.) 771

NOTES AND BRIEFS.

Contracts; conflict of laws as to; releasing carrier from liability for negligence; refusal to enforce when in violation of law of state though valid in state where made. 357

Against public policy: preventing competition in business; injuries to public; partial restraint of trade. 512

Interference with right to contract; by statute forbidding payment of wages in store orders not redeemable in cash. 597

Effect of invalidity of part of. 603

Executory; for sale of land; made on Sunday; validity of; at common law; where statute forbids labor, business, or work of "ordinary calling" on such days; a promise for a promise as valuable consideration to sustain; right of one party to relief without consent of the other; right to specific performance for breach of. 683

Made by telephone in one county with person in another; where deemed to be made; right to bring action at place of performance. 90

Intervening impossibility to perform; apportionability of the consideration; right to recover on *quantum meruit* where complete performance impossible; effect of extension of time to perform on right to recover for value of work done and destroyed; construction of contract by parties followed by courts; waiver of stipulated time for performance; what constitutes substantial performance. 112

Breach of; before time for performance arrives; measure of damages for. 304

To raise the price of property of parties combining; criminality of, at common law. 343

To furnish information and assistance in recovering land; agreement to pay contingent fee; validity of. 348

By vendee of stock of goods to pay creditors of vendor out of purchase money; right of creditors to enforce; as against assignee for creditors of vendee. 737

For purchase and sale of hops; effect of clause entitling purchaser to reject hops tendered if not of proper quality to destroy mutuality; effect of part performance to cure want of mutuality; duty of seller to tender goods and of buyer to accept and pay for them; specific performance of; where remedy at law is inadequate. 784

CONVICTS.

1. The photograph, description, and measurement of one sentenced to a state prison, which the law requires the superintendent of prisons to secure and preserve, are a part of the public records which the superintendent has no power to remove or destroy, even though the prisoner's sentence is afterwards reversed, and he is subsequently acquitted of the charge against him. *Re Molineux* (N. Y.) 104

2. One convicted of murder, and remanded to the warden of the state prison to be kept in solitary confinement awaiting execution, is within the operation of a statute requiring prisoners received under sentence in the state prison to be measured and described in accordance with the Bertillon system for the identification of criminals. Id.

NOTES AND BRIEFS.

Convicts; right to take photograph and measurements of person condemned to death; when person becomes a convict. 104

65 L. R. A.

COPYRIGHT.

1. That the publisher of an author's copyrighted work is not authorized to sell unbound copies will give the author no right of action against another publisher who purchases unbound sheets, which he binds and sells. *Kipling v. G. P. Putnam's Sons* (C. C. A. 2d C.) 873

2. The copyright of a new edition of an author's works covers only new matter contained in them. Id.

3. One has a right to make and publish an index of copyrighted works, although it contains words and phrases found in the text. Id.

NOTES AND BRIEFS.

Copyright; purchase of unbound copyrighted books; right to bind and dispose of as purchaser pleases; where seller was not authorized to sell unbound copies; right of author who has sold copyrighted books without restriction or published them without copyright to prohibit collection and sale of volumes in sets; right to use author's portrait on edition of works; right to publish index of copyrighted books; what revision sufficient to justify copyright; who owner of copyright when taken in publisher's name; right of author to sue for infringement where he does not own copyright; necessity of proving fraud in suit based on unfair simulation of bindings; who are necessary parties in suit for infringement. 874

CORPORATIONS.

Foreign Insurance Company, see INSURANCE, 4.

Lapse of Legacy by Consolidation of, see LEASE, 1.

NOTES AND BRIEFS.

See also BANKRUPTCY.

Corporations; as persons entitled to equal protection of laws. 777

Forbidding payment of wages by, in store orders not redeemable in cash; as class legislation; corporation as person entitled to constitutional protection; limit of corporate power to contract. 597

Legal effect of consolidation upon consolidating corporations. 228

As citizens of state which created them, for purpose of Federal jurisdiction; where corporation subsequently becomes a corporation of another state also; filing of charter within state by foreign corporation as required by state law; effect of, to make it a state corporation; right of foreign corporations to do business within state; right of state to require corporation to become do-

mesticated as condition of doing business in state; compliance with state law requiring domestication to make corporation a domestic one; right of foreign corporation becoming thus domesticated to remove action by citizen of state to Federal court on ground of diversity of citizenship. 915

Assumpsit against. 158

COSTS.

Reimbursement of Administrator Where Proceedings Appointing Him are Void, see EXECUTORS AND ADMINISTRATORS, 3.

COURTS.

Existence of Actual Controversy so as to Give Court Jurisdiction, see ACTION OR SUIT, 1.

See also REMOVAL OF CAUSES.

1. A Federal court has no jurisdiction of a suit to enjoin a state food commissioner from proceeding to enforce a pure-food statute of the state by criminal prosecutions, as he is required to do by the statute, on the ground that he has erroneously construed the statute to include matters not within it. *Arbuckle v. Blackburn* (C. A. 6th C.) 864

2. Mere failure of a petition to state a cause of action, or the defective statement of a good cause of action, does not deprive the court of jurisdiction. *Schubach v. McDonald* (Mo.) 136

NOTES AND BRIEFS.

Courts; question whether statute is proper exercise of police power as a judicial one. 425

Right of Federal court to enjoin criminal proceedings in state court. 868

COVENANT.

1. A covenant on the part of a vendor of land, which forms part of the consideration of the grant, to open a way through another tract which he does not at the time own, but contemplates purchasing, does not run with the latter tract after it comes into possession of the vendor; and it cannot, therefore, be enforced against his grantee. *Houston v. Zahm* (Or.) 799

2. A covenant to repair a standing building and construct an annex thereto which shall become an integral part of it is discharged by a destruction by lightning of the main building when the work is practically completed, so as to render the repair and completion of the annex impossible without the reconstruction of the main building. *Krause v. Crothersville School Trustees* (Ind.) 111

building. *Krause v. Crothersville School Trustees* (Ind.) 111

3. Failure to complete the repair of a building and the construction of an annex thereto as soon as possible, so that the main building is destroyed by lightning before the work is completed but after it might have been done, does not deprive the one undertaking the work of the benefit of the rule that relieves him from his covenant in case the building upon which his work is to be done is destroyed without his fault. *Id.*

4. Failure to complete construction work as soon as possible, if a breach of the covenant for its performance, is waived by proceeding against the covenantor for failure to replace and complete the work after the building has been destroyed by fire. *Id.*

5. The offer by the owner of a building which another has contracted to repair and add to, to restore it after it has been destroyed by lightning when the work was nearly completed, will not require the contractor to comply with his covenant and reconstruct and complete the work according to the original contract. *Id.*

NOTES AND BRIEFS.

Covenant; by vendor of land to open way through another tract which he does not own but contemplates purchasing; as one running with the land; failure to describe the dominant or servient estate. 801

CRIMINAL LAW.

Equity Jurisdiction to Enjoin Criminal Prosecution, see INJUNCTION, 2.

Criminal Nature of Proceedings to Condemn and Destroy Liquors, see INTOXICATING LIQUORS.

Unlawful Search of Private House, see SEARCHES AND SEIZURES.

The system of trial by jury in criminal cases, which existed in North Dakota for fourteen years prior to the adoption of the Constitution, gave the state, as well as the defendant, a right to have the place of trial changed from the county where the offense was committed to another county, when necessary to secure a fair and impartial trial; and it was the right thus known and understood which is secured by the Constitution. *Barry v. Truax* (N. D.) 762

NOTES AND BRIEFS.

Criminal law; injunction to restrain criminal proceedings. 868

Right of accused to speedy and public trial by impartial jury. 76

CY PRÈS.**NOTES AND BRIEFS.**

Cy près; when doctrine of, cannot be applied. 226

DAMAGES.

Necessity that Damages be Specially Pleaded, see **PLEADING**, 2.

1. The owner of a building negligently destroyed by fire while in possession of a tenant cannot recover from the one responsible for the loss the whole value of it, but from such value must be deducted the value of the leasehold. *Nashville, C. & St. L. R. Co. v. Heikens* (Tenn.) 298

2. Four hundred dollars is not excessive as damages to be awarded to a minor who is compelled to find his way home on foot during the winter, after being left without means in a strange city, 400 miles from home, by the negligent failure of a telegraph company to deliver a telegram. *Barnes v. Western Union Teleg. Co.* (Nev.) 666

3. Damages may be allowed for mental suffering for failure to deliver a telegram, although it is not accompanied by physical suffering or injury. *Id.*

Mitigation.

4. In an action for personal tort, the compensatory damages which may be recovered from the principal for the wrongful and unlawful act of its agent are not subject to mitigation, nor is the liability of the principal for such damages defeated, by proof that the act which caused the injury was provoked or induced by abusive language used by the plaintiff to such agent. *Mahoning Valley R. Co. v. De Pascale* (Ohio) 860

5. Words of provocation may be considered in mitigation of punitive, but not compensatory, damages. *Id.*

Exemplary damages.

6. Exemplary damages may be awarded against attaching officers who, although they have no personal acquaintance with, or ill-will against, defendant, wilfully and knowingly allow themselves to become tools of the attaching creditors, whose object is apparently malicious, and make an unlawful levy in a high-handed and oppressive way to oppress the debtor. *Giddings v. Freedley* (C. C. A. 2d. C.) 327

Breach of contract.

7. One who sues for breach, before the time for performance arrived, of a contract to employ him as manager of an opera house for a compensation, to consist in part of a 65 L. R. A.

share of the net profits, is not entitled to recover as damages a share of the amount for which his employer disposed of the lease subsequent to the time when such employment should have begun. *Greenwall Theatrical Circuit Co. v. Markowitz* (Tex.) 302

Personal injuries.

8. Thirteen thousand dollars is excessive to award as damages for negligently knocking down, severely bruising, and causing loss of an arm by, a laborer thirty-four years old who was earning \$1 per day. *Louisville & N. R. Co. v. Lowe* (Ky.) 122

Expulsion of member of society.

9. The damages to be recovered by a member wrongfully expelled from an unincorporated benefit society may include the loss sustained by being deprived of the use and enjoyment of the property of the society and of the privileges of membership, and also the mental suffering caused by the wrongful expulsion and the manner in which it was effected. *Lahiff v. St. Joseph Total Abstinence & Benev. Soc.* (Conn.) 92

NOTES AND BRIEFS.

Damages; for breach of contract to perform work; measure of. 112

For mental suffering. 520

Mental sufferings; element of. 93

For wrongful stoppage of engine under writ of attachment; where special damages are not alleged; exemplary damages; when given; in case of suit against joint tortfeasors. 327

For failure to deliver telegram; measure of; when excessive. 667

For interfering with the right to carry on business; effect on, of motive in performing legal act. 858

Effect of provocation in mitigation of damages for tort. 860

For interference with rights under trademark; extent of. 875

DEADLY WEAPON.

Assault with, see **ASSAULT AND BATTERY**, 1, 2.

DEATH.

An executor may bring an action for the negligent killing of his testator, under a statute providing that the action may be brought by heirs or personal representatives, although the statute expressly provides that the action shall be in favor of the wife or children of decedent, and a widow survives him, provided it is shown that the action is brought with her consent. *Copland v. Seattle* (Wash.) 333

DEBTOR AND CREDITOR.**NOTES AND BRIEFS.**

Debtor and creditor; domicile of creditor
as situs of debt. 357

DECLARATIONS.

Admissibility of, see EVIDENCE.

DEEDS.

Setting Aside, as Constituting a Proceeding in *Rem*, see ACTION OR SUIT, 2.

See also PERPETUITIES.

1. A condition in a deed of a small parcel of land that no grain shall ever be handled on the land granted, which contains no facilities for handling grain at the time of the grant, is not unreasonable or contrary to public policy. *Wakefield v. Van Tassel* (Ill.) 511

2. That plaintiffs stood by and permitted, without protest, an elevator to be erected on the granted land at large expense is not available to defeat an action of ejectment to recover possession of the land on the ground that the placing of the building thereon was a breach of condition in the title deed. *Id.*

NOTES AND BRIEFS.

Deeds; restrictions in, on use of real estate; validity; do not run with land; conditions subsequent in; estoppel of grantee to deny title of grantor. 512

Effect of invalid deed; estoppel by. 925

DEFINITIONS.**NOTES AND BRIEFS.**

Definitions; meaning of "education." 121

Gift enterprise. 169

Meaning of word "void." 925

DESCENT AND DISTRIBUTION.

The execution of releases from part only of the children to whom advances are made, of all further interest in the estate, does not destroy their right to share in intestate property thereafter accumulated by the ancestor, where all his children had shared equally in the advancements. *Headrick v. McDowell* (Va.) 578

DISBURSEMENTS.

Reimbursement of Administrator where Proceedings Appointing Him are Void, see EXECUTORS AND ADMINISTRATORS, 3.

DIVORCE.

See HUSBAND AND WIFE.
65 L. R. A.

DOCKING HORSES' TAILS.

Constitutionality of Statute, see CONSTITUTIONAL LAW, 9, 16.

See also ANIMALS.

DOCUMENTARY EVIDENCE.

See EVIDENCE.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW.

EASEMENTS.

1. The public use for the prescriptive period, of a path along a railroad right of way, with the knowledge, acquiescence, and consent of the railway company, gives the public no prescriptive right to travel there, where the statutes limit the use to which a railroad company can devote its right of way to the purposes for which it was condemned, and allow the condemnation of rights of way across the railroad right of way only when it can be done without hindrance to the use for which the property was acquired by the railroad company. *Matthews v. Seaboard Air Line Railway* (S. C.) 286

2. An easement of way cannot be imposed upon a tract of land by one who has not at the time of the agreement acquired title to it, although he undertakes to do so as part of the consideration of another tract conveyed to him, and he at the time contemplates acquiring title to the parcel to be affected and afterward in fact does so. *Houston v. Zahm* (Or.) 799

3. One who purchases land over which an irrigation ditch is in operation takes subject to the rights of the owner of the ditch. *Crescent Canal Co. v. Montgomery* (Cal.) 940

NOTES AND BRIEFS.

Easement; of railroad in highway; acquiring by prescription; what included within. 562

Of highway; extent of. 949

EIGHT-HOUR LAW.

Eight-Hour Day; Constitutionality of Statute Providing for, see CONSTITUTIONAL LAW, 22.

See also CONSTITUTIONAL LAW, NOTES AND BRIEFS.

EJECTMENT.

As Proper Remedy instead of Injunction, see INJUNCTION, 1.

NOTES AND BRIEFS.

Ejectment; to oust from possession one entering on premises under void oil and gas lease. 210

Nature of action of; judgment in, as bar to other action; where for costs and dismissal of complaint only, and there is no description of land involved, or ownership thereof. 791

By owner of fee to prevent wrongful use of highway. 949

ELECTIONS.

Charging Candidate with Criminal Offense, see LIBEL AND SLANDER.

ELEVATOR.

Burden of Proof as to Liability for Injury to One Using Elevator, see EVIDENCE, 1.

Liability of Municipality for Injury from, see MUNICIPAL CORPORATIONS, 4-6.

The owner of an elevator for carrying passengers from one floor of a building to another is governed by the rule applicable in case of common carriers, which makes him liable for injuries caused by the slightest negligence against which human prudence and foresight might have guarded. *Fox v. Philadelphia* (Pa.). 214

NOTES AND BRIEFS.

Elevators; owner and operator of, as common carrier; presumption of negligence from happening of accident. 215

EMINENT DOMAIN.

A taking, or appropriation, of property, within the meaning of a constitutional provision requiring the payment for property taken for public use, is not effected by the construction of bridge piers in a navigable river and the dredging of the channel so as to change the current and cause it to run directly against the bank, tearing and carrying away portions of the land of the riparian owner. *Salliotte v. King Bridge Co.* (C. C. A. 6th C.) 620

EQUAL PROTECTION OF THE LAWS.

See CONSTITUTIONAL LAW.

EQUITY.

See also SPECIFIC PERFORMANCE.

1. A court of equity has jurisdiction to enjoin ticket brokers from disposing of, or attempting to transfer, tickets which they have purchased with notice from persons who agreed that they should not be transferred. *Schubach v. McDonald* (Mo.) 136

2. The principle, "He who comes into equity must do so with clean hands," repels a complainant only when his iniquity has an immediate and necessary relation to the 65 L. R. A.

equity for which he sues. *Shaver v. Heller & Merz Co.* (C. C. A. 8th C.) 878

NOTES AND BRIEFS.

Equity; equity jurisdiction of circuit court of United States; effect on, of existence of statutory mode of redress under state law. 869

ESTOPPEL.

To Claim Breach of Condition in Deed, see DEEDS, 2.

By Judgment, see JUDGMENT.

1. Stockholders in, and owners of, land served by an irrigation ditch, who tacitly assent to, and are present without objection during the extension of, the canal over other land of theirs for the purpose of changing the point of intake, are estopped from objecting to the maintenance of the canal after its completion. *Crescent Canal Co. v. Montgomery* (Cal.) 940

2. Arguments of counsel in setting forth the relief to which he claims his client is entitled in a particular case are in no sense an estoppel which will prevent the court from granting other or additional relief. *Voorhees v. Porter* (N. C.) 736

NOTES AND BRIEFS.

Estoppel; invalid contract as; by permitting expenditure of money in making improvements; estoppel of grantee in deed to deny title in grantor; estoppel *in pais* relating to real estate; not available in court of law. 513

Of owner of bill of lading indorsed in blank and intrusted to another, to claim goods as against bona fide holder for value. 443

By deed; to set up deed held void in suit by one party, as against others not parties thereto; necessity of mutuality of estoppel. 925

To object to maintenance of irrigating canal over land; where construction of, acquiesced in; necessity of certainty in case of estoppel. 941

EVIDENCE.

Presumptions and burden of proof.

1. The burden of rebutting the presumption of negligence is upon a municipal corporation, when one attempting to use an elevator in one of its buildings is shown to have been crushed to death through no fault or negligence of his own. *Fox v. Philadelphia* (Pa.) 214

2. One claiming protection of the law for a business of so-called "magnetic healing" by a mental process transmitted to pa-

tients at a distance has the burden of showing the rationale of anything therein, if there be any such thing, not perceptible to the uninstructed, which entitles the business to protection. *Weltmer v. Bishop* (Mo.) 584

3. The burden of showing lack of diligence on the part of the obligee in prosecuting the principal debtor so as to release the guarantor from liability for a debt is upon the latter. *Cowan v. Roberts* (N. C.) 729

Relevancy and materiality.

4. Evidence is not admissible to show the nature and business and property interests of the grantor in an action to recover possession of real estate for breach of condition in the title deed that certain business should not be transacted on it. *Wakefield v. Van Tassel* (Ill.) 511

5. Misrepresentation as to the quality of scales sold is not shown by evidence that other scales sold by the same vendor, but not shown to be of the same pattern as those in controversy, had rusted, and that they did not compute certain fractions of a cent accurately, without showing the circumstances, or that the vendor made any representations on these points, or by showing that, although the scales were represented to be dust proof, the seller had advised putting paper over them to keep the dust out, without showing that it was necessary, and not a mere matter of precaution. *Computing Scales Co. v. Long* (S. C.) 294

6. As part of the circumstances leading immediately to the search without a warrant of a citizen's house for evidence of crime, persons sued for such act may prove the presence of bloodhounds in the searching party, and the use made of them on the occasion under investigation, as bearing upon the question of malice. *McClurg v. Brenton* (Iowa) 519

7. In defense of an action for illegal search of a citizen's residence, evidence is not admissible as to the breeding and training of the hounds which led the party to the house. *Id.*

Declarations and *res gestæ*.

8. Statements of one who claims to be the victim of rape are not inadmissible in evidence as part of the *res gestæ* because not precisely coincident in point of time with the outrage, if they were made only a few moments afterwards, and they are in fact proximate to the event and apparently spontaneous. *Kenney v. State* (Tex. Crim. App.) 316

9. That a child is too young to be a competent witness because of inability to

comprehend the obligation of an oath does not preclude the admission in evidence of its declarations as part of the *res gestæ*. *Id.*

Opinions and conclusions.

10. Refusing to strike out the opinion of a witness as to the genuineness of signatures in evidence upon withdrawing other signatures which had been introduced for the purpose of comparison is not error, where the witness had seen the person write who is alleged to have written the signatures, as to which he testifies, and is therefore competent to give his opinion as to their genuineness independently of any comparison with other signatures in evidence. *State v. Hall* (S. D.) 151

11. Perpendicular marks across the signature of a will, made apparently to cancel it, are not writings, within the meaning of a statute permitting the comparison of writings by experts so as to admit opinion evidence of their origin. *Re Hopkins's Will* (N. Y.) 95

Parol evidence concerning writings.

12. Parol testimony as to an agreement for disposing of the proceeds of a life-insurance policy is not inadmissible as tending to contradict the terms of the policy. *Hinton v. Mutual Reserve Fund Life Assn.* (N. C.) 161

Documentary evidence.

13. An entry in a record kept by a postmaster as to the payment of a money order is admissible in evidence, although neither the statute nor the requirements of the post-office department require the record to be kept, where it is necessary and proper in the orderly conduct of the business of the office. *State v. Hall* (S. D.) 151

14. Photographs of hounds used in tracking an alleged criminal are not admissible in evidence upon trial of an action for unlawfully searching his house for evidence of the crime, without a warrant. *McClurg v. Brenton* (Iowa) 519

Weight, effect, and sufficiency.

15. Courts are not required to give credence to testimony that would falsify well-known laws of nature. *Weltmer v. Bishop* (Mo.) 584

NOTES AND BRIEFS.

Evidence; presumption against implied repeal of laws. 71

Presumption of negligence from happening of accident. 215

Presumption of malice in case of libel. 939

Burden of proof on carrier to excuse non-delivery of goods. 718

Burden of proof of contributory negligence. 84

Expert testimony as to handwriting; perpendicular marks across signature of will not writing; burden of proof on one introducing instrument in evidence to prove its genuineness; presumption that alterations in will were made after execution; presumption that cancelation of signature was made by testator. 95

Procedure in proof of handwriting:—(I.) Scope; (II.) procedure generally; (III.) purpose of the proof; (IV.) examination of the witness; (V.) deciphering of obscurities; (VI.) summary. 151

Comparison of marks and spelling of disputed instrument:—(I) Comparison of marks; (II.) comparison of spelling. 95

As to action of bloodhounds in tracing supposed criminal. 520

Admissibility of declarations of infant too young to be sworn as a witness at the trial:—(I.) The general rule; (II.) *res gestæ* as an exception to the general rule. 316

EXCEPTIONS.

Sufficiency to Raise Question on Appeal, see APPEAL AND ERROR, 4.

EXECUTORS AND ADMINISTRATORS.

Constitutionality of Statute Authorizing Appointment of Special Administrator where Person Disappears, see CONSTITUTIONAL LAW, 13, 27.

Action for Negligent Killing, see DEATH.

1. A contract by one named as executrix in a will, that in consideration of the withdrawal of opposition to its probate she will distribute money which comes into her hands as executrix as fast as a certain sum shall accumulate, may be enforced against the promisor in her individual capacity. *Painter v. Kaiser* (Nev.) 672

2. Taking possession, under a statute providing for the appointment of a special administrator in case of a person who has disappeared under circumstances which afford reasonable grounds for believing he is dead, of the property of such person under letters of administration issued without notice, is not such notice to such owner as will validate the proceedings. *Clapp v. Houg* (N. D.) 757

3. Costs and disbursements incurred by a special administrator acting in good faith under authority of a statute providing for the appointment of a special administrator in case of a person who has disappeared under circumstances which afford reasonable grounds for believing that he is dead are not a legal charge against such person or his property, as the proceedings are wholly void. *Id.*

grounds for believing that he is dead are not a legal charge against such person or his property, as the proceedings are wholly void. *Id.*

NOTES AND BRIEFS.

Executors and administrators; right to bring action for negligent killing of testator; under statute providing that action may be brought by heirs or personal representatives; where widow survives. 334

Validity of administration proceedings as to parties living; validity of statute permitting administration where party has disappeared under circumstances justifying a belief that he is dead. 758

EXPULSION.

Member of Beneficial Society, see BENEVOLENT SOCIETIES.

FACTORS.

Liability of Bank for Permitting Factor to Check out Money Deposited by Him, see BANKS, 1.

Application of Bank Funds Deposited by Factor upon Individual Debt, see BANKS, 3.

1. A merchant who ships goods to his broker without conveying title to him, but purely for the purpose of distribution to others, and sends to the broker a bill of lading indorsed in blank for the goods, the possession of which, by the general custom of trade, is regarded as evidence of the right to dispose of the property for which it is issued, cannot, in an action of trover, recover the goods from a bank which has, in good faith and without notice of the owner's title, taken the bill of lading as security for a loan of money to the broker on his individual account, and converted the property upon default in the payment of its debt. *Commercial Bank v. J. K. Armsby Co.* (Ga.) 443

2. Insolvency of a factor, even though accompanied by the commission of an act of bankruptcy, does not terminate his authority to deposit funds received from sales of his customer's property in his own name. *Interstate Nat. Bank v. Claxton* (Tex.) 820

FEDERAL COURTS.

See REMOVAL OF CAUSES.

FELLOW SERVANTS.

See MASTER AND SERVANT.

FINDER.

NOTES AND BRIEFS.

Finder; right of discoverer of buried treasure. 526

FINDINGS.

See TRIAL.

FISHING.

Fishing Nets; Setting of, as Constituting a Public Nuisance, see NUISANCES.

See also WATERS, NOTES AND BRIEFS.

FIXTURES.

Attachment upon and Removal from Building, see ATTACHMENT, 2.

The main belt which transmits the power from an engine which is so affixed to the building as to be real estate, to the machinery in the mill, is, as between the owner and attaching creditors, real estate. *Giddings v. Freedley* (C. C. A. 2d C.) 327

NOTES AND BRIEFS.

Fixtures; what constitute; engine, shafting, anchor stones, etc., as. 327

FOOD.

Statute Conflicting with Power of Congress to Regulate Commerce, see COMMERCE.

Constitutionality of Pure Food Law, see CONSTITUTIONAL LAW, 5.

Jurisdiction of Federal Court of Suit to Enjoin Food Commissioner, see COURTS, 1.

Injunction against Officer Enforcing Food Law, see INJUNCTION, 4, 5.

Operation of Food Law upon Article Produced under Patent, see PATENTS, 1.

NOTES AND BRIEFS.

Food; statute prohibiting the coating, polishing, or glazing of article of food to conceal inferiority; validity; injunction to restrain enforcement of; injunction to restrain enforcement in accordance with alleged erroneous construction of; right of vendors of food to attract customers by every legitimate means; jurisdiction of equity to determine whether case comes within provisions of statute. 869

FORFEITURE.

Of Insurance Policy, see INSURANCE.

FRAUD AND FRAUDULENT CONVEYANCES.

Constitutionality of Statute Regulating Sale by Merchant of Stock of Goods in Bulk, see CONSTITUTIONAL LAW, 7.

In Assignment of Insurance Policy, see INSURANCE, 6, 7.

Immediate delivery, followed by act-
65 L. R. A.

ual and continual change of possession, as required by statute to make valid a sale of personal property, may be found from the fact that a purchaser of fruit in bins sent a representative the same evening to take possession of it, and the next morning sent men to prepare it for shipment, although on the day of the purchase the fruit was not moved from where it was when the sale took place. *Feeley v. Boyd* (Cal.) 943

FRAUDULENT REPRESENTATIONS.

Securing Money by, see LARCENY.

FRAUDULENT TELEGRAM.

Liability of Telegraph Company, see TELEGRAPHS.

GAME LAWS.

Constitutionality of Statute, see CONSTITUTIONAL LAW, 11.

NOTES AND BRIEFS.

Game laws; game as property of the state; validity of statute authorizing summary seizure and forfeiture to state of all guns, etc., in actual use in violation of law. 611

GAMING.

Constitutionality of Statute, see CONSTITUTIONAL LAW, 12.

Validity of Patent upon Device Which may be Used for Purpose of, see PATENTS, 2.

Gaming tables seized under a warrant from a justice under W. Va. Code 1899, chap. 151, § 1, cannot be burned, as provided in the act, on the order of the justice, but only upon conviction of their owner, upon the charge of keeping them, in a criminal or circuit court, and under its order. *Woods v. Cottrell* (W. Va.) 616

NOTES AND BRIEFS.

Gaming; what constitute gaming tables or instruments; right to seize and confiscate. 616

Summary seizure, without warrant, of property used in gambling. 611

GARNISHMENT.

Garnishment of a debt which has been delivered to attorneys for collection, and for which a receiver has been appointed, will take precedence of a deed granting it in trust for creditors, previously executed by the creditor but subsequently recorded, which has the force of a mortgage, where, by statute, such mortgage does not become binding against creditors until it is recorded in the county where the property is situated. *Smead v. Chandler* (Ark.) 353

NOTES AND BRIEFS.

Garnishment; when lien of, dates from. 358

GAS.

Injunction as Proper Remedy to Oust One in Possession under Void Lease, see **INJUNCTION**, 1.

An assignee of a gas lease, which, to avoid accounting to its assignor for his share of the profits of a well to which he is entitled under the contract of assignment, fraudulently commingles the product of the well with the product of other wells, without keeping any account or preserving any record of the amount of gas produced by it, will be compelled to account for the proportionate part called for by the contract of the whole amount of gas produced and sold by it, under the principle which is applied in case of the fraudulent confusion of goods. *Stone v. Marshall Oil Co. (Pa.)* 218

GIFT.

Parol instructions by one who has given money to another for safe keeping, which has been deposited by the latter's husband in a bank upon a certificate taken in his own name, to the one to whom the money was delivered, as to the persons to whom it is to be paid after the death of the donor, without any instruction in writing or delivery of the certificate of deposit, are not sufficient to effect a valid gift *causa mortis*. *Hawn v. Stoler (Pa.)* 813

NOTES AND BRIEFS.

Gift; *causa mortis*; necessity of delivery to complete; gift of check delivered to donee, but not cashed in lifetime of donor; what constitutes sufficient delivery. 813

GIFT ENTERPRISE.

See **LOTTERY**.

GUARANTY.

Burden of Showing Lack of Diligence, see **EVIDENCE**, 3.

1. Notice of acceptance is not necessary to bind one who executes a paper by which he "hereby" guarantees a debt which another now owes, or may owe in the future, to a specified amount, the instrument expressly stating that it is to remain in full force until the debt is fully discharged or the agreement is relinquished in writing. *Cowan v. Roberts (N. C.)* 729

2. Continued extension of credit to a merchant is a sufficient consideration to support a guaranty by a third person of payment of what has already accrued, as well as what will accrue in the future, where the entire contract is part of one 65 L. R. A.

transaction and evidenced by one instrument. Id.

3. Breach by the principal, without the knowledge of the obligee, of a condition upon which one agrees to guarantee payment of debts, to the effect that another signer of the instrument will be secured before it is delivered; will not release the one who actually signs from liability. Id.

4. Failure for a period of three months, by one who has signed an instrument guaranteeing payment of another's debts, to notify the obligee that the condition of its delivery has not been complied with, during which time further credit has been extended, will preclude him from taking advantage of the breach of condition. Id.

NOTES AND BRIEFS.

Guaranty; effect of fraud of principal on liability of guarantor; where creditor has no notice thereof; delivery by principal of guaranty without obtaining other signatures as agreed; effect on liability where obligee ignorant thereof; duty of guarantor to repudiate guaranty on discovery of fraud; liberal construction of guaranty; necessity of notice of acceptance; where guaranty is a continuing one; want of consideration for; sufficiency of consideration; question as to notice of acceptance for jury. 731

HABEAS CORPUS.

The supreme court has both the authority and the duty, on habeas corpus in favor of a private soldier held on a criminal charge for acts performed in the course of his duty, to see that at least a prima facie case of guilt is supported by the evidence against him. *Com. ex rel. Wadsworth v. Shortall (Pa.)* 193

NOTES AND BRIEFS.

Habeas corpus; by putative father of bastard child to obtain custody of. 689

HANDWRITING.

Opinion Evidence as to, see **EVIDENCE**, 10, 11.
Comparison of, see **EVIDENCE**, 11.

NOTES AND BRIEFS.

Handwriting; what constitutes. 96
Procedure in proof of. 151

HEALTH.

Injury to, see **NUISANCES**.

HEIRS.

Right to Benefit of Judgment Secured in Action by Coheir, see **JUDGMENT**, 4.

HIGHWAYS.

Constitutionality of Statute Imposing Duty to Remove Ice and Snow, see CONSTITUTIONAL LAW, 17, 18.

Enjoining Digging of Trench to Lay Water Main Across, see INJUNCTION, 3.

Contract to Sell Water to Railroad Company to be Conducted through the Latter's Pipes along Highway, see MUNICIPAL CORPORATIONS, 4.

Frightening Horses on, by Escape of Steam from Locomotive, see RAILROADS, 2, 3.

1. A person licensed to move houses in a city is legally liable for damages done by him, while moving a house, to the wires and property of a telephone company duly authorized by ordinance to establish a telephone system in said city, and maintained therein. *Northwestern Teleph. Exchange Co. v. Anderson* (N. D.) 771

2. The use of a street for moving houses is an extraordinary use thereof which may be permitted, but not so as to destroy the use of the street for travel or necessary public purposes, and cannot be legally done in destruction or impairment of vested rights. *Id.*

3. The public does not, by laying out a highway, acquire a right to prevent the owner of the fee from removing and applying to his own use timber standing therein, which the public may desire to preserve for shade or ornamentation. *Bigelow v. Whitcomb* (N. H.) 670

4. That one is riding a bicycle at the time he is injured by a defect in a highway will not preclude his holding the municipal corporation liable for the injuries if the highway is unsafe for ordinary purposes of travel. *Fox v. Clarke* (R. I.) 234

5. A street car company which removes from its tracks an obstruction wrongfully placed there by trespassers is not bound to place it where it will not be dangerous to travelers upon the highway; nor is it liable for such injuries to a traveler in case it leaves the obstruction in the traveler's path after dark, unmarked by light, so that the traveler comes into contact with it to his injury. *Howard v. Union Railroad Co.* (R. I.) 231

6. A highway easement does not include the right to bore wells within the limits of the highway to obtain water to sprinkle the road and keep it in repair. *Wright v. Austin* (Cal.) 949

7. A statute imposing a penalty for failure to remove the ice from a sidewalk upon one who, under the provisions of the statute, may already be in confinement for violation of its provisions, is void. *McGuire v. District of Columbia* (D. C. App.) 430

8. A municipal corporation is liable for injuries to property upon which it casts surface water in a body across intervening land by means of a drain or culvert in a highway, although no more water is collected than would have naturally flowed upon the property in a diffused condition. *Johnson v. White* (R. I.) 250

9. A statute making a municipal corporation liable for injuries caused by failure to keep its streets safe for travelers "with their teams, carts, and carriages" will not apply in favor of one using a bicycle, when such means of conveyance subsequently comes into use. *Fox v. Clarke* (R. I.) 234

10. A municipal corporation has no such title to the fee of its streets as entitles it to claim compensation from a railroad company which, by virtue of a legislative franchise, occupies a portion of a street for a crossing. *Canton v. Canton Cotton Warehouse Co.* (Miss.) 561

11. A legislative grant to a railroad company of the right of way through the state carries with it the power to cross over highways of every description when necessary for the completion of the railroad; and such crossings cannot be prevented by the municipal corporations through which the road is laid. *Id.*

12. A grant to a railroad company of a right to cross highways in municipal corporations includes the right to lay along the right of way pipes to conduct water needed to supply locomotives, and the other needs attendant upon the operation of the road. *Id.*

13. The mere fact that an engine is within the limits of the highway more than five minutes does not make its presence wrongful, so as to charge its owner with responsibility for injuries caused by steam emitted from it, regardless of the question of negligence, if it does not obstruct the highway, under a statute forbidding the obstruction of any street or highway by cars or trains for more than five minutes at any one time. *Hinchman v. Pere Marquette R. Co.* (Mich.) 553

NOTES AND BRIEFS.

Highway; nature of right acquired by public in; right of owner of trees in, to remove; where public desire to preserve them for shade. 676

Duty of city to keep safe; failure to keep safe for bicycle riders; bicycle as "carriage or vehicle;" propriety of use of bicycle in street. 234

Statute imposing upon abutting owner or occupant duty to keep sidewalks free from snow and ice. 430

Injury by unsafe condition of sidewalk or street; liability of municipal corporation for; remedy over against person causing unsafe condition; obstruction of street by independent contractor. 446

Authority of legislature over; easement in, for railroad acquired by prescription; implied grant of such incidental use as is necessary to complete enjoyment of the easement. 561

Permitting street to be used for moving buildings; acceptance by telephone company of ordinance permitting its use of streets as creating contract; liability for injury to wires of, by person licensed to move houses. 771

Rights of owner of fee in; as to trees, springs, mineral deposits, etc.; right to sink drain or watercourse below surface of; ejectment, trespass, or injunction by owner of fee in case of wrongful use of; right of public to disturb fee and remove soil at point where road does not need repair; right of public to sink well in; rights acquired by public by prescription; extent of; right of owner of fee to compensation for other new use; right of public to place reservoirs in. 949

HOMICIDE.

Recovery of Insurance on Life of One Murdered, see *INSURANCE*, 10, 11.
Shooting of Person by Private Soldier Detailed to Guard Residence, see *MILITIA*, 4.

HORSES.

Docking Tails of, see *ANIMALS*.
Constitutionality of Statute Relating to Docking of Tails, see *CONSTITUTIONAL LAW*, 9, 16, 25.

HOSPITAL.

Liability for Injury to Patient, see *CHARITIES*, 1.

NOTES AND BRIEFS.

Hospitals; as charitable institutions; where charge is made for services; liability for injury to patients through negligence. 373

HUSBAND AND WIFE.

Effect of Discharge in Bankruptcy upon Judgment for Alienation of Affections, see *BANKRUPTCY*, 5.

Enforcement, in Other State, of Decree in Equity for Payment of Alimony, see *CONFLICT OF LAWS*, 4.

Larceny by Husband of Wife's Separate Property, see *LARCENY*.

1. A pension received by a soldier of the 65 L. R. A.

Civil War from the Federal government may be taken into consideration as part of his resources, in fixing the future alimony to be paid by him, when his wife is granted a divorce, although, under the Federal statutes, it is not subject to seizure by any legal process until it has reached his possession. *Bailey v. Bailey* (Vt.) 332

2. The obligation of a married woman, not a free trader, to pay for goods which form part of a stock in trade with which she is carrying on business, which may, in equity, be enforced against her separate estate, is a "debt" within the meaning of the clause of the bankruptcy act relating to involuntary bankruptcy proceedings. *MacDonald v. Tefft-Weller Co.* (C. C. A. 5th C.) 106

3. A man is not bound to pay for necessities furnished to his wife with whom he is living, upon any theory of implied agency on her part, where she was amply supplied with articles of the same character as those purchased, or was furnished with ready money with which to pay cash for them. *Wanamaker v. Weaver* (N. Y.) 529

4. A merchant may continue to furnish necessities to a woman upon the credit of her husband, where she is known to him, and he has been in the habit of doing so, until he receives notice from the husband forbidding him to do so any longer. *Id.*

NOTES AND BRIEFS.

Husband and wife; liability of the husband for necessities furnished wife while living with him:—(I.) Scope; (II.) introductory; (III.) personal necessities: (a) implied agency in law; (b) effect of notice to tradesmen; (IV.) family necessities; (V.) husband's liability affected by style of life he adopts: (a) in general; (b) effect of notice to tradesmen; (c) burden of proof; (VI.) presumptive agency arising from cohabitation: (a) in general; (b) may be rebutted: (1) in general; (2) by proof of ample provision otherwise made by husband: (a) in general; (b) allowance; (3) by proof of notice to tradesmen; (4) by proof of authority in wife privately withdrawn; (5) by proof of extravagance of the purchases; (6) burden of proof; (VII.) authority implied from husband's assent to previous transactions; (VIII.) liability of husband, by reason of estoppel or ratification, for wife's purchases upon his credit or articles for personal use; (IX.) when husband is an infant; (X.) money loaned wife to purchase necessities; (XI.) in absence of certainty as to whom credit was given; (XII.) statutes. 529

Power of court to decree to wife divorced

absolutely property subsequently to be acquired by husband; awarding pension money not received at date of decree as alimony; order for alimony not barred by discharge in bankruptcy. 332

Larceny by husband of wife's property, or by wife of husband's; common-law rule; effect of married woman's act; husband cannot be guilty of arson of wife's house; not indictable for slandering wife; husband and wife cannot be guilty of conspiracy. 71

Power of married woman to contract debt and make herself personally liable; statutes giving her the right to manage her estate and become free trader; obligation of married woman as "debt" within meaning of bankruptcy act. 108

Liability of husband for necessities furnished wife; at common law; while wife is living with husband; where she is already sufficiently supplied. 520

Statute giving husband right to make deed of real estate without signature of wife; land conveyed subject to wife's dower right. 683

Enforcement in other state of decree for alimony; by action at law; where amount payable in instalments. 816

ILLEGITIMACY.

NOTES AND BRIEFS.

Illegitimacy; conflict of laws as to legitimacy. 177

Conflict of laws as to; power of legislature to legitimate children; legitimation by law of domicile enforced in other state. 178

Right of mother, or reputed father, of illegitimate child to its custody or control:— (I.) Mother generally entitled to custody; (II.) reputed father's right to custody in general; (III.) rights of mother, or reputed father, as against each other: (a) mother's right as against reputed father; (b) reputed father's right as against mother; (IV.) rights of mother, or reputed father, as against other persons: (a) mother's right as against others than reputed father; (b) reputed father's right as against others than mother: (1) as against parish; (2) as against town or county; (3) as against strangers; (4) as against relatives; (V.) right of mother, or reputed father, to guardianship of child: (a) mother's right of guardianship; (b) mother's right to appoint testamentary guardian; (c) reputed father's right of guardianship; (d) reputed father's right to appoint testamentary guardian; (VI.) right of mother or reputed father, as against guardian of child: (a) mother's right as against guardian; (b) reputed father's right as against guardian; 65 L. R. A.

(VII.) rights of mother, or reputed father, in proceedings affecting custody: (a) notice; (b) consent; (c) right to appear or be heard. 689

Right of father to custody of illegitimate child where mother is dead; habeas corpus to obtain possession of. 689

IMPAIRMENT OF OBLIGATION OF CONTRACT.

See CONTRACTS, 14.

IMPUTED NEGLIGENCE.

See NEGLIGENCE, 4.

INCOMPETENT PERSONS.

NOTES AND BRIEFS.

Incompetent persons; deed by *non compos mentis*; not void but voidable. 926

INDEPENDENT CONTRACTOR.

See MASTER AND SERVANT, NOTES AND BRIEFS.

INDICTMENT, INFORMATION, AND COMPLAINT.

1. An indictment for violating a statute prohibiting the breach of a contract not to exact more than a specified number of hours of labor per day from persons engaged on state work must show the existence of an express contract, or that the accused was bound by an implied one, by force of statute or otherwise. *People v. Orange County Road Constr. Co.* (N. Y.) 33

2. That money is shown by the evidence to have been obtained from a woman by the instrumentality of her check does not constitute a variance from a charge that the money was obtained from her. *Hunt v. State* (Ark.) 71

INFANTS.

Effect in Other State of Statute Legitimizing Children, see CONFLICT OF LAWS, 1.

Declarations of, as Part of *Res Gestæ*, see EVIDENCE, 9.

The putative father of a bastard child may maintain a writ of habeas corpus to recover possession of it from its maternal relatives after the death of its mother, where there is nothing to show that he is an improper person to have custody of it. *Aycock v. Hampton* (Miss.) 689

NOTES AND BRIEFS.

Infants; admissibility of declarations of, when too young to be sworn as a witness at the trial. 316

Custody of illegitimate child; who entitled to. 689

INJUNCTION.

Jurisdiction of Federal Court to Restrain State Courts, see **COURTS**, 1.
To Abate Nuisance, see **NUISANCES**, 3, 4.

Prohibition to Restrain Enforcement of, see **PROHIBITION**.
See also **EQUITY**.

1. Ejectment, and not a bill in equity for an injunction, is the appropriate remedy to oust from possession one who has entered upon premises under an oil and gas lease which is alleged to be invalid, and has erected necessary machinery, drilled a well, and is proceeding to drill others. *Hicks v. American Natural Gas Co. (Pa.)* 209

2. That property rights are involved will not give equity jurisdiction to enjoin criminal prosecutions. *Arbuckle v. Blackburn (C. C. A. 6th C.)* 864

3. Equity will not, at the suit of the municipality, enjoin the digging of a trench to lay a water main across a public street under legislative authority, where there is no proof that the free use of the street will be permanently interfered with, or that any irreparable injury will be inflicted thereby. *Canton v. Canton Cotton Warehouse Co. (Miss.)* 561

4. Equity will not enjoin an officer charged with the execution of a pure-food law from publishing the opinion that a specified product is within the prohibition of the law. *Arbuckle v. Blackburn (C. C. A. 6th C.)* 864

5. That an article of food is widely sold throughout a state will not enlarge the jurisdiction of a court of equity to enjoin the institution of prosecutions against its sale as violating the pure-food laws. *Id.*

Preliminary.

6. A preliminary injunction will not be granted to restrain further operations under an oil and gas lease alleged to be of no effect as against a purchaser of the premises, where the lessee has a well in operation from which he is supplying the public, and has machinery in place for the drilling of another one, so that, by stopping his operations, the lessee will lose everything he hoped to gain by his contract, while the owner of the premises will lose nothing by delaying the injunction until final hearing. *Hicks v. American Natural Gas Co. (Pa.)* 209

7. A preliminary injunction will not be awarded a purchaser of a farm to restrain operations under a prior oil and gas lease of the premises, which he alleges is void as to him, where by the terms of the lease the lessee is bound to pay for all injuries to the

surface, and to measure accurately all gas taken from the premises. *Id.*

Ticket scalpers.

8. Equity has jurisdiction to enjoin ticket brokers from trafficking in nontransferable railroad tickets where there is no adequate remedy at law because of their insolvency and the frauds which, by such traffic, will be perpetrated upon the railroads and innocent purchasers of tickets which cannot be used, and because of the many suits which would be necessary if an attempt should be made to recover the damages in each case separately. *Schubach v. McDonald (Mo.)* 136

9. In granting an injunction to prohibit ticket brokers from violating the rights of railroad companies in contracts represented by special nontransferable tickets to be issued by them, the court does not prescribe a rule of civil conduct, nor invade the prerogative of the legislature, nor establish government by injunction. *Id.*

Enforcement of ordinance.

10. Equity has no jurisdiction of a suit to enjoin the enforcement of a municipal ordinance for the alleged reason that it is unreasonable and void, since there is an adequate remedy at law. *Paul v. Washington (N. C.)* 902

11. One who obtains a license to sell liquor has no standing in court to restrain the enforcement of existing ordinances regulating the manner of sale. *Id.*

12. That officers charged with the execution of a void penal ordinance are insolvent, so that a judgment against them will be unavailing, is not sufficient to require equity to take jurisdiction of a suit to restrain the attempted enforcement of the ordinance. *Id.*

Unfair competition.

13. A manufacturer who has applied to certain articles which he makes the names "American Ball Blue" and "American Wash Blue," until they have become well known to the trade and the public by these names and command a large and lucrative trade, is entitled to an injunction to restrain a firm of merchants from applying these names and the word "American" to goods of other manufacturers, and offering them for sale under these names for the purpose of diverting complainant's trade to themselves. *Shaver v. Heller & Merz Co. (C. C. A. 8th C.)* 878

14. A proprietary interest in the terms or symbols used to palm off the goods of one manufacturer or vendor as those of another, or to commit any other fraud, is not

essential to the maintenance of a suit to enjoin the perpetration of the wrong; but an interest in the good will of the business, or in the other property threatened, is sufficient. Id.

NOTES AND BRIEFS.

Injunction; to restrain ticket brokers from dealing in nontransferable tickets; injunction not awarded to allay "mere apprehension;" injunction against trespassers or nuisances; when granted; injury to "business" as subject-matter of injunction. 137

Preliminary; when refused; to restrain operations under oil and gas lease. 209

To restrain bankrupt's creditor from taking after-acquired property of bankrupt. 604

To restrain enforcement of statute by officers; where statute constitutional, but officers' construction of, is alleged to be erroneous; to restrain threatened criminal proceeding; by Federal court in restraint of proceedings in state court. 808

Against enforcement of void ordinance; temporary restraint of enforcement of valid ordinance. 905

To prevent execution of public statute. 950

By owner of fee to restrain wrongful use of highway. 949

INNKEEPER.

Liability to Guest for Assault by Servant, see MASTER AND SERVANT, 6, 7.

NOTES AND BRIEFS.

Innkeepers; measure of duty to protect guest; liability for malicious assault by servant. 88

INSOLVENCY.

NOTES AND BRIEFS.

Insolvency; transfer of property out of the state by insolvency proceedings; conflict of laws as to. 353

INSURANCE.

Parol Testimony to Show Agreement as to Proceeds, see EVIDENCE, 12.

1. A marine policy providing that no risk shall attach to it until the amount and description of the same shall be approved and indorsed thereon by the insurer is not changed into an open and unrestricted policy covering all property which the assured elects to report, even after notice of loss, by the adoption of an agreement fixing a uniform premium, the supplying of the assured with

blanks on which to report risks, and the custom extending over a long period of years, of reporting risks by the assured, when convenient, in due course of business after departure of the vessel, and the uniform acceptance of the risks by the insurer. *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.* (C. C. A. 3d C.) 387

2. The indorsement by the clerk of an insurance company of a slip of paper notifying the company of a shipment to be covered by an open marine policy in the usual way with the amount of the premium and the check mark indicating its readiness for entry in the books, will not show an acceptance of the risk in the face of its positive rejection by the officers of the company as soon as they learned that it was on property already lost, of which the assured is notified without delay. Id.

3. The members of an unincorporated mutual benefit association are not subject to suit by the beneficiary of a deceased member for their respective shares of such benefit, where the by-laws of the association contemplate the collection and disbursement of benefits by officers, and forfeiture of membership is the only penalty provided for failure to pay an assessment. *Cochran v. Boleman* (Ind.) 516

Foreign insurance companies.

4. A foreign insurance company which has been doing business in the state cannot, so far as existing obligations are concerned, escape from the provisions of a statute permitting process to be served upon it by delivery to the insurance commissioner, by withdrawing from the state, discharging its agents, and canceling its consent to have process served through such commissioner. *Hinton v. Mutual Reserve Fund Life Assn.* (N. C.) 161

Insurable interest.

5. The holder of a purchase-money mortgage has no insurable interest in the life of the wife of the mortgagor, who did not join in the execution of the mortgage debt. Id.

Assignment.

6. The insurer may resist payment to the assignee, on the ground of fraud, of the amount due on a policy secured by the holder of a purchase-money mortgage on the life of the mortgagor's wife, who was not bound by the mortgage, to secure his debt, where, knowing that, if the insurer knew the facts, it would not issue a policy in his favor, he procured it to be issued to her, paying the premiums himself, and then took an assignment of it without notice to, and contrary to the rules of, the insurer. Id.

7. A mortgagee who has secured a policy on the life of the mortgagor's wife as security for the debt, by having it issued to her and assigned to him under circumstances amounting to fraud upon the insurer, will not be permitted to collect the proceeds of the policy as administrator of her estate, on the theory that she might secure the policy on her own life, and that the assignment, being void, had not affected the integrity of the policy or the right of her administrator to enforce the contract, at least where he is to be permitted by the husband to retain the proceeds for his own benefit. *Id.*

Forfeitures.

8. An insurance policy on a building and the furniture, fixtures, counters, etc., and a stock of merchandise therein, which describes the building and its contents separately, and apportions the insurance between the building, the fixtures, and the merchandise, specifying a certain amount for each, is not avoided as to the insurance on the building and fixtures by breach of a condition in the policy requiring the insured to take an inventory of the stock at stated intervals, to keep a set of books, and to keep such inventory and books in a fire-proof safe when the building is not open for business or in some place not exposed to fire which would ignite or destroy the building, and providing that the entire policy shall become null and void for failure to comply therewith. *Miller v. Delaware Ins. Co. (Okla.)* 173

9. Where different classes of property are covered by an insurance policy, each class being separated from the others and insured for a specific amount, and there is a breach of the conditions of the contract as to one class of the property insured, the contract should be considered, not as one entire in itself, but as one which is severable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more of them without regard to the other; provided the contract is not affected by any question of fraud, act condemned by public policy, or any increase of the risk of the company on the whole property insured because of the breach. *Id.*

Cause of death.

10. Public policy does not forbid a recovery by the next of kin on a policy upon the life of one murdered by the beneficiary named in the policy. *Supreme Lodge K. & L. of H. v. Menkhausem (Ill.)* 508

11. If the beneficiary deprives himself of the right to enforce a benefit certificate by murdering the insured, the obligation of the society may be enforced by those designated 65 L. R. A.

by the statute and the rules of the society as entitled to the fund, in the absence of the beneficiary named. *Id.*

NOTES AND BRIEFS.

Insurance; necessity of insurable interest; insurable interest of mortgagee in life of wife of mortgagor; right of person taking out policy to assign it to one having no insurable interest; effect of void assignment. 161

When policy severable. 174

Open policy; no contract created until after risk has been submitted for approval; marine policy; delay in reporting and requesting insurance on goods; effect of words "lost or not lost," in policy; policy written on goods already lost; duty of insured to disclose knowledge of loss. 388

Right of heirs at law of member of beneficiary society to insurance where beneficiary not capable of taking; where beneficiary kills insured. 510

INTEREST.

Interest will be allowed from maturity of the debt, in case of failure to pay a certain sum of money at a fixed time. *Computing Scales Co. v. Long (S. C.)* 294

INTOXICATING LIQUORS.

Right of Licensee to Enjoin Enforcement of Ordinance Relating to, see *INJUNCTION*, 11.

Right to Jury Trial in Proceedings for Destruction of, see *TRIAL*, 2.

Condemnation of liquor.

1. A proceeding to condemn and destroy liquor alleged to be kept in a prohibited district for sale contrary to the law is not criminal, so as to require the proof of facts necessary to the condemnation beyond a reasonable doubt. *Kirkland v. State (Ark.)* 76

Regulation of sale.

2. That a municipal corporation has power to prohibit the sale of intoxicating liquor within its limits does not, in case it attempts to regulate such sale, empower it to make unreasonable provisions for such regulation. *Paul v. Washington (N. C.)* 902

3. A municipal ordinance forbidding the use of any screen of any nature which shall shut off the view from the street of the interior of a place where liquor is sold is not unreasonable. *Id.*

4. A municipal ordinance may require all liquor sold in saloons to be served and drunk at the counter. *Id.*

5. Forbidding the use of side, rear, or

trap doors connected with a saloon for the sale or delivery of liquors, or the entrance or exit of customers, is not an unreasonable restraint upon the use of property. *Id.*

6. Requiring liquor saloons to be closed between 8 o'clock in the evening and 6 o'clock in the morning, and forbidding the doors to be open between those hours, are not unreasonable. *Paul v. Washington* (N. C.) 902

7. Places where liquor is sold may be required to be kept lighted throughout the night, even during the hours when they are not open for the transaction of business. *Id.*

8. Forbidding owners of, or employees in, places where liquor is sold to be in such places between the hour of closing on Saturday night and the hour for opening on Monday morning is not so clearly unreasonable as to require the court to set aside an ordinance making such provision. *Id.*

9. The keeping of games and devices for amusements in places where liquor is sold may be forbidden by a municipal corporation having power to regulate or prohibit the sale of such liquor, although the state may have imposed a tax upon such things when used in connection with such places. *Id.*

10. Forbidding the maintenance of restaurants or eating rooms in connection with barrooms is not unreasonable. *Id.*

11. A provision in an ordinance regulating the liquor traffic authorizing the aldermen to investigate alleged violations of the ordinance, and revoke licenses if violations are found, is not void as against one who consented to it. *Id.*

12. The invalidity of a provision in an ordinance regulating the liquor traffic, permitting the revocation of licenses, does not render void the provisions of the ordinance prescribing the manner in which the business shall be conducted, for violation of which a penalty is prescribed. *Id.*

NOTES AND BRIEFS.

Intoxicating liquors; statute providing for destruction of, without jury trial, when kept for illegal sale; proceeding as one *in rem*; criminal nature of; necessity of proving beyond reasonable doubt intent to violate law; question of intent as one for jury. 76

Summary seizure of, without warrant, when kept for unlawful sale. 611

Ordinance placing certain restrictions on conduct of business of selling; restricting hours of sale; forbidding use of screens; presence of billiard tables, etc.; reasonable. 65 L. R. A.

ness of; right of legislature to prohibit sales throughout the state; advisability of regulation of sale of, as matter of legislative discretion. 905

IRRIGATION.

Purchase of Land Subject to Rights of Existing Irrigation Ditch, see EASEMENTS, 3.

Estoppel to Object to Maintenance of Canal, see ESTOPPEL, 1.

See also WATERS, NOTES AND BRIEFS.

JUDGMENT.

Upon Appeal, see APPEAL AND ERROR, 10.

Necessity that One Pleading Judgment Should Set up Entire Record, see PLEADING, 1.

1. One joined as defendant with a city in an action for injuries to a pedestrian through obstructions on a sidewalk, but who fails to make any defense to the action, which results in his favor because of the statute of limitations, is not estopped, in a subsequent one by the city to compel him to reimburse it the amount which it has been compelled to pay to the injured person, from showing that it was not through his fault that the injury happened. *Richmond v. Sitterding* (Va.) 445

2. A judgment against the city in an action against it and a private citizen for injuries to a pedestrian through obstructions on a sidewalk, in which the question of the liability of the latter was not considered, is not *res judicata* upon the question of his ultimate liability, in an action by the city to compel him to reimburse it for what it was required to pay under the judgment. *Id.*

3. A judgment dismissing the action and assessing costs against plaintiff, entered upon a verdict for defendant in a suit to recover possession of real estate which involves two issues,—one as to plaintiff's title, and the other as to the right of possession,—without disclosing upon which the judgment is based, will not bar a subsequent action for possession, although the statute contemplates that the title shall be tried in such actions, and makes the judgment conclusive as to the estate in such property and the right of possession thereof, so far as the same is thereby determined. *Hoover v. King* (Or.) 790

4. Heirs at law are not entitled to the benefit of a judgment in an action by a coheir to set aside a deed of the ancestor, where they were not made parties to the suit, and it was not brought for their benefit. *Allred v. Smith* (N. C.) 924

5. One not a party to the action cannot take any advantage of an erroneous judgment. Id. 816

6. Judgments in actions quasi *in rem* are binding only on the parties. Id. 791

NOTES AND BRIEFS.

Judgment; in ejectment; for costs only, and dismissal of complaint; failure to describe nature of estate, land involved, or ownership thereof; as bar to other action. 791

For alimony; right to enforce in other state; by action at law; where alimony payable in instalments. 816

In favor of one joint tortfeasor as bar to separate action against another; judgment conclusive only upon matters actually determined; judgment in favor of plaintiff as proof of probable cause for bringing action; where subsequently reversed. 826

Conclusiveness of record of; what constitutes judgment *in rem*; binding effect of, on persons not parties or privies; where one was originally a party; effect of judgments quasi *in rem* against those not parties thereto. 925

JURY.

Right to Jury Trial, see TRIAL, NOTES AND BRIEFS.

JUSTICE OF THE PEACE.

Prohibition to Restrain Enforcement of Order, see PROHIBITION, 2.

LANDLORD AND TENANT.

Amount of Damages Recoverable by Owner of Building Destroyed by Fire, see DAMAGES, 1.

Gas Lease, see GAS.

The lease of a building, without anything to indicate that it is to be separate from the subjacent land, will pass both building and land; and the destruction of the building will not terminate the liability of the lessee, but he will continue liable for the rent until the expiration of the term. *Nashville, C. & St. L. R. Co. v. Heikens* (Tenn.) 208

LARCENY.

1. A man who obtains money from a woman with intent to convert it to his own use, by means of a well-laid scheme which includes the performance of a marriage ceremony with her, and fraudulent representations that, in case she intrusts him with the money, he will invest it for her benefit, may be convicted of larceny. *Hunt v. State* (Ark.) 71

2. A man may be guilty of larceny of 65 L. R. A.

property which the Constitution makes the sole and separate property of his wife. Id.

NOTES AND BRIEFS.

Larceny; by husband of wife's goods; rule at common law; effect of married woman's act; larceny by wife of husband's goods; selling property which seller knows does not belong to him; appropriation of check given to person to cash as larceny; appropriation of proceeds of; not larceny; appropriation of money given to person for speculative purposes as larceny. 71

LEASE.

See LANDLORD AND TENANT; RAILROADS.

LEGACY.

Legatee; Power to Enforce Contract Made by Executrix, see CONTRACTS, 12.

See also LEASE.

LEVY AND SEIZURE.

Allowance of Exemplary Damages for Unlawful Levy, see DAMAGES, 6.

LIBEL AND SLANDER.

1. The business of pretending to heal absent patients by supernatural powers without medicine or surgery is fraudulent, and not protected by the law against libel, although many persons claim to have been benefited by the treatment. *Weltmer v. Bishop* (Mo.) 584

2. A publication by a newspaper charging a candidate for nomination for a public office with a criminal offense is in no way privileged, but is made at the risk of the publisher, who, to escape liability for libel, must prove the truth of the charge made. *Star Publishing Co. v. Donahoe* (Del.) 980

3. The publication of a libel is not justified by the prior publication of an independent libel against accused by the one who is attacked in the later one. *Patton v. Cruce* (Ark.) 937

4. That two persons had been engaged in the publication of a series of libelous articles against each other may be taken into consideration in assessing the damages in a suit by one, based on the publications of the other. Id.

5. Accusing one of being a secret slanderer and scandal monger, with betraying his friends, and telling lodge secrets, is libelous *per se*. Id.

NOTES AND BRIEFS.

Libel; in imputing dishonesty or misconduct in business; actionable without

proof of special damages; admissibility of defendant's testimony as to good faith in publishing libel; evidence to prove person intended where libel ambiguous; loss of privilege by indiscriminate publication; by violent and intemperate language. 584

Mutual controversy and vituperation as defense in; where plaintiff was the aggressor; effect of use of excessive language to take away privilege; criticism of acts which are of public concern as privileged. 938

Criticism of candidate for nomination for public office; extent of privilege; qualified privilege; charging criminal offense against; accusation of bribery, as libelous *per se*. 979

Defaming person in his vocation as actionable *per se*; without proof of actual damages. 858

LIBERTY.

Guaranty of, see CONSTITUTIONAL LAW.

LICENSE.

NOTES AND BRIEFS.

License; of restaurants; validity of classification for purpose of. 946

LICENSE TAX.

Constitutionality of Statute, see CONSTITUTIONAL LAW, 6.

LIS PENDENS.

NOTES AND BRIEFS.

Lis pendens; right of one who, pending appeal from judgment of foreclosure, purchases property from mortgagee, who acquired it at foreclosure sale; effect of subsequent reversal of judgment. 420

LITERARY PROPERTY.

See UNFAIR COMPETITION.

LOTTERY.

1. A concern which sells trading stamps to merchants, to be given to customers as an inducement to secure their trade, and which redeems the stamps with articles kept in stock for that purpose, does not conduct a gift enterprise within the meaning of the statute authorizing municipal corporations to impose taxes on such enterprises in the same manner as upon lotteries. *Winston v. Beeson* (N. C.) 167

2. The fact that one who sells trading stamps to be given to merchants and redeemed by him may profit by the failure to present some stamps for redemption does not introduce such an element of chance into the transaction as to make it a lottery or gift enterprise. *Id.*

65 L. R. A.

NOTES AND BRIEFS.

Lottery; what necessary to constitute; trading stamp business as. 169

MACHINERY.

See FIXTURES.

MAGNETIC HEALING.

Burden of Proof, see EVIDENCE, 2.

MALICE.

Use of Bloodhounds as Evidence of Malice in Action for Unlawful Search, see EVIDENCE, 6.

A patron of a street railway company incurs no liability to a conductor by reporting to the superintendent of the company such conductor's misconduct while on duty toward a passenger, though in making the report, he is prompted by ill will and a desire to secure the conductor's discharge from the service of the company. *Lancaster v. Hamburger* (Ohio) 856

NOTES AND BRIEFS.

Malice; definition of. 520

What constitutes; within meaning of bankruptcy act. 523

Effect of, to give right of action for injury; where there is a legal right to do the act; right to consider, in determining damages. 859

MALICIOUS PROSECUTION.

No action lies for malicious prosecution of a civil action in which there is no arrest or attachment of property, and no special injury inflicted which would not necessarily result from the prosecution of any similar suit. *Abbott v. Thorne* (Wash.) 826

NOTES AND BRIEFS.

Malicious prosecution; of civil action; right of action for, where there is no arrest or attachment of property and no special injury; judgment for plaintiff as conclusive proof of probable cause; when subsequently reversed. 826

MANDAMUS.

Mandamus will not lie to compel a public official to surrender or destroy a record which his official duty requires him to preserve. *Re Molineux* (N. Y.) 104

NOTES AND BRIEFS.

Mandamus; to compel removal, from records, of photograph and measurements of person convicted of murder; where sentence afterwards reversed. 104

MARINE INSURANCE.

See **INSURANCE**, 1, 2.

MARRIAGE.

For Purpose of Securing Money from Woman as Constituting Larceny, see **LARCENY**.

MARTIAL LAW.

See also **MILITIA**.

A condition of qualified martial law exists where the governor is compelled to call out the militia, and direct it to restore order, when rioting and disorder exist in certain counties of the state by reason of a strike. *Com. ex rel. Wadsworth v. Shortall* (Pa.) 193

NOTES AND BRIEFS.

Martial law when there is no actual war:—(I.) Scope of note; (II.) definition of martial law; (III.) power to proclaim and maintain martial law; (IV.) discretion and authority of military when called to aid civil power; (V.) power of military, in time of actual war, to arrest and punish citizens in places where civil courts are open; (VI.) conclusion. 193

MASTER.**NOTES AND BRIEFS.**

Master; reversal of master's findings without assigning reason. 221

MASTER AND SERVANT.

Assignment of Wages, see **ASSIGNMENT**.

Constitutionality of Statute Forbidding Giving of Store Order, see **CONSTITUTIONAL LAW**, 3.

Constitutionality of Statute Regulating Hours of Labor, see **CONSTITUTIONAL LAW**, 22, 23.

Indictment for Violating Statute Fixing Hours of Labor, see **INDICTMENT, ETC.**, 1.

Act of Third Person in Procuring Discharge of Employee, see **MALICE**.

Duty and Liability of master.

1. In moving engines and trains on tracks and about yards in towns where not only railroad employees, but other persons, are in the habit of crossing the tracks, those in charge of the trains should anticipate the presence of persons on the tracks, and keep a lookout for them. *Louisville & N. R. Co. v. Lowe* (Ky.) 122

2. A railroad company is liable for running an engine over a car inspector who has stepped onto the track in front of it without looking, if those in charge of it, after perceiving his danger, or after they should have perceived it by the exercise of ordinary care, 65 L. R. A.

in view of the circumstances, might have avoided the injury. Id.

3. A railroad company, in moving engines about a yard, must give signals for the benefit of, and keep a lookout for, car inspectors employed there, and who are likely to be passing back and forth over the tracks. Id.

4. The fact that a boy employed to operate a machine, and injured because of failure to notify him of its dangerous character and give him instructions as to the manner of operating it, is employed in violation of a statute prohibiting the employment of children under a certain age at any work which endangers their lives or limbs, cannot be considered by the jury, in connection with other evidence in the case, as bearing upon the question of the negligence of the master in causing the injury. *Jacobs v. Fuller & Hutsinpillier Co.* (Ohio) 833

Fellow servants and their negligence.

5. A hostler in charge of an engine running through a yard is not a fellow servant of a car inspector at work therein, so as to relieve the company from liability for injuries inflicted by him upon the inspector by the negligent running of the engine. *Louisville & N. R. Co. v. Lowe* (Ky.) 122

Liability of master to third persons.

6. An innkeeper is not, in the absence of negligence on his own part, liable for injuries to a guest caused by an assault committed by a servant employed in the inn. *Rahmel v. Lehdorff* (Cal.) 88

7. An employer of table waiters is not liable, as such, for an assault by one of them upon a guest at the table, since the assault is not an act which the servant is, under any circumstances, empowered to commit. Id.

Liability for acts of independent contractor.

8. One who employs another to manufacture furniture for him, furnishing all the machinery and materials and tools for that purpose, among which is a machine which is safe to operate under proper instructions, but dangerous to operate without instructions, cannot, in an action for injury to a person using the machine, due to failure to notify him of its dangerous character and give him instructions as to operating it, set up the defense that the injured person is an employee of an independent contractor, since, under the circumstances, a resulting injury might be anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care should be omitted. *Jacobs v. Fuller & Hutsinpillier Co.* (Ohio) 833

9. A property owner cannot relieve himself from liability for injuries to a traveler upon the highway by reason of the negligent failure to guard and light, after dark, a trench opened in the highway to connect his dwelling with the street water main, by employing an independent contractor to perform the work. *Thomas v. Harrington* (N. H.) 742

10. One who has constructed a bridge under contract for another is not liable for injuries to adjoining land because of the deflection of currents due to the work, where the injury does not occur until after the bridge has been surrendered to and accepted by the owner. *Salliotte v. King Bridge Co.* (C. C. A. 6th C.) 620

11. One who contracts to construct bridge abutments according to plans and specifications already prepared for one who has taken the contract for the construction of the bridge is an independent contractor, for whose acts the employer is not responsible, although his agent exercises some kind of general supervision for the purpose of seeing that the work is done according to the contract. *Id.*

12. One who contracts for the sinking of a shaft on his property, agreeing to furnish the necessary tools, including a "hoist," while the other party is to furnish the labor, is not answerable to laborers for the continued safety of the machinery furnished; so that no recovery can be had against him for injuries to an employee through the breaking of a rope used on the hoist, which is sufficient when furnished, but is allowed by the contractor to become defective. *Central Coal & I. Co. v. Grider* (Ky.) 455

13. A competent person who undertakes to construct the brick work on a building with his own employees and according to his own discretion is as to such work an independent contractor, for whose negligent acts the owner of the building is not responsible. *Richmond v. Sitterding* (Va.) 445

14. The construction of the brick work of a building adjoining a street is not so inherently or necessarily dangerous as to bring an injury caused to a pedestrian by reason of planks laid across the walk to facilitate the transfer of mortar from the street to the building, within the exception of the rule exempting property owners from liability for acts of independent contractors, which imposes such liability in case the work to be performed is necessarily dangerous. *Id.*

NOTES AND BRIEFS.

Master and servant; validity of statutes limiting hours of labor. 33
65 L. R. A.

Validity of statutes limiting hours of labor; regulating manner of paying wages; other regulations for protection of employees. 48

Liability for injury caused by servant, only when act done in prosecution of business; malicious assault by servant. 88

No presumption of negligence from injury to servant; person operating engine in switch yard and car inspector as fellow servants; duty to protect car inspector in car yard; delegation of master's duty to servant; liability for negligence of such servants; assumption of risk of negligence of fellow servant. 122

Doctrine of *respondet superior*. 401

Liability for acts of independent contractor. 447

Forbidding payment of wages in store orders not redeemable in cash. 597

Right of master to treasure discovered by servant on master's property, but not in course of employment. 528

Liability for damages done by independent contractor. 627

Exceptions to rule that master is not liable for acts of independent contractor. 743

Independent contractors; who are; liability for negligence of, where work is dangerous in itself; violation of statute as to employment of children; right of jury to consider, in determining negligence of master. 833

Wrongful act of servant; liability where not authorized by master; when act is malicious; ejection of passenger from car by servant; use of unnecessary force. 861

Liability of employer for injuries caused by the performance of work by independent contractor, which is dangerous unless certain precautions are observed:—(I.) Scope of note; (II.) doctrine stated generally; (III.) limits of the doctrine; (IV.) effect of stipulation by contractor to take appropriate precautions; (V.) necessity of showing that the contractor was acting under the authority of the employer; (VI.) liability of employer where work is dangerous to persons using highways: (a) in general; (b) erection of buildings; (c) delivery of goods through openings in footpaths; (d) construction or repair of highways; (e) other construction work on highways: (1) street railways; (2) area under footpath; (3) sewer; (4) pipe line; (5) telephone line; (f) removal of wrecks from navigable rivers; (VII.) liability where work is dangerous to adjoining landowners: (a) in general; (b) injury to lateral support; (c) injury to adjoining building through negligent execution of work connected with party

wall; (d) injury to business and goods of occupant of adjoining premises; (e) injury from explosion caused by negligent escape of gas; (f) injury resulting from flooding of lands through negligent drainage operations; (g) injury resulting from allowing materials dredged from water to escape onto adjoining land; (h) injury resulting from negligent demolition of fire ruins; (i) injury resulting from allowing fire to escape; (j) injury resulting from blasting operations; (VIII.) liability where work is dangerous to persons invited onto defendant's premises; (IX.) liability where work is dangerous to tenants; (X.) liability where work is dangerous to owners of vessels navigating rivers. 833

Liability of employer for acts of independent contractor where injury is direct result of work contracted for:—(I.) Scope of note; (II.) in general; (III.) liability where stipulated work is illegal; (IV.) liability where performance of work will involve commission of trespass; (V.) liability where performance of work will necessarily cause injury: (a) in general; (b) commission of nuisance; (c) blasting operations; (VI.) liability where work is done according to plans furnished by employer; (VII.) liability where work is done according to methods prescribed by employer. 742

Persons deemed to be independent contractors within meaning of rule relieving employer from liability:—(I.) Independent contractors distinguished from servants and agents; (II.) persons acting in the dual capacity of contractor and servant or agent; (III.) contractors not within purview of statutes relating to servants or agents; (IV.) character of contract is tested by the existence or absence of a right of control on the employer's part; (V.) presumptions entertained as to character of contract; (VI.) independence of contract usually inferable where it is for the performance of an entire piece of work at a specified price: (a) in general; (b) persons engaged in construction or other work on railways; (c) persons who undertake the construction of entire buildings or specific portions thereof; (d) persons engaged to execute repairs or improvements on a building; (e) architects; (f) persons doing work on bridges; (g) persons engaged in other kinds of construction work; (h) persons undertaking various kinds of work on highways; (i) persons operating mines; (j) persons operating quarries; (k) persons operating mills; (l) master tradesmen and craftsmen; (m) persons who furnish teams and men to do various kinds of work; (n) draymen, truckmen, carters, etc.; (o) keepers of livery stables; (p) drovers; (q) 65 L. R. A.

persons who undertake various operations connected with the handling of timber; (r) persons employed to clear land; (s) persons cultivating land on shares; (t) persons engaged in scavenging work; (u) railway companies operating cars on private lines; (v) persons assisting in public entertainments; (w) persons conducting departments in stores; (x) stevedores; (y) construction and repair of ships; (z) transfer agents doing business on railway trains; (aa) contractors not within purview of statutes relating to servants only; (VII.) liability arising from employment of tug: (a) English doctrine as to relation between owner of tug and its tow; (b) American doctrine; (c) liability of harbor commissioners; (VIII.) liability arising out of certain other contracts of an independent nature; (IX.) effect of reservation of a limited power of control: (a) in general; (b) clauses relating to supervision of work; (c) clauses providing that the work shall be done under the direction of the employer; (d) effect of other clauses; (X.) effect in general of reservation of full power of control; (XI.) matters negating independence of contractor: (a) effect of specific terms of contract: (1) work on railroads; (2) construction of buildings; (3) demolition of buildings; (4) street improvements; (5) construction of canals; (6) laying of pipe lines; (7) work in mines; (8) scavenging work; (9) work in manufacturing establishments; (10) sale of commodities; (b) effect of provisions of statute applicable to the circumstances; (c) effect of direct evidence that employer exercised control over the work: (1) work on railways; (2) construction of buildings; (3) work in streets; (4) clearing of land; (5) work in manufacturing establishments; (6) work done with teams; (7) unloading of ships; (8) sale of commodities; (d) effect of character of stipulated work; (e) effect of employment being general; (f) effect of partition of work among several contractors; (XII.) nature of contract determined with reference to various factors: (a) degree of skill or care required; (b) existence or absence of obligation to perform work in person; (c) reservation of right to terminate contract of employment; (d) surrender or retention of control of premises on which stipulated work is done: (1) surrender of control; (2) retention of control; (e) the basis on which the compensation of the employee is calculated; (f) pecuniary circumstances of person employed; (g) provision in contract that employer shall be indemnified for all losses caused by the negligence of the person employed; (h) use of contractor's appliances by employer; (i) the furnishing by the

employer of the appliances or materials for the work; (j) the fact that the stipulated work constituted a part of the employer's regular operations; (k) provision in contract prohibiting use of employer's name; (l) the fact that the contractor was a director of the employing company; (m) virtual identity of an employing and contracting company; (XIII.) province of court and jury. 445

General rule as to absence of liability of employer for torts of independent contractor:—(I.) Scope of note; (II.) general doctrine stated; (III.) history of the doctrine: (a) *Bush v. Steinman* considered; (b) doctrine that different rules apply to real and to personal property; (c) final rejection of doctrine making distinction between real and personal property; (d) effect of decision in *Randleson v. Murray*; (e) subsequent development of the law; (IV.) rationale of the doctrine; (V.) extent of employer's duty with respect to the supervision and direction of the work; (VI.) extent of duty of employer to guard against possible accidents; (VII.) for what torts of contractor the employer is not bound to answer: (a) in general; (b) negligence not productive of permanently dangerous conditions: (1) work on railways; (2) work on buildings; (3) work on highways; (4) work involving the handling of heavy articles; (5) management of teams; (6) management of vessels; (7) entertainments at public resorts; (8) loading or unloading of ships; (9) blasting operations; (c) negligence productive of dangerous conditions of a more or less permanent character: (1) in general; (2) work on railways; (3) construction of bridges, embankments, and dams; (4) construction of telegraph and telephone lines; (5) laying of pipe lines; (6) construction of buildings; (7) repairing or reconstruction of buildings; (8) demolition of buildings; (9) work performed on streets and highways; (10) work done on premises adjacent to streets and highways, and affecting the safety thereof; (11) scavenging work; (12) work in harbors; (13) excavation work; (14) work involving the use of fire for the destruction of timber; (15) work in mines; (16) hauling of timber; (17) operation of ferries; (18) loading or unloading of ships; (d) acts constituting a trespass. 620

MAXIMS.

See also *EQUITY*.

1. A man is presumed to intend the natural consequences of his acts. *Drum v. Miller* (N. C.) 890

2. Caveat emptor. *Bunch v. Weil* (Ark.) 80
65 L. R. A.

3. General words are restrained according to the nature of the thing or person. *Krause v. Crothersville School Trustees* (Ind.) 111

4. Interest reipublicæ ut sit finis litium. *Abbott v. Thorne* (Wash.) 826

5. Noscitur a sociis. *Winston v. Beeson* (N. C.) 167

6. Nul prendra avantage de son tort. *Whitworth v. Shreveport Belt R. Co.* (La.) 129

7. Qui facit per alium facit per se. *Louisville & N. R. Co. v. Lowe* (Ky.) 122

8. Res perit domino. *Krause v. Crothersville School Trustees* (Ind.) 111

9. Salus populi suprema est lex. *Re Boyce* (Nev.) 47; *Block v. Schwartz* (Utah) 308

10. Satiù est petere fontes quam sectari rivulos. *Dyson v. Rhode Island Co.* (R. I.) 236

11. Sic utere tuo, ut alienum non lædas. *Re Boyce* (Nev.) 47; *Block v. Schwartz* (Utah) 308; *Longtin v. Persell* (Mont.) 655; *Bland v. People* (Colo.) 424

12. The welfare of the people is the supreme law. Id.

13. Void in part, void in toto. *Miller v. Delaware Ins. Co.* (Okla.) 173

14. Volenti non fit injuria. *Whitworth v. Shreveport Belt R. Co.* (La.) 129

NOTES AND BRIEFS.

Maxims; respondeat superior. 401

Sic utere tuo ut alienum non lædas. 424

MENTAL SUFFERING.

As an Element of Damages, see *DAMAGES*, 3.

MILITIA.

Habeas Corpus to Review Determination of Criminal Charge against Member of, see *HABEAS CORPUS*.

See also *MARTIAL LAW*.

1. The authority of the ordinary civil officers of the government is subordinated to that of military officers when the governor, in response to a call for military aid to restore order, which the civil officers are not able to do, details a military officer with troops at his command to perform that duty. *Com. ex rel. Wadsworth v. Shortall* (Pa.) 193

2. While the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war, although their acts are subject

to review by the civil authorities, which is not the case where actual war exists. *Id.*

3. A military officer charged with the duty of suppressing a riot cannot be punished by the civil authorities for acts which, at the time, seemed necessary for the accomplishment of his commission. *Id.*

4. A private soldier who has been stationed to guard a residence, which, during a time of rioting and disorder, has been dynamited, and against which threats have been made to repeat the offense, with orders to shoot to kill any person found prowling about the house, is guilty of no crime if he shoots a person who approaches the building and refuses to obey his command to halt. *Id.*

MINES.

See also **GAS**.

NOTES AND BRIEFS.

Mines; regulation of hours of labor in. 51

MINNESOTA.

Concurrent Jurisdiction with Wisconsin on Mississippi River, see **STATES**.

MINORS.

Declarations of, as Part of *Res Gestæ*, see **EVIDENCE**, 9.

MISREPRESENTATIONS.

Relevancy of Evidence to Show, see **EVIDENCE**, 5.

MONOPOLY.

Violation of Public Policy by Contract Creating, see **CONTRACTS**, 6.

NOTES AND BRIEFS.

Monopolies; combination to regulate prices. 343

MORTGAGE.

Distinguished from Assignment for Benefit of Creditors, see **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 3.

Conflict of Laws as to Deed of Trust, see **CONFLICT OF LAWS**, 2, 3.

Insurable Interest of Mortgagee in Life of Wife of Mortgagor, see **INSURANCE**, 5.

A stranger who purchases from a plaintiff in a foreclosure suit property which the latter has obtained at the foreclosure sale is not entitled to the benefit of a statute protecting the rights of one who purchases at a sale ordered by the judgment. *Di Nola v. Allison* (Cal.) 419
65 L. R. A.

NOTES AND BRIEFS.

Mortgage; conflict of laws as to deed of trust to secure debts. 354

MUNICIPAL CORPORATIONS.

Burden of Proof as to Liability for Injury to One Using Elevator, see **EVIDENCE**, 1.

Liability of Municipality for Casting Surface Water upon Adjoining Lands, see **HIGHWAYS**.

Regulation of Sale of Intoxicating Liquors, see **INTOXICATING LIQUORS**.

Enjoining Enforcement of Ordinance, see **INJUNCTION**, 10, 12.

See also **HIGHWAYS**.

1. Payment by a municipal corporation of the bill of the city plumber for connecting, by direction of the superintendent of waterworks, the city water mains with a well which was in fact on private property, but which was not known to be so, by either the superintendent or any of the city officers, does not constitute a ratification of the act, so as to render the city liable to pay for water taken from the well. *Wilson v. Mitchell* (S. D.) 158

2. A municipal corporation cannot ratify the act of the superintendent of its waterworks system in entering upon private property and connecting a well there located with the city water mains without consent of its owner, so as to become liable for the water taken from the well; since, having no authority to make such entry itself, it could not ratify the act when performed by its agent. *Id.*

3. A recovery by a lot owner against a municipal corporation, for the entry upon his property by a city officer without his consent, and the connection of the city water mains with a well there located, is not facilitated by waiving the tort and suing for the value of the water taken and the use of the property. *Id.*

Liability for injuries.

4. A municipal corporation cannot relieve itself from liability for injuries caused by the negligence of one employed to operate an elevator in a public building which is under its control by the fact that he was employed by a commission which had been created by the legislature for the erection of the building, where he was paid by the city, and the elevator had been turned over to the city for use, at which time the authority of the commission over it impliedly ceased according to the terms of the act creating it. *Fox v. Philadelphia* (Pa.) 214

5. The creation by the legislature of a

commission to erect public buildings for a municipal corporation does not relieve the city from liability for injuries caused by negligent operation of elevators in a building after it has been turned over to the city, where the commission is given no power to maintain, rebuild, repair, or furnish the building after it has once parted with possession of it. *Id.*

6. The creation, by the legislature, of a commission to supervise the construction of public buildings for a municipal corporation does not relieve the latter from the obligation of seeing that elevators in the building are safe before it places them in use, where that duty is not imposed, by the terms of the act, upon the commission. *Id.*

7. A municipal corporation is not liable for the death of one killed by the fall of material from a building in process of construction adjoining a street, by the mere fact that it granted a permit for the construction of the building, and took no precautions to warn passersby of danger in using the street pending the construction of the building. *Copland v. Seattle (Wash.)* 333

Power of taxation.

8. The validity of a contract of a municipal corporation, which can be performed only by a resort to taxation, depends upon the power of such corporation to levy and collect a tax for that purpose. *Manning v. Devils Lake (N. D.)* 187

9. The incidental and indirect benefits which accrue to the inhabitants of a city from the development of its commercial interests will not sustain an exercise of the power of taxation. *Id.*

10. The taxing power of a city cannot be lawfully invoked by it to raise funds to construct a bridge which is not located upon a street or highway having a legal existence. *Id.*

11. The construction and maintenance of a bridge outside of the territorial boundaries of a city, the purpose of which is not to serve the convenience of its inhabitants, but the convenience of the inhabitants of an outlying district, and to promote the business and commercial interests of the city by increasing the trade of its business men, is not such a corporate purpose as will sustain the exercise of the power of taxation. *Id.*

NOTES AND BRIEFS.

Municipal corporations; right of action against township for injury resulting from lawful exercise of legislative authority. 628

Power of legislature as to use of funds 65 L. R. A.

of; constitutional protection of property rights of; legislative limitation of hours of labor for employees of; distinction between public and private character of; liability for negligence. 33

What sufficient to constitute ratification of unauthorized acts of servants; construction and maintenance of waterworks as public function; liability for acts of officers in reference to; no liability for *ultra vires* acts; liability for acts of fire department; of police department. 158

Validity of ordinance forbidding giving of trading stamps. 169

No right to make gift of property or money; where right to use any corporate power is in doubt, power is denied. 188

Commission appointed by legislature to erect public buildings as agent of; liability for negligence of; private functions and powers of municipality; liability for negligence in respect to public buildings. 215

Liability for death caused by fall of material from building in process of construction under building permit. 334

Liability for casting surface water upon land. 251

Application of doctrine of *respondent superior* to. 402

Liability for injury caused by unsafe condition of streets or sidewalks; remedy over against person whose wrongful act renders sidewalk or street unsafe. 446

Injunction to restrain ordinance of; validity of ordinance regulating conduct of business of selling intoxicating liquors; reasonableness of; right of court to inquire into reasonableness of ordinance where within grant of power by legislature; burden of proving invalidity of ordinance. 905

Ordinance imposing revenue tax on restaurants; discrimination in favor of those where meals are cooked and served by proprietor or member of family; presumption of reasonableness of fee. 946

Rights and duties of municipal corporations with respect to surface water. 250

MUTUAL BENEFIT SOCIETIES.

See INSURANCE.

NECESSARIES.

Liability of Husband, see HUSBAND AND WIFE, 3, 4.

NEGLIGENCE.

Right of Owner out of Possession to Recover for Negligent Injury of Property, see ACTION OR SUIT, 3.

Contributory Negligence; Effect upon Liability of Owner of Steamship, see CARRIERS, 1.

Burden of Rebutting Presumption of,
see EVIDENCE, 1.

Questions for Jury, see TRIAL.

See also PROXIMATE CAUSE.

1. A telephone lineman was not guilty of negligence in going to the rescue of a fellow workman who while on a telephone pole received a shock caused by the wire he was handling coming in contact with a span wire of an electric street car system, which, because of the defective insulation of the hanger by which it was connected with the trolley wire, was heavily charged with electricity, whereupon he fell headlong, and, his spurs catching on a spike on the pole, hung suspended in the air; and the railroad company is liable for the death of the lineman, where in his effort to relieve his fellow worker he seized the telephone wire, which had become charged with electricity through the negligence of the railroad company, and was instantly killed. *Whitworth v. Shreveport Belt R. Co. (La.)*

129

2. Violation by a railroad company of a provision of a contract with a municipal corporation by which it undertakes to limit the speed of its trains in streets which it is allowed to use is evidence of negligence, in an action against it for injuries to an individual upon the street. *Duval v. Atlantic Coast Line R. Co. (N. C.)*

722

3. A railroad company which permits the public to use its right of way for travel on foot at a particular place so continuously and frequently as to result in a well-beaten and clearly defined path, plain and open, is bound to use ordinary care not to maintain pitfalls or unsafe conditions which may result in injury to one attempting to use the path relying on the safety suggested by the implied invitation arising from the visible conditions. *Matthews v. Seaboard Air Line Railway (S. C.)*

286

4. One riding in a conveyance controlled by her father is not chargeable with his negligence, which combines with that of persons in charge of another conveyance to bring them into collision to her injury, so as to preclude her recovery from the latter for the injuries received. *Duval v. Atlantic Coast Line R. Co. (N. C.)*

722

5. The jury must decide, upon all the circumstances of the case, whether or not one is negligent who, without acquaintance with the place, attempts to use a well-worn path along a railroad right of way, and falls into an unguarded cut across the path, and is injured. *Matthews v. Seaboard Air Line Railway (S. C.)*

286

6. One, unacquainted with the place,
65 L. R. A.

who attempts to use a path along a railroad right of way in reliance on the invitation implied from its well-worn condition, may hold the company liable in case, without negligence on his part, he falls into an unguarded and unmarked cut at right angles with the path, and is injured. *Id.*

NOTES AND BRIEFS.

Negligence; what may be proved under general allegations of. 334

Duty of owner of premises to keep safe for licensee or trespasser. 287

Presumption of, from happening of accident. 215

Effect of contributory negligence on right to recover for injury; where direct cause of injury is omission of other party after becoming aware of the injured party's negligence; duty to avoid injuring person guilty of negligence where his danger is seen; concurring negligence. 122

Contributory; necessity of pleading; burden of proof as to; duty of carrier to avoid contributory negligence of passenger; effect of, where carrier also negligent; last clear chance. 84

Of employee in hospital causing injury to patient; liability for. 373

Of railroad employees causing loss of package in mails; liability of company for; liability of agent for negligent conduct. 402

NEW TRIAL.

1. When the court has improperly instructed the jury as to the law governing the facts as shown in evidence, a verdict in accordance with such instructions should, on motion of the prejudiced party, be promptly set aside, and a new trial granted. *Dorr v. Camden (W. Va.)*

348

2. Permitting an officer who had heard the evidence on a former trial of accused, and had formed an opinion as to his guilt, to summon the jury for the new trial, is not such an abuse of discretion as to require a new trial, where it affirmatively appears that he had no actual bias or prejudice against accused, and there is nothing to show that he used his office to the detriment of the prisoner. *State v. Hall (S. D.)*

151

3. A statement on motion for new trial because the evidence does not justify the decision, which contains substantially all the evidence given at the trial, need not specify the particulars in which it is insufficient. *Di Nola v. Allison (Cal.)*

419

NOTICE.

To Agent as Binding Principal, see
PRINCIPAL AND AGENT.

To Purchaser of Agreement or Covenant
Made by Grantor, see **VENDOR AND
PURCHASER**.

NOTES AND BRIEFS.

Notice; what constitutes; presumption
of; notice to agent as notice to principal;
constructive notice; burden of proving no-
tice. 209

NUISANCES.

Constitutionality of Statute Subjecting
Property to Summary Forfeiture,
see **CONSTITUTIONAL LAW**, 26.

See also **BLASTING**; **BRIDGES**.

1. A child living in the family of his
father, upon property in which he has no
property right, has a right of action against
one who maintains a well on adjoining prop-
erty in such a condition as to constitute a
nuisance which renders the child ill to his
injury. *Ft. Worth & R. G. R. Co. v. Glenn*
(Tex.) 818

2. The owner of an island, across a chan-
nel constituting the approach to which a
fishing net is placed in such a manner as
to constitute a public nuisance by inter-
fering with navigation, may maintain an
action to redress the private injury inflicted
upon him by interference with his access to
and from his property. *Reyburn v. Sawyer*
(N. C.) 930

3. Injunction may issue, at the suit of
the owner of an island, to compel the re-
moval of nets set in the adjoining waters
in such a manner as to constitute a public
nuisance, where they interfere with the ac-
cess to and from the island, and the one re-
sponsible for them is insolvent, so that an
action for damages would not afford ade-
quate relief. *Id.*

4. To entitle the owner of an island to
an injunction against the maintenance of
nets across the channel by which he gains
access to his property, it is sufficient that
his agent, visiting the island on business, is
delayed by the presence of the nets. *Id.*

5. The setting of fishing nets in a per-
manent manner by means of stakes driven
into the soil in a navigable sound so as to
interfere with navigation is a public nu-
isance. *Id.*

NOTES AND BRIEFS.

Nuisance; bridge as, when built without
authority. 624

Keeping of dangerous explosives in pub-
lic place as; blasting in quarry on city lots
as. 658

Nature of action for, at common law; ne-
cessity of possession or title in property;
right of child living on father's property to
65 L. R. A.

maintain action for injury caused by; par-
ents' right of action. 818

Fishing nets set by stakes in navigable
stream as; private right of action for; in-
junction to restrain. 934

Surface water as; liability of city for. 280

OFFICERS.

Constitutionality of Statute Interfering
with Term of Office, see **CONSTITU-
TIONAL LAW**, 20.

Mandamus to Compel Surrender or De-
struction of Record, see **MANDA-
MUS**.

The title and ownership of the stat-
utes mentioned in Neb. Acts, 28th Gen.
Assem. chap. 124, p. 630, granting to a cer-
tain person the right to publish the stat-
utes of the state, and providing for the
purchase of a certain number of copies to
be distributed to members of the legislature
and state officers, is not thereby vested in
the officers to whom said statutes are to
be delivered by the secretary of state.
Marsh v. Stonebraker (Neb.) 607

NOTES AND BRIEFS.

Officers; vested right of, in office. 699

Nature of public office; right of officer
to delegate discretionary powers conferred
upon; distinction between government of-
fice and government contract; liability for
failure to perform ministerial duties. 402

OPINION.

See **EVIDENCE**.

OPTION.

NOTES AND BRIEFS.

Option; to purchase land; abandonment
of; merger in subsequent deed. 801

ORDINANCE.

Enjoining Enforcement of, see **INJUNC-
TION**, 10, 12.

PARTNERSHIP.

NOTES AND BRIEFS.

Partnership; right of partner to obtain
renewal of partnership lease, to commence
after expiration of original lease. 304

PASSENGERS.

See **CARRIERS**.

PATENTS.

1. That an article intended for food is
produced under a United States patent will
not prevent it from coming within the op-
eration of a state pure-food law. *Arbuckle
v. Blackburn* (C. C. A. 6th C.) 864

2. A patent on a bogus-coin detector for

use on self-operating vending machines is not void for want of utility in the device because it has been used only in connection with gambling appliances, where it is equally capable of use on machines used for legitimate purposes. *Fuller v. Berger* (C. C. A. 7th C.) 381

3. Equity will not refuse to grant relief against the infringement of a patent because the owner has devoted it wholly to an immoral use. *Id.*

NOTES AND BRIEFS.

Patents; necessity that patented device possess legal utility; what degree of utility necessary; protection of patentee who has applied invention to gambling device; where invention possesses legal utility; obligation of patentee to place device on market; effect of act of infringer applying part of device to gambling machine; right of the courts to defeat patent because capable of harmful use. 382

PENSIONS.

As Element for Consideration in Determining Amount of Alimony, see *HUSBAND AND WIFE*, 1.

NOTES AND BRIEFS.

Pensions; right to consider, in fixing future alimony to be paid by pensioner to divorced wife. 332

PERPETUITIES.

The spirit of the rule against perpetuities is not violated by a condition in a deed that no grain shall ever be handled on the land. *Wakefield v. Van Tassell* (Ill.) 511

NOTES AND BRIEFS.

Perpetuities; definition of; extent of rule prohibiting. 512

PERSONAL INJURIES.

Measure of Damages for, see *DAMAGES*, 8.

PERSUASION.

See *TORTS*, *NOTES AND BRIEFS*.

PHOTOGRAPHS.

Of Convict, Effect of Reversal of Conviction, see *CONVICTS*, 1.

Of Hounds used in Tracking Criminal, see *EVIDENCE*, 14.

PHYSICAL CULTURE.

Institution for, as Constituting an Educational Institution, see *TAXES*, 2.

PLEADING.

1. One claiming property rights under 65 L. R. A.

a judgment in an action to which he was not a party should set up the entire record, to the end that the court may see what was in litigation and what was adjudicated. *Allred v. Smith* (N. C.) 924

2. Damages which are the natural and reasonably to be expected result of the wrongful stoppage of an engine under a writ of attachment may be recovered in an action for the trespass, although they were not specially pleaded. *Giddings v. Freedley* (C. C. A. 2d C.) 327

3. A petition for injunction to restrain ticket brokers from dealing in nontransferable tickets, which does not show that it is applicable to a concrete case, is brought within the jurisdiction of the court under the doctrine of "aider" by a return which shows that defendants have in possession at the time tickets of the value of which they will be deprived by the issuance of the injunction. *Schubach v. McDonald* (Mo.) 136

4. A pleading cannot be stricken out for indefiniteness. *Computing Scales Co. v. Long* (S. C.) 294

5. A plaintiff who has stated facts in his complaint entitling him to relief will not be restricted to the relief demanded in his prayer for judgment. *Voorhees v. Porter* (N. C.) 736

NOTES AND BRIEFS.

Pleading; necessity of pleading contributory negligence. 84

Plaintiff's duty to state in complaint all the facts showing his right and an invasion of this right by the defendant. 287

General allegation of negligence; right to prove other negligent acts besides those specifically alleged. 334

In libel case; right to maintain defense of privilege under plea of "not guilty;" proving that charge made was true, under plea of the general issue. 981

POLICE.

Assault upon Officer, see *ASSAULT AND BATTERY*, 1, 2.

POLICE POWER.

See *CONSTITUTIONAL LAW*.

POSTOFFICE.

Admissibility of Entry in Record Kept by Postmaster, see *EVIDENCE*, 13.

1. A railroad company in the transportation of mail, either under contract with the government or by reason of the general laws and the regulations of the Postoffice Department, is an agent of the government, and not liable to individuals for loss of mail

through negligence of its subordinate employees, whom it has selected with due care, and whose acts cannot be regarded as the acts of the corporation. *Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. M. R. Co.* (C. C. A. 8th C.) 397

2. Mere proof that a package of mail was stolen while in the possession of a railroad company for transportation is not sufficient to charge the railroad company with liability for the loss in favor of the owner of the package, in the absence of anything to show that the negligence of the railroad company, as contradistinguished from that of its subordinate agents, was the direct cause of the loss. *Id.*

NOTES AND BRIEFS.

Postoffice; obligation of railroads to carry United States mail; liability for package lost or destroyed in mails; liability of subcontractor for transfer of mail between railroad station and postoffice; liability of postmaster for negligence in performing duty; for negligence of assistants and clerks. 401

PRELIMINARY INJUNCTION.

See INJUNCTION, 6, 7.

PRESCRIPTION.

NOTES AND BRIEFS.

Prescription; acquirement of highway easement by; extent of right. 950

PRESUMPTION.

See EVIDENCE.

PRINCIPAL AND AGENT.

1. One negotiating for the purchase of a farm is charged with notice of facts with reference to the title, which come to the knowledge of his agent who conducts the negotiations and secures the option. *Hicks v. American Natural Gas Co.* (Pa.) 209

2. Neither an agent or subagent can lawfully withhold from his principal information acquired by him in the exercise of such agency, and use the same to extort an increased compensation from the principal, or to coerce the principal into a contract he would not enter into upon full information. *Dorr v. Camden* (W. Va.) 348

NOTES AND BRIEFS.

Principal and agent; right of agent to deposit funds belonging to principal to his own credit. 822

PRINCIPAL AND SURETY.

See GUARANTY.

PROHIBITION.

1. Prohibition will not lie to restrain 65 L. R. A.

the enforcement of an injunction against future dealings in nontransferable railroad tickets, where the court had jurisdiction of the petition because of tickets actually in the possession of defendants; since, if error exists, it must be corrected by the proper process, and not by prohibition. *Schubach v. McDonald* (Mo.) 136

2. A justice who issues a warrant to arrest a party for keeping a slot machine as a gaming table, and to seize the same, and who, on hearing, requires the accused to give recognizance to appear before the criminal or circuit court to answer the charge, and orders the constable to turn over to the clerk of such court the slot machine to abide its order, is acting within his jurisdiction; and a writ of prohibition will not lie against him and the constable to restrain them from executing such order, nor against such clerk to prohibit his retaining the machine until such court act upon it. *Woods v. Cottrell* (W. Va.) 616

NOTES AND BRIEFS.

Prohibition; to restrain inferior tribunal; after its judgment has been given and fully executed; where tribunal has jurisdiction of subject-matter, and does not exceed legitimate powers. 616

Writ of, as one of common right; to restrain inferior court from unauthorized acts; where court has jurisdiction; writ not allowed to usurp functions of appeal. writ of error, or certiorari. 137

PROXIMATE CAUSE.

That an injury to one attempting to drive a horse across a railroad track would not have happened but for the unsnapping of a line does not relieve the railroad company from liability for the injury, if the horse was frightened by defendant's negligence, and the unsnapping of the line was caused by its rearing because of the fright. *Hinchman v. Pere Marquette R. Co.* (Mich.) 553

NOTES AND BRIEFS.

Proximate cause; of injury to one driving horse which is frightened by emission of steam from engine, where a line breaks because of its rearing. 554

PUBLIC IMPROVEMENTS.

Constitutionality of Statute Regulating Hours of Labor, see CONSTITUTIONAL LAW, 23.

One who contracts for the performance of public work, the incidental effect of which is to injure private property, is entitled to all the exemption to which the public is entitled from liability to private property

owners for the consequences of such work.
Salliotte v. King Bridge Co. (C. C. A. 6th C.) 620

QUARRY.

See **BLASTING**.

QUESTION FOR JURY.

See **TRIAL**.

RAILROADS.

Joinder of Both Railroads in Action to Recover for Injuries at Railroad Crossing, see **ACTION OR SUIT**, 4.

Blasting on Right of Way, see **BLASTING**.

Prescriptive Right of Public to Use Path Along Right of Way, see **EASEMENTS**, 1.

Compensation to City for Occupying Portion of Street for Crossing, see **HIGHWAYS**.

Right to Cross Highways without Permission of Municipality, see **HIGHWAYS**, 11.

Right to Lay Pipes for Water Supply Across Highways, see **HIGHWAYS**, 12.

Obstruction of Highway by Locomotive, see **HIGHWAYS**, 13.

Liability for Loss of Mail, see **POST-OFFICE**.

Injury by, see **PROXIMATE CAUSE**.

1. A provision in a lease to a foreign corporation of a domestic railroad, which it executed by authority of the legislature and confers upon the lessee the right to have, hold, exercise, and enjoy all the rights, powers, privileges, and franchises which can be lawfully exercised and enjoyed in or about the said railroad as fully, amply, and entirely as the same might have been held, exercised, or enjoyed by the lessor, confers upon the lessee the right to lay water mains along the right of way if the lessor had that right. *Canton v. Canton Cotton Warehouse Co.* (Miss.) 561

2. A railroad company does not, by obstructing a highway with an engine contrary to the provisions of the statute, become liable for injuries to persons attempting to use the highway, which are caused by the emission of steam from the engine, if such emission does not result from its negligence, or have any relation to its wrongful act. *Hinchman v. Pere Marquette R. Co.* (Mich.) 553

3. A railroad company may be found negligent in permitting the emission of steam from an engine in the highway at a railroad crossing at a time when a traveler is attempting to drive a horse across the track, if the one in charge of the engine could foresee and prevent such emission. *Id.* 65 L. R. A.

4. Negligence will prevent one injured while attempting to drive over a crossing obstructed by an engine from holding the railroad company liable for the accident, although his act was not foolhardy. *Id.*

NOTES AND BRIEFS.

Railroads; duty of persons operating engines in railroad switch yards to keep lookout for persons using tracks. 122

Right to dispose of right of way; public acquiring easement over, by prescription; traveler upon path along right of way as licensee or trespasser; duty of company toward. 287

Frightening horses by noise of emission of steam; proximate cause of accident where line breaks because of horse's fright; wilful act of engineer in permitting escape of steam. 554

Acquiring easement in highway by prescription; what included within. 562

Refusal to deliver freight because of refusal to pay excessive charge for carriage; duty of consignee to tender proper amount; lien of carrier for charges; liability for injury to goods wrongfully detained; burden of proof to excuse nondelivery. 718

RAPE.

Statements Made by Victim, as Part of *Res Gestæ*, see **EVIDENCE**, 8.

Complete penetration is not necessary to sustain a conviction for rape. *Kenney v. State* (Tex. Crim. App.) 316

NOTES AND BRIEFS.

Rape; admissibility of declarations of infant too young to be sworn as a witness at the trial. 316

RECEIVERS.

As Representative of Creditors Entitled to Prove Claim Against Insolvent Stockholder, see **BANKRUPTCY**, 1.

RECOVERY.

See **JUDGMENT**.

RELEASE.

NOTES AND BRIEFS.

Release; of interest in estate by one receiving advancement; effect on right to share in after-acquired property. 578

RELEVANCY.

Of Evidence, see **EVIDENCE**.

RELIGIOUS CORPORATION.

Lapse of Legacy to, see **LEASE**, 1.

REMOVAL OF CAUSES.

Constitutionality of Statute Interfering with Right of, see **CONSTITUTIONAL LAW**, 14.

1. The mere filing of a petition for the removal of a cause from a state court to a Federal court does not oust the state court of jurisdiction, where the petition does not show a *prima facie* case for the removal. *Debnam v. Southern Bell Teleph. & Teleg. Co.* (N. C.) 915

2. A foreign corporation which complies with Pub. Laws 1899, chap. 62, which compels it, as a condition of the privilege of doing business in the state, to "become a domestic corporation" by filing its charter, etc., whereupon it is entitled to the rights and privileges, and subject to the liabilities, of corporations of the state as if it had been originally incorporated in that state, thereby becomes, not a mere licensee, but a domestic corporation, which cannot remove a cause against it by a citizen of that state into a Federal court on the ground of diverse citizenship. *Id.*

3. Though the plaintiff in a suit which has been properly removed from a state to a Federal court having concurrent jurisdiction of the cause of action on which the suit was founded has been nonsuited, or has voluntarily dismissed his case in the United States court, it is, nevertheless, his right to bring another suit on the same cause of action in the state court at any time within the statute of limitations applicable to such an action, notwithstanding the damages in the second suit are laid in an amount which will prevent another removal to the Federal court. *Melver v. Florida Central & P. R. Co.* (Ga.) 437

NOTES AND BRIEFS.

Removal of causes; right of person, who, after removal to Federal court, is nonsuited or voluntarily dismisses his case, to bring another suit in state court. 438

By corporation originally incorporated in other state; of suit brought by citizen; where it has become domesticated as required by state law. 915

RES GESTÆ.

Evidence as Part of, see **EVIDENCE**.

RES JUDICATA.

See **JUDGMENT**.

RESTAURANTS.

Classification of, as a Denial of Equal Protection of the Laws, see **CONSTITUTIONAL LAW**, 15.

Forbidding Maintenance of, in Connection with Bar-Room, see **INTOXICATING LIQUORS**, 10.

65 L. R. A.

Liability to Guest for Assault by Servant, see **MASTER AND SERVANT**, 6, 7.

NOTES AND BRIEFS.

Restaurants; imposition of revenue tax on; validity of classification of; requiring license from. 946

RESTITUTION.

Upon Appeal, see **APPEAL AND ERROR**, 11-13.

RÉSUMÉ.

For *Résumé* of Contents of Book, see p. 993.

SALE.

Constitutionality of Statute Regulating Sale of Goods in Bulk, see **CONSTITUTIONAL LAW**, 7.

Relevancy of Evidence to Show Misrepresentations as to Quality, see **EVIDENCE**, 5.

Acts Constituting Delivery and Change of Possession, see **FRAUD AND FRAUDULENT CONVEYANCES**.

See also **SPECIFIC PERFORMANCE**.

1. The sale of flour in quantity by the barrel, to one who intends to resell it under a representation that it is of a certain quality, without opportunity of inspection on the part of the purchaser, gives him the right to rescind in case the flour proves to be of inferior quality. *Bunch v. Weil* (Ark.) 80

2. One who purchases flour in quantities by the barrel for resale may, upon discovering that the quality is not as represented, tender back as much as is undisposed of, and recover back the purchase price, less what he has realized from the sales. *Id.*

3. A purchaser of machinery cannot rescind the contract merely because the patents under which it is manufactured are in dispute. *Computing Scales Co. v. Long* (S. C.) 294

NOTES AND BRIEFS.

See also **CONTRACTS**.

Sale; implied warranty of quality and fitness of article sold; where goods ordered for particular purpose. 81

Rule of *caveat emptor*. 443

Necessity of immediate delivery and change of possession; failure to make; effect of, where possession is subsequently taken before levy of attachment; what sufficient to constitute change of possession and delivery; sale of fruit in bins. 943

SCALPERS.

See **TICKET BROKERS**.

SCHOOLS.

1. A teacher is not liable for permanent injuries inflicted without malice in the correction of a pupil, unless they were of such a nature that a reasonably prudent person would reasonably foresee that a permanent injury of some kind would naturally or probably result from his act. *Drum v. Miller* (N. C.) 890

2. To render a teacher liable for injuries inflicted upon a pupil by an attempt to correct him in a wrongful manner, it is not necessary that he should be able to foresee that the particular injury inflicted would be the natural and probable consequence of his act. *Id.*

3. A teacher is liable for the destruction of the sight of a pupil by throwing a pencil at him to attract his attention if he did not act with ordinary care, and the injury was the natural and probable result of his negligence, and he ought reasonably to have foreseen that a permanent injury would be the natural and probable consequence of his act. *Id.*

NOTES AND BRIEFS.

Schools; liability of school teacher for personal injury to pupil: (I.) Introductory; (II.) reasonable restraint or correction: (a) in general; (b) when injury results from punishment on account of defect in pupil's constitution unknown to teacher; (c) when pupil is of age; (d) when teacher is not regularly appointed; (III.) excessive restraint or correction: (a) in general; (b) error of judgment: (1) the discretionary nature of the power to punish, vested in teachers; (2) presumption of proper motive; (3) effect of proper motive; (c) improper motive; (IV.) punishment inflicted without proper cause; (V.) when cause of punishment is unknown to pupil; (VI.) reasonableness or excessiveness of punishment is for the jury: (a) in general; (b) material considerations; (VII.) statutes. 890

SEARCHES AND SEIZURES.

Use of Bloodhounds as Evidence of Malice in Action for Unlawful Search, see *EVIDENCE*, 6.

1. An officer of the law has no right to break in upon the privacy of a home, and subject its occupants to the indignity of a search for the evidences of crime, without a legal warrant procured for that purpose. *McClurg v. Brenton* (Iowa) 519

2. One who consents to have his property searched by an officer without a warrant has no right of action as for an illegal search. *Id.*
65 L. R. A.

3. The doctrine or rule of probable cause has no application in a suit to recover damages for the unlawful search, without a warrant, of a citizen's house for evidence of crime. *Id.*

NOTES AND BRIEFS.

Search; damages for unlawful search. 520

SHIPPING.

The presence, in a boat sent to transfer passengers from shore to a steamboat, of the president of the steamboat company, and his knowledge of the overloaded condition of the boat when it attempts the voyage, will prevent the company from taking advantage of the statute permitting the limitation of liability of vessel owners for injuries caused by the negligence of those in charge of the vessel. *Weisshaar v. Kimball Steamship Co.* (C. C. A. 9th C.) 84

SIDEWALKS.

Constitutionality of Statute Imposing Duty to Remove Ice and Snow, see *CONSTITUTIONAL LAW*, 17, 18.

Statute Imposing Penalty for Failure to Remove Ice, see *HIGHWAYS*, 7.

Validity of Statute Compelling Removal of Ice and Snow, see *STATUTES*, 3, 4.

SLAVES.

Enforcement, in Foreign State, of Statute Legitimizing Children of, see *CONFLICT OF LAWS*, 1.

SPECIFIC PERFORMANCE.

1. The insolvency of the defendant is not of itself sufficient to give equity jurisdiction to enforce specific performance of a contract for the sale of chattels. *Livesley v. Johnston* (Or.) 783

2. Equity will enforce specific performance of a contract to sell and deliver a crop of hops after it has been produced, where, as part of the consideration, the purchaser surrenders promissory notes of the seller, and undertakes to make advances to aid in cultivating and harvesting the crop, and the seller is insolvent so that an action at law would be fruitless. *Id.*

3. Specific performance of a contract to sell and deliver a crop of hops will not be refused on the ground that the remedy is not mutual, where, had the purchaser capriciously and fraudulently refused to approve and accept hops tendered, the seller would have been entitled to a decree of specific performance to prevent fraud. *Id.*

4. That the complainant in an action to compel specific performance of a contract

to sell and deliver a crop of hops does not show that defendant had any interest in the land upon which they were grown is not fatal, although the land is shown to belong to another, since the presumption is that, being in possession, and nothing to the contrary appearing, he held it under a lease.

Id.

5. A man who is decreed by the court to perform his contract to convey land has no right to raise the objection that the dower rights of his wife are not sufficiently guarded, where she is not a party to the action, nor bound by the decree. *Rodman v. Robinson* (N. C.)

682

6. The promisee in a contract to convey real estate is not limited to an action for damages in case of breach by the other contracting party; but he may have a decree requiring specific performance of the contract.

Id.

NOTES AND BRIEFS.

Specific performance; of contract of sale.

684

Of contract of sale; necessity of mutuality; provision leaving buyer free to reject goods if not of proper quality as destructive of mutuality.

784

STATE.

Constitutionality of Statute Regulating Hours of Labor, see CONSTITUTIONAL LAW, 23.

1. The boundary line of Wisconsin, as to its outlying rivers, is the main channels of such rivers. *Roberts v. Fullerton* (Wis.)

953

2. The "concurrent jurisdiction" over the waters of the Mississippi river, given to the states of Wisconsin and Minnesota by the act of Congress admitting them to the Union, does not empower one state to regulate the individual enjoyment, by people of another state within its boundaries, of property held in trust by such other state for the people within its limits,—such as public water and the fish and game that inhabit the same.

Id.

3. The term "concurrent jurisdiction on the water" of the Mississippi river, in the acts of Congress providing for the admission of the states of Wisconsin and Minnesota into the Union, must be restrained to the ordinary meaning thereof in American public law at the time the term came into use in the legislative enactments of this country.

Id.

4. The enforcement, by the state of Minnesota, of its fish and game laws on the Wisconsin side of the main channel of the Mississippi river, is not justifiable on the theory of common ownership of the river,

65 L. R. A.

or things in or on or under the same, on the Wisconsin side of the main channel.

Id.

5. The term "concurrent jurisdiction on the water" of the Mississippi river, used in the acts of Congress providing for the admission of the states of Wisconsin and Minnesota into the Union, refers to the effect of the law of each state within the domain of the other covered by water divided by the boundary line between the two states, as regards persons or things on the water, concerned or connected in some way with the use thereof for purposes of navigation, and has no reference to the land under the water, or things of a permanent nature in or over the water. In respect to such matters, and rights incident thereto, the jurisdiction of each state on its side of the boundary line is exclusive.

Id.

6. The concurrent jurisdiction which Wisconsin has with the state of Minnesota on the Mississippi river is of a special nature,—one not incident to, nor implying concurrent dominion over, the territory covered by water between the two states, or concurrent ownership in such water, or the land under the water, or the fish and game that inhabit the same.

Id.

NOTES AND BRIEFS.

State; action to restrain state food commissioner from enforcing pure-food statute as one against state.

864

STATUTES.

Private Ownership by Officer of Copies of Statutes Distributed to Him, see OFFICERS.

See also CONSTITUTIONAL LAW.

1. The legislature is not prohibited by any provision of the Nebraska Constitution from granting to a person the right to publish the statutes of the state, and making such statute prima facie evidence of the law, nor from purchasing such number of copies thereof as the legislature may deem necessary for the use of its officers. *Marsh v. Stonebraker* (Neb.)

607

Title.

2. The creation of a municipal corporation with the powers conferred by a particular title of the Political Code makes the provisions of such title a part of the corporate charter; and, when more than one title exists of the specified number, that title will be included which is plainly the only one applicable. *Re Lemon* (Cal.)

946

Validity.

3. A statute imposing the burden of removing ice and snow from the sidewalks upon the occupants of improved property abutting thereon, without anything to des-

ignate the person responsible in case of apartment houses, is void for uncertainty. *McGuire v. District of Columbia* (D. C. App.) 430

4. A provision that sand, sawdust, "or other such substance," must be used on icy sidewalks, without specifying what such substance may be, renders the statute void for uncertainty. Id.

5. A constitutional provision that a bill shall become a law unless returned by the governor with his disapproval within five days does not require him to retain the bill for that time, but he may waive the provision, and return it before the expiration of five days, with the notification that it may become a law without his approval. *Hunt v. State* (Ark.) 71

6. A statute prescribing a penalty for requiring more than a certain number of hours' labor from employees engaged in performing work for the state, which is void because applying to all persons generally, cannot be enforced, even against persons who have contracted not to exact more than specified labor. *People v. Orange County Road Constr. Co.* (N. Y.) 33

7. An act cannot be declared void because its general operation is unjust and unfair to individuals, unless it trenches upon some provision of the Constitution. *Block v. Schwartz* (Utah) 308

8. All acts of the legislature are presumed to be valid until it is clearly shown that they violate some constitutional restriction. *Re Boyce* (Nev.) 47

NOTES AND BRIEFS.

Statutes; what necessary to make unconstitutional; unreasonableness or oppressiveness of, not sufficient; burden of proof on person asserting unconstitutionality of; interpreting act to make it constitutional where two interpretations possible. 48

Presumption against implied repeal of. 71

Repeal by implication not favored. 699

Law providing for publication of, by individual, and for distribution of copies to public officers; validity; construction of statute by legislative or executive department. 607

Construction of; adopting construction which renders it constitutional; controlling effect of title; forbidding coloring, coating, or polishing of article of food to conceal inferiority; constitutionality of. 868

STORE ORDER.

Constitutionality of Statute Regulating, see CONSTITUTIONAL LAW, 3.

65 L. R. A.

STREET RAILWAYS.

Removing Obstruction from Track in such a Manner as to Injure Travelers, see HIGHWAYS, 5.

Procuring Discharge of Conductor, see MALICE.

NOTES AND BRIEFS.

See also CARRIERS.

Street railways; liability for injuries caused by manner of removing snow from track. 232

SUNDAY.

1. A contract for the purchase and sale of real estate is not void because made on Sunday, under a statute forbidding the doing of any labor, business, or work "of his ordinary calling" on that day, where such transaction is not a part of the ordinary calling of either party to it. *Rodman v. Robinson* (N. C.) 682

2. A contract made on Sunday cannot be declared void because opposed to public policy. Id.

NOTES AND BRIEFS.

Sunday; validity of Sunday laws. 52

Contract for sale of land on; validity; at common law; where statute forbids doing of labor, business, or work of "ordinary calling" on that day. 683

SWINDLING.

See LARCENY.

TAXES.

Appeal in Collateral-Inheritance Tax Proceeding, see APPEAL AND ERROR, 1.

Deprivation of Property without Due Process of Law, see CONSTITUTIONAL LAW, 8.

Constitutionality of Collateral-Inheritance Tax Statute, see CONSTITUTIONAL LAW, 19.

Purposes for Which Municipal Corporation may Levy Tax, see MUNICIPAL CORPORATIONS, 8-11.

1. Boards and societies and auxiliaries thereto, which are incorporated and organized under the laws of other states, for "purposes of purely public charity or other exclusively public purposes," are not "institutions" of that class in this state, within the meaning of the latter clause of Ohio Rev. Stat. § 2731-1, exempting such institutions in the state from the payment of a collateral-inheritance tax; and, where they are entitled to receive property within the jurisdiction of the state, by deed of gift, bequest, or devise, such gift, bequest, or devise is li-

able to a collateral-inheritance tax as provided in said section, although some of the charitable works of the institutions so incorporated and organized are carried on within the state. *Humphreys v. State (Ohio)* 776

2. An institution for the teaching of physical culture is within a constitutional provision exempting from taxation institutions of education. *German Gymnastic Asso. v. Louisville (Ky.)* 120

3. The principle of uniformity in taxation is not violated by providing a mode of levying a tax against the goods of a merchant, who, after the taxes for the year have been assessed, brings his stock into the state with the intention of disposing of it without engaging in business permanently, different from that employed in case of resident merchants. *Nathan v. Spokane County (Wash.)* 336

4. Property liable to taxation under the general laws of a state is not exempt therefrom because it may have been returned for taxation for the same year in another state. *Id.*

5. The objection that a statute imposing a tax is void for failure to provide notice to the property owner is not available to one who has an opportunity to submit evidence to the assessor, and to be heard with regard to the value of such property. *Id.*

6. The law will presume that a tax officer will do his duty under the law, and not act unfairly or arbitrarily regarding the assessment of property for taxation. *Id.*

7. A statutory provision for a writ of review when an inferior tribunal, board, or officer exercising judicial functions is acting illegally, or to correct an erroneous or void proceeding, is available for the correction of the acts of a county assessor where there is no other method of reviewing such acts. *Id.*

8. The legislature has no power to permit a person who, upon bringing a stock of goods into a state after the time for levying the taxes for a year has passed, pays the tax for the whole year, to deduct from the regular assessment against him at the beginning of the next year the amount representing the time when his property was not in the state; since it would grant him a special privilege, and create unequal taxation. *Id.*

9. A statute providing for the taxation of property brought into the state by a merchant after the regular tax is levied in any year is not rendered void by the failure of a proviso granting him a rebate from the next regular tax levied against him. *Id.*
65 L. R. A.

NOTES AND BRIEFS.

Taxes; what constitutes institution of education within meaning of exemption from.

121

Privilege tax; as debt which may be sued for; on persons using street cars for advertising; power of legislature to make debt collectible from street car company. 296

Different mode of taxing merchant who, after taxes for the year have been assessed, brings his stock into state for sale, with no intention to engage in business permanently; discrimination in taxation between products of different states; discrimination against nonresidents; necessity of notice of tax proceedings; right to tax for the year property not in state at time of assessment; failure to provide method of appeal from tax; necessity of hearing; necessity of provision for board of review. 337

Collateral-inheritance tax; nature of inheritance tax; exemption from, of charitable institutions in the state; foreign charitable corporations not included in; unjust discrimination by exclusion of. 777

TEACHER.

Corporal Punishment of Pupils, see SCHOOLS.

TELEGRAPHS.

Amount of Damages for Negligent Failure to Deliver Telegram, see DAMAGES, 2, 3.

1. A telegraph company does not, by delivering a telegram, vouch for its authenticity, and is not bound to make good absolutely the truth of the representation, or to compensate for loss occasioned by its falsity. *Western U. Teleg. Co. v. Uvalde Nat. Bank (Tex.)* 805

2. In the absence of negligence on its part, a telegraph company is not liable, by the mere fact of delivering a fraudulent telegram sent by one who tapped the company's wires, to make good the loss resulting from the sendee's reliance upon the faith of its authenticity. *Id.*

3. A telegraph company which delivers a fraudulent message transmitted by a stranger tapping its wires does not exculpate itself from the charge of negligence by showing merely that the message was put upon the wire by the stranger, and deceived its agents; but it must further show that this was accomplished despite the exercise of the care incumbent on it under the circumstances. *Id.*

4. A telegraph company which delivers a fraudulent message put upon its wires, by one who tapped them for that purpose, to one who suffers loss by acting upon its ap-

parent authenticity, may be found negligent in failing to take any precautions to guard against such frauds. *Id.*

5. A telegraph company cannot defend a suit for negligent failure to deliver a telegram, on the ground that other persons who are not shown to have any connection with plaintiff were also negligent. *Barnes v. Western Union Teleg. Co. (Nev.)* 666

6. A telegraph company which negligently fails to deliver a telegram from one in a strange city a long distance from home, asking for money, by reason of which failure he is compelled to attempt to make the journey on foot, is liable for the price of the telegram, compensation for time lost, price of meals and lodging during the time he is *en route*, and damages for the mental worry and distress accompanying the physical fatigue and exertion caused by the journey. *Id.*

7. The rule that, for breach of contract, damages may be recovered, which may be supposed to have been contemplated by the parties thereto, renders a telegraph company liable for the hardship and suffering endured by a minor who is compelled to attempt to walk home in the winter time by the failure of the company to deliver a telegram asking for aid, where the company is informed that he is without money in a strange city, 400 miles from home. *Id.*

NOTES AND BRIEFS.

Telegraphs; measure of damages for failure to deliver; duty as to finding sendee. 667

Liability for transmission of fraudulent message; in absence of negligence; right to establish rules limiting liability; stipulations on blank as part of contract; negligence in failing to prevent tapping of wires. 806

Liability of telegraph company for transmission or delivery of forged message:— (I.) Liability of company when its agent is deceived: (a) liability to addressee; (b) liability to stranger; (II.) Liability of company when its agent perpetrates the fraud. 805

TELEPHONES.

Injury to Telephone Wires by Person Using Highway, see HIGHWAYS, 1.

NOTES AND BRIEFS.

Telephones; ordinance permitting use of streets by telephone companies; acceptance of, as creating contract with city; liability for injury to wires of, by person licensed to move house through street. 771

TICKET BROKERS.

Jurisdiction of Equity to Enjoin, see EQUITY, 1.
65 L. R. A.

Injunction against, see INJUNCTION, 8, 9.

Petition for Injunction to Restrain Sale of Ticket by, see PLEADING, 3.

NOTES AND BRIEFS.

Ticket brokers; lawfulness of business of; as question for legislature, and not for the courts, to determine; injunction to restrain dealing in nontransferable tickets. 137

TICKETS.

See CARRIERS.

TIMBER.

Right of Abutting Owner to Cut Timber Growing on Highway, see HIGHWAYS, 3.

TORTS.

NOTES AND BRIEFS.

Torts; joint tort feasons; joint and several liability to full extent of injury; liability for exemplary damages; effect of malicious motive of one party. 327

Interfering with the right to carry on one's business as; mere persuasion, unaccompanied by threats or intimidation, as actionable wrong. 858

TRADEMARKS.

See also UNFAIR COMPETITION.

1. Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles cannot be monopolized as trademarks. *Shaver v. Heller & Merz Co. (C. C. A. 8th C.)* 878

2. Merely placing a design on the covers of an edition of an author's works without registering it as a trademark, or giving notice that it is claimed as such, does not protect it from use by others. *Kipling v. G. P. Putnam's Sons (C. C. A. 2d C.)* 873

NOTES AND BRIEFS.

Trademarks; on books; extent of protection of; compensatory damages only allowed in infringement of. 874

TRADING STAMPS.

See also LOTTERY.

NOTES AND BRIEFS.

Trading stamps; validity of business of dealing in; statute prohibiting business of; business not gift enterprise or lottery. 169

TRANSFER.

Of Railroad Ticket, see CARRIERS.

TREASURE TROVE.

NOTES AND BRIEFS.

Treasure trove; definition of; right of discoverer. 526

TREES.**NOTES AND BRIEFS.**

Trees; in highway; right of owner of fee of, to remove. 676

TRESPASS.**NOTES AND BRIEFS.**

Trespass; by owner of fee against person making wrongful use of highway. 949

TRIAL.

Single Exception Covering Several Propositions in Instruction, see **APPEAL AND ERROR**, 5.

Sufficiency of Exception to Raise Question on Appeal, see **APPEAL AND ERROR**, 4.

Review of Findings, see **APPEAL AND ERROR**, 8.

Change of Place of, see **CRIMINAL LAW**. Arguments of Counsel Constituting an Estoppel, see **ESTOPPEL**, 2.

Bias of Officer Summoning Jury, see **NEW TRIAL**, 2.

Right to jury trial.

1. The power of the court to assess the damages, in case of default, without the aid of a jury, is not destroyed by a constitutional provision preserving the right of trial by jury inviolate, where, at the time of the adoption of the Constitution, the court followed the common-law practice of assessing damages in such cases without calling a jury. *Dyson v. Rhode Island Co. (R. I.)* 236

2. The legislature may provide for the destruction of intoxicating liquors kept for illegal sale, without granting their owner a jury trial. *Kirkland v. State (Ark.)* 76

3. A North Dakota statute which provides for a change of place of trial to another county, upon the application of the state's attorney, when a fair and impartial trial cannot be had in the original county, merely perpetuates the right as it was known when the Constitution was adopted, and also as it existed at common law, and does not violate the right of trial by jury as secured by N. D. Const. § 7. *Barry v. Truax (N. D.)* 762

4. At common law the right of trial by jury of the county of the offense was a general one, not unconditional, but always subject to the exception that the indictment might be removed and the trial take place in another county, either upon the application of the prosecution or the defendant, when necessary to secure a fair and impartial trial. *Id.*

Conduct of counsel.

5. Counsel must not, in argument, attempt to convey to the jury suggestions as 65 L. R. A.

to what impression excluded evidence would have made upon them. *Hinchman v. Pere Marquette R. Co. (Mich.)* 503

6. The assumption of facts by counsel in argument to the jury, which are not in evidence, is improper. *Id.*

Questions of law and fact.

7. The jury must determine whether a householder consented to have his premises searched by an officer of the law for evidences of crime, where the evidence upon that subject is conflicting. *McClurg v. Brenton (Iowa)* 519

8. A submission to the jury of the legitimacy of a business, with directions to find it legitimate if it has been substantially beneficial to the public, is error when there is no evidence to support such a finding except testimony which the jurors cannot believe without surrendering their own intelligence. *Weltmer v. Bishop (Mo.)* 584

9. The contributory negligence of a person killed by blasting is a question for the jury, where the blasting was lawfully done on a railroad right of way, about 150 feet from a river along which such person was walking a short distance below a point opposite the place of blasting, assisting a ferryman in pulling his ferryboat up the stream; and such person knew that the blasting was being done, and that rocks frequently fell all around the place where he was, and that it was the custom of the contractor to send men out shouting "Fire," at short intervals, for fifteen or twenty minutes before exploding a charge; while the persons engaged in blasting were unaware of the presence of the ferryman and his companion because the view was obstructed by intervening trees; and several persons, including the ferryman, heard the cries of fire for some time before the explosion causing the death; and the ferryman shouted twice "Don't shoot," but he and his companion continued to ascend the stream within 200 or 300 feet of the place of blasting; and the persons blasting testified they did not hear the ferryman's cries. *Cary v. Morrison (C. C. A. 8th C.)* 659

10. Whether or not a car inspector is guilty of contributory negligence in stepping on a main track without looking behind him at a time when a train is due from the opposite direction is for the jury. *Louisville & N. R. Co. v. Lowe (Ky.)* 122

11. The question whether or not one is guilty of contributory negligence is ordinarily for the jury. It is only when the facts which condition the question are stipulated, or are established by testimony which is free from substantial conflict, and the inference from the facts is so certain that all

reasonable men, in the exercise of a fair and impartial judgment, must agree upon it, that the question of contributory negligence may be lawfully withdrawn from the jury. *Cary v. Morrison* (C. C. A. 8th C.) 659

Findings.

12. If the court calls a jury to aid in the assessment of damages in case defendant suffers a default, it must approve the finding of the jury before such finding can become operative under a statute providing that in such cases "damages shall be assessed by the court, with or without the intervention of a jury, in the discretion of the court." *Dyson v. Rhode Island Co.* (R. I.) 236

NOTES AND BRIEFS.

Trial; power of court to determine sufficiency of evidence and direct verdict; where evidence not conflicting. 76

When request to charge to be complied with. 327

Question for jury as to whether articles furnished wife by merchant were necessities. 530

Question for jury as to notice of acceptance of guaranty. 731

Right to jury trial; constitutional guaranty of; impairment of, by statute permitting change of venue by state without consent of accused. 762

Malice as question for jury. 939

TROVER.

By Principal against Bank Dealing with Factor, see **FACTORS**, 1.

Trover will lie on behalf of one who, while in the employ of another, finds upon the latter's premises money evidently hidden and forgotten by an unknown owner, against his employer, in case the latter takes it out of his possession and refuses to restore it to him. *Danielson v. Roberts* (Or.) 526

TROVER AND CONVERSION.

See **TROVER**.

TRUSTS.**NOTES AND BRIEFS.**

Trusts; in money of principal deposited by factor in bank; misappropriation of, by factor; liability of bank having knowledge of trust character of fund; liability, to beneficiary, of one who only participates in misappropriation of trust fund. 821

UNFAIR COMPETITION.

Injunction against, see **INJUNCTION**, 13, 14.

1. One who offers the goods of one manufacturer under the well-known names and es-

established reputation of articles of another manufacturer, for the purpose of deceiving the public and defrauding the latter, aggravates, rather than justifies, his wrong by placing his own name upon the packages. *Shaver v. Heller & Merz Co.* (C. C. A. 8th C.) 878

2. The use of geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another, and to carry on unfair competition, may be lawfully enjoined by a court of equity to the same extent as the use of any other terms or symbols. *Id.*

3. The sale of the goods of one manufacturer or vendor as those of another is unfair competition, and constitutes a fraud which a court of equity may lawfully prevent by injunction. *Id.*

4. The use, upon bottles containing water from the Saratoga spring, of a label in which the word "Saratoga" is made inconspicuous and the word "Vichy" prominent, so that, when the bottles are standing on a table or shelf, the word "Vichy" is the prominent object of sight, is unfair competition with bottled waters from the commune of Vichy in France, which have long been upon the market under that name. *La Republique Francaise v. Saratoga Vichy Springs Co.* (C. C. A. 2d C.) 830

5. The use upon the cover of an edition of an author's works of a design appearing upon an edition published under the author's supervision does not indicate unfair competition in trade, where the two editions differ in almost all essential features, so that one will not be taken for the other. *Kipling v. G. P. Putnam's Sons* (C. C. A. 2d C.) 873

6. Upon the issue of unfair competition with an authorized edition of the works of an author, evidence is admissible of his acts in authorizing other editions, which, in regard to the edition sought to be protected, were in many respects identical with the conduct complained of. *Id.*

NOTES AND BRIEFS.

Unfair competition; in imitation of dress of merchandise; necessity of proving fraud. 875

VENDOR AND PURCHASER.

Consideration to Support Contract, see **CONTRACTS**, 3.

Relief of Vendor Solely on Ground that He has Made a Bad Bargain, see **CONTRACTS**, 7.

Covenant of Vendor to Open Way through Another Track, see **COVENANT**, 1.

Purchase of Land Subject to Rights of Existing Irrigation Ditch, *see* EASEMENTS, 3.

Purchaser at Foreclosure Suit, *see* MORTGAGE.

Purchaser Charged with Knowledge of Agent, *see* PRINCIPAL AND AGENT. See also SPECIFIC PERFORMANCE.

1. A contract to sell "all the lands" controlled by the vendor is not performed by a tender of a deed subject to a contract giving a third person the right to remove all the saw timber therefrom. *Arentsen v. Moreland* (Wis.) 973

2. Knowledge by one contracting to purchase real estate that the vendor has only an option contract to purchase, and has contracted to sell the saw timber on the land to a third person, will not deprive him of his right to damages for loss of his bargain in case the vendor refuses to convey anything except the land free from the timber. *Id.*

3. One who takes title to a farm without making any inquiries as to the purpose of a derrick and connecting machinery which are plainly in use for the production of oil or gas on the premises is not entitled to a preliminary injunction to restrain further operations under a lease transferring the right to the oil and gas to another person, although it was not recorded. *Hicks v. American Natural Gas Co.* (Pa.) 209

4. A personal covenant on the part of a landowner to locate a way across the land is not binding upon his grantee without notice. *Houston v. Zahm* (Or.) 799

5. A grantee of land is not charged with notice of an agreement by his grantor to open a road across it by the recording of the option contract under which the latter acquired title to the tract, which bound him to open the way, where the recorded conveyance contained no reference to the agreement. *Id.*

NOTES AND BRIEFS.

Vendor and purchaser; rights of purchaser with notice of unrecorded oil and gas lease; duty to inquire as to rights of parties in possession. 209

VENUE.

See ACTION OR SUIT, 5-7.

VESTED RIGHTS.

See CONSTITUTIONAL LAW.

WAGES.

Assignment of, *see* ASSIGNMENT.

Effect of Discharge in Bankruptcy upon Assignment of Future Wages, *see* BANKRUPTCY, 4.

65 L. R. A.

Constitutionality of Statute Forbidding Assignment of Future Wages, *see* CONSTITUTIONAL LAW, 10.

Assignment of Future Wages as a Violation of Public Policy, *see* CONTRACTS, 5.

NOTES AND BRIEFS.

Wages; right of legislature to prescribe rate of. 36

WAR.

See MARTIAL LAW, NOTES AND BRIEFS.

WARRANTY.

NOTES AND BRIEFS.

Warranty; implied warranty of quality and fitness of article sold. 81

WATERS.

Purchase of Land Subject to Rights of Existing Irrigation Ditch, *see* EASEMENTS, 3.

Construction of Bridge Pier in Navigable River as Constituting a Taking of Property, *see* EMINENT DOMAIN.

Interference with Current and Bank of Stream as Constituting a Taking of Property, *see* EMINENT DOMAIN.

Estoppel to Object to Maintenance of Irrigation Canal, *see* ESTOPPEL, 1.

Liability of Municipality for Casting Surface Water upon Adjoining Lands, *see* HIGHWAYS.

Boring Wells in Highway for Purpose of Obtaining Water for Sprinkling. *see* HIGHWAYS, 6.

Enjoining Digging of Trench to Lay Water Main Across Street, *see* INJUNCTION, 3.

Interference with Navigation as Constituting a Nuisance, *see* NUISANCES.

Injunction to Compel Removal of Nets, *see* NUISANCES, 3, 4.

River as Boundary between States, *see* STATES.

Concurrent Jurisdiction over Boundary Waters, *see* STATES.

1. One over whose land an irrigation canal has been extended to supply the needs of a farming community has no right to destroy the canal, but must resort to action to recover damages for the injury done to his property. *Crescent Canal Co. v. Montgomery* (Cal.) 940

2. Users of water from an irrigation ditch or canal, acquire such a property right as they may transfer to other lands under such ditch or canal. *Hard v. Boisé City Irrig. & Land Co.* (Idaho) 407

3. One owning the right to take water from an irrigation canal may sell and transfer such right, and the purchaser may transfer it to other lands under the canal, so long

as the change of place does not interfere with the rights of others. Id.

NOTES AND BRIEFS.

Waters; surface waters; rights and duties of municipality with respect to. 251

Transfer of right to use water for irrigation; canal company as original appropriator. 407

Exclusive right of state to authorize building of bridge over navigable stream; title of abutting owners extends to center of stream; power of Congress to make alterations in navigable river; liability for injury to riparian owner by construction of bridge; when built according to plans approved by Secretary of War in interest of navigation; state control of navigable waters within borders of, where Congress has not acted. 623

Navigable; right to fish in; subordinate to rights of navigation; nets set by means of stake in navigable waters as nuisance; right of private action by one suffering special damage; right of riparian owner to free egress and ingress; right of civil action for interference with, or injunction to restrain. 933

Appropriation and distribution of, as public use; protection of. 941

Jurisdiction of states over boundary waters; right to regulate taking or killing of fish in. 955

Rights and duties of municipal corporations with respect to surface water:—(I.) Duty to care for: (a) in general; (b) upon raising grade of street; (c) upon gathering water in body; (d) drainage of highway; (II.) negligent or wrongful acts: (a) changing course of drainage; (b) casting collected body on adjoining property; (c) accelerating or increasing flow; (d) damming back; (e) consequential injuries; (f) pollution of water; (III.) acquiring right of way for drain; (IV.) plans; (V.) obstructed drains; (VI.) unusual storms; (VII.) right and duty of individual: (a) to avoid injury; (b) casting water into street; (VIII.) nuisance; (IX.) embankments; (X.) remedy: (a) in general; (b) who may sue; (c) liability; (d) damages; (e) limitation; (XI.) abandonment of drain. 250

Transfer of right to use water for irrigation:—(I.) Of right acquired by appropriation; (II.) of right in ditch; (III.) may pass by conveyance of land; (IV.) method of transfer. 407

Jurisdiction over boundary rivers:—(I.) Right to exercise: (a) in general; location of boundary line; (b) grant of opposite shore; (c) effect of treaties and compacts; 65 L. R. A.

(II.) equal rights on; (III.) what rights are exclusive; (IV.) what concurrent jurisdiction includes; (V.) effect of change of channel. 953

WILLS.

1. A legacy to a religious corporation lapses when the corporation consolidates with another, under a statute which contemplates the termination of the existence of the old corporations and the formation of the new one to acquire their property. *Glad-ding v. St. Matthew's Church* (R. I.) 225

2. The addition to a will giving a legacy to a religious corporation of a codicil after the legatee has ceased to exist, which makes no provision for the change effected by the termination of such existence, cannot be held to have continued the legacy in favor of another corporation into which the interests of the legatee were consolidated, because the new corporation has a department identical with the work which the legacy was intended to advance. Id.

3. A legacy to a particular church of which testator is a member will lapse with the termination of the church's existence, and it will not be administered *cy près* although the church was for the benefit of deaf mutes, and the work in their behalf is carried on by the corporation into which the legatee was consolidated, where there is nothing to indicate that the continuation of the work, rather than the church itself, was the object of the testator's bounty. Id.

4. Finding a will in testator's desk with the signature canceled raises the presumption that the cancelation was done by him with the intention of revoking the will. *Re Hopkins's Will* (N. Y.) 95

NOTES AND BRIEFS.

Wills; presumption that alterations in, were made after execution; that cancelation of signature was made by testator; presumption as to revocation of. 98

Lapse of legacy by decease of object in testator's lifetime; effect of codicil to revive a devise or bequest the object of which has previously died; application of doctrine of lapse in case of gifts to charitable uses; when *cy près* doctrine does not apply. 226

Comparison of marks and spelling of disputed will. 95

WISCONSIN.

Concurrent Jurisdiction with Minnesota on Mississippi River, see *STATE*.

WITNESSES.

NOTES AND BRIEFS.

Witnesses; qualifications of expert witness as to handwriting. 96

Ex. A. 58
11/3/15

